



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

LIBRARIES



740481 8





State Trials.

VOL. XVIII.



A
COMPLETE COLLECTION
OF
State Trials

AND
PROCEEDINGS FOR HIGH TREASON AND OTHER
CRIMES AND MISDEMEANORS

FROM THE
EARLIEST PERIOD TO THE YEAR 1783,
WITH NOTES AND OTHER ILLUSTRATIONS:

COMPILED BY
T. B. HOWELL, Esq. F.R.S. F.S.A.

INCLUDING,
IN ADDITION TO THE WHOLE OF THE MATTER CONTAINED IN THE
FOLIO EDITION OF HARGRAVE,
UPWARDS OF TWO HUNDRED CASES NEVER BEFORE COLLECTED;

TO WHICH IS SUBJOINED
A TABLE OF PARALLEL REFERENCE,
RENDERING THIS EDITION APPLICABLE TO THOSE BOOKS OF AUTHORITY IN
WHICH REFERENCES ARE MADE TO THE FOLIO EDITION.

IN TWENTY-ONE VOLUMES.

VOL. XVIII.

17—26 GEORGE II.....1744—1753.

L O N D O N :

Printed by T. C. Hansard, Peterborough-Court, Fleet-Street :

FOR LONGMAN, HURST, REES, ORME, AND BROWN; J. M. RICHARDSON;
BLACK, PARBURY, AND ALLEN; BALDWIN, CRADOCK, AND JOY;
E. JEFFERY; J. HATCHARD; R. H. EVANS; J. BOOKER; E. LLOYD;
J. BOOTH; BUDD AND CALKIN; AND T. C. HANSARD.

1816.

NY
C. & .



NOV 1904
TILDEN
LIBRARY

TABLE OF CONTENTS

TO

VOLUME XVIII.

REIGN OF KING GEORGE THE SECOND.

	<i>Page</i>
504. THE Trial of Mrs. MARY HEATH, (a Witness examined on the Trial in Ejectment in the Court of Exchequer in Michaelmas Term, 1743, in the Cause wherein Campbell Craig, Lessee of James Annesley, esq. was Plaintiff, against the Right Hon. Richard Earl of Anglesea, Defendant) for Perjury, at the Bar of the Court of King's-Bench in Ireland, on Friday the 8th Day of February, A. D. 1744.....	1
505. The Trial of the Right Hon. RICHARD Earl of ANGLESEA, FRANCIS ANNESLEY, esq. and JOHN JANS, gent. for an Assault on the Hon. James Annesley, Daniel Mac Kercher, and Hugh Kennedy, esqrs. and William Goostry, gent. A. D. 1744 ...	198
506. The Trial of WILLIAM CHETWYND, esq. for the Murder of Mr. Thomas Ricketts, A. D. 1743.....	290
507. The Trial of FRANCIS TOWNLEY, esq. for High Treason, (in levying War against his most Sacred Majesty King George the Second), A. D. 1746	330
508. The Trial of GEORGE FLETCHER, for High-Treason, A. D. 1746	354
509. The Trials of THOMAS CHADWICK and WILLIAM BAT-TRAGH, for High Treason, A. D. 1746	359

TABLE OF CONTENTS.

	<i>Page</i>
510. The Trial of THOMAS THEODORUS DEACON, for High Treason, A. D. 1746	366
511. The Trial of JOHN BERWICK, for High Treason, A. D. 1746	367
512. The Trial of DAVID MORGAN, of Monmouth, but late of Derby, esq. for High Treason, A. D. 1746	371
513. The Trial of ALEXANDER MAC GROWTHER, for High Treason, A. D. 1746	391
514. The Proceedings at St. Margaret's-hill, Southwark, relating to ALEXANDER and CHARLES KINLOCH (Brothers to Sir James Kinloch, bart.), relating to their Plea that they were born in Scotland, and ought to be tried according to the Laws of that Kingdom, &c. A. D. 1746	395
515. The Trial of JAMES BRADSHAW, for High Treason, A. D. 1746	415
516. The Trial of Sir JOHN WEDDERBURN, bart. for High Treason, A. D. 1746	426
517. Proceedings at the Court of King's-Bench, Westminster, November 21, against CHARLES RATCLIFFE, esq. on a Conviction and Attainder of High Treason in May 1716, A. D. 1746.....	430
518. The whole Proceedings in the House of Peers, upon the Indictments against WILLIAM Earl of KILMARNOCK, GEORGE Earl of CROMERTIE, and ARTHUR Lord BALMERINO, for High Treason, in levying War against his Majesty, A. D. 1746	442
519. The whole Proceedings in the House of Peers, upon the Impeachment exhibited by the Knights, Citizens, and Burgesses, in Parliament assembled, in the Names of themselves, and of all the Commons of Great Britain, against SIMON Lord LOVAT, for High Treason, A. D. 1746-7	530
520. Proceedings against AENEAS MACDONALD alias ANGUS MACDONALD, for High Treason, A. D. 1747	856

TABLE OF CONTENTS.

	<i>Page</i>
521. The Trial of ARCHIBALD STEWART, esq. late Lord Provost of Edinburgh, for Neglect of Duty and Misbehaviour in the Execution of his Office, as Lord Provost of Edinburgh, before and at the Time the Rebels got Possession of that City, in the Month of September 1745, A. D. 1747. [Extracted, under the Hand of the Clerk of Justiciary, from the Books of Adjournal of that Court]	863
522. The Trials of WILLIAM JACKSON, WILLIAM CARTER, BENJAMIN TAPNER, JOHN COBBY, JOHN HAMMOND, RICHARD MILLS, senior, and RICHARD MILLS, junior, his son, for the Murder of Wm. Gally and Daniel Chater, A. D. 1749.....	1070
523. The Trial of MARY BLANDY, Spinster, for the Murder of her Father, Francis Blandy, gent. A. D. 1752	1118
524. The Case of JOHN SWAN and ELIZABETH JEFFERYS, for the Murder of Joseph Jefferys, A. D. 1752	1194
525. The Trial of WILLIAM OWEN, for Printing and Publishing a Libel, intituled, " The Case of Alexander Murray, esq." A. D. 1752	1203
526. The Trial of JOHN BARBOT, Attorney at Law, for the Murder of Matthew Mills, esq. A. D. 1753	1230
527. The Case of Pressing Mariners, on the Trial of ALEXANDER BROADFOOT, for Murder, A. D. 1743	1233
528. The Trial of Mr. DANIEL TAYLOR, Preacher in an Episcopal Meeting-House, and others, for not presenting their Letters of Orders, and for not praying for his Majesty King George, A. D. 1716. [Now first published from the Records of Justiciary at Edinburgh.] [N.]	1363

A COMPLETE COLLECTION
OF
STATE TRIALS,
&c. &c.

504. The Trial of Mrs. MARY HEATH, (a Witness examined on the Trial in Ejectment in the Court of Exchequer in Michaelmas Term, 1743, in the Cause wherein Campbell Craig, Lessee of James Annesley, esq. was Plaintiff, against the Right Hon. Richard Earl of Anglesea, Defendant) for Perjury, at the Bar of the Court of King's-Bench in Ireland, on Friday the 8th Day of February, 17 GEORGE II. A. D. 1744. [Published by Permission of the Right Hon. the Lord Chief-Justice Marlay, Mr. Justice Ward, and Mr. Justice Blennerhasset.]

THE SEVERAL PROCEEDINGS HAD UPON
AN INDICTMENT AGAINST MARY
HEATH, FOR PERJURY, PREVIOUS
TO HER TRIAL.

THE Bill was found by the grand-jury of the county of Dublin, at a session of the commission of Oyer and Terminer, on the 24th day of October 1744; and there she traversed the indictment, and removed the record by Certiorari into the Court of King's-bench, returnable the first day of last Michaelmas term.

On the sixth day of November 1744, the traverser appeared in the Court of King's-bench, and the Court appointed the trial to be at the bar of the Court on the 14th day of November, with liberty for either party to apply in the mean time to put off the trial, for reasonable cause, to be made appear by affidavit.

The traverser did apply to put off the trial on the following affidavit, sworn the 10th of November 1744.

"The KING against MARY HEATH.

"The traverser, Mary Heath, came this day before me and made oath, that James Annesley, having as deponent heard and believes, brought an ejectment in the Exchequer for recovery of the possession of part of the estate whereof Arthur late earl of Anglesea died seized in this kingdom; and the right honourable Ri-
VOL. XVIII.

chard earl of Anglesea having taken defence to said ejectment, the same came to be tried at the bar of said court in last Michaelmas term; which trial continued and was adjourned from day to day, for upwards of ten days, on which trial deponent was produced and examined as a witness on behalf of said earl. That deponent is well informed and verily believes, that on said trial the only point tried was, whether said James Annesley was the son of Arthur late lord Altham by his wife Mary lady Altham; that she is well assured and believes, that examinations were laid before the grand-jury at last commission of Oyer and Terminer for the county of Dublin, for perjury, alleged to be committed by deponent on said trial; and that a bill of indictment was found on said examinations against deponent the 24th day of October last, and not before, as she is informed and verily believes. Saith, she is informed and believes, the points in said indictment, and on which deponent is indicted, are relative to said lady Altham's having a child by said lord Altham, and in some measure the same as that tried in the Exchequer as aforesaid. Saith, she is informed and believes, that a suit was instituted in the Chancery of England by said James Annesley for recovery of the English estate, whereof said Arthur earl of Anglesea died seized, or part thereof; and has been informed and believes, said James has also filed a bill in the Chancery of Ireland for recovery of the said Irish estate, whereof the said Arthur

died seized, or part thereof; and saith, that a commission is now speeding at Wexford in said English cause, and that the same was opened before said indictment was found; and deponent was examined on behalf of the said earl upon said commission, and the examination of said commission is still going on, as deponent believes. Saith, she is informed and verily believes, that the title of the several estates is the same, and that the point to be determined as to said estates between said James Annesley and said earl of Anglesea, and the other parties interested in, whether said James is the son of said late lord Altham by his said lady. Saith, she is advised and believes, the same evidence, in a great measure, will be necessary for deponent's defence on the trial of said indictment, and in the defence of said suits, and therefore deponent believes (being so advised) that preparing for deponent's defence on said indictment, will take a considerable time, there being many witnesses necessary for deponent's defence, living in different parts of this kingdom as well as in England. Saith, there are several persons, whose place of residence is in London and other places in England, and who are now there, as she verily believes, who are material witnesses for deponent's defence on said indictment, and without whose testimony deponent cannot with safety stand her trial, and whom deponent could not possibly get from England since said bill of indictment was found; and in particular, Mrs. Mary Judd of the county of Essex, and Mrs. Sarah Bonner of London, Mrs. Sarah Heath of London, and Thomas Rolph of Marybone in England, and several other persons who reside in England, are very material witnesses for deponent upon her said trial, and whom deponent could not possibly get over to attend this term, and whom deponent believes and doubts not but she can get to attend the next term. That there are several persons in the counties of Cork, Wexford, and Galway, who are very material witnesses for deponent; several of whom are wrote to, but they cannot, as deponent is informed and believes, attend this present term. Saith, that Sarah Weedon, widow of John Weedon, who was coachman to lord Altham (at the time when the said James Annesley alleges he was born), and lived at that time near Dunmaine-house (where said James Annesley alleges he was born) and was frequently at Dunmaine-house, now lives at colonel John Blakeney's at Abbert in the county of Galway, which, as deponent is informed and believes, is seventy miles from Dublin, and is a most material witness for deponent; and deponent having caused application to be made to the said Sarah, is informed and believes, she is so infirm, that she cannot travel without a carriage, and therefore is not come up to Dublin, though deponent has good reason to believe, and doubts not but she will be able to get her to attend the next term. Saith, she is credibly informed and verily believes, that James Annesley and those concerned for him (who de-

ponent believes are the persons that carry on the prosecution against deponent), are so sensible that the said Sarah is a material witness for deponent, that they, or some of them, have lately, by bribes and otherwise, attempted to seduce and carry off the said Sarah from said colonel Blakeney's, and had a horse and pillion for that purpose at Abbert, but were discovered and prevented by said colonel Blakeney's means. That Anthony Dyer, now of Cork, was gentleman to the said lord Altham when he dwelt at Dunmaine aforesaid, and is a very material witness for deponent upon said trial, who deponent cannot get to attend this term, but believes she will be able to get him to attend next term. Saith, that from the number of witnesses, material for her to produce on said trial, and the different parts of this kingdom and Great-Britain, where they reside, it will not be possible for deponent to get them to attend this term, nor can deponent be in any sort prepared to defend herself in a proper manner, unless reasonable time be given her; and is satisfied in her conscience, it is not, nor was it in her power, or in the power of any other person, to get the several witnesses, material for her defence, to attend this term; but believes and doubts not but she will be able to get them to attend the next term."

In order to oppose this motion, the following affidavit was sworn the 13th of November, 1744.

"*The KING against MARY HEATH.*

"*Daniel Mac Kercher, esq.* came this day before me and made oath, that the traverser, Mary Heath, was, as he believes, apprehended in August last upon a warrant, granted against her for wilful and corrupt perjury; and saith, That in expectation of said Heath's trial coming on at the last sitting of the court of Oyer and Terminer held for the county of Dublin, on the 24th of October last, deponent sent to England and to several counties of this kingdom for several witnesses, to be produced and examined against said Heath; and saith, a great many of said witnesses came to Dublin from England, and several remote counties of Ireland, to be examined on behalf of his majesty on said trial; but the indictment being removed by writ of Certiorari to the Court of King's-bench, deponent sent many of said witnesses, who live in this kingdom, out of town; and such other of said witnesses as are old and infirm, and live in remote parts, and also the witnesses, who came from England, deponent hath kept in Dublin at considerable expences. Saith, he was at very considerable expences in bringing said witnesses to Dublin, in expectation that said Heath's trial would have come on at said sitting of the said commission. Saith, that the trial of said Heath being appointed to come on, on Wednesday the 14th of November instant, deponent hath, since the said day for trial was appointed, sent to several counties of this kingdom for several of said witnesses that were before in Dublin, to

give evidence on behalf of his majesty against said Heath upon said trial; and saith, some of said witnesses, who are material to be examined on said trial against her, have a call to England upon business of great importance; and others, who are very material evidences against her, are very old and infirm; so that deponent saith, if the trial of said Heath should be put off from this term to next it will put the prosecutors to very considerable expences and hardships; and not only so, but it will be highly inconvenient to, and almost impossible for several other witnesses (who are obliged as soon as they can to go for England) to attend in this kingdom next Hilary term, without neglecting affairs of the greatest consequence; and several other very material witnesses, who are old and infirm, may die, or become so weak and infirm as not to be able to attend next term. Saith, that the application on behalf of said Heath to put off her trial to next term is intended, as deponent verily believes, not only to put the prosecutors to great expence, but also for other ends and purposes, and to avoid or postpone, as much as she can, her being tried. Says, if said Heath's trial should be put off to the next term, she will not, nor can she be so effectually prosecuted as she would now be, in regard that several material witnesses against her will be under a necessity of being next term in England, and said Heath may, for want of the evidence of such witnesses, be acquitted. Whereas, if such witnesses could and did attend to give evidence against her, she would be found guilty of perjury, as deponent verily believes. And believes said Heath had time sufficient to prepare for and have any witnesses material for her. Saith, he is credibly informed and believes, said Heath, or any one for her, did not, since she was apprehended for said perjury, issue any summons or subpoenas for any witnesses to come to attend and give evidence on her trial; nor has she, or any other person on her behalf, as deponent believes, since she was taken for said perjury, used any means to have any witnesses ready to appear for her, in expectation and upon an assurance given her, as deponent is informed and believes, by some of her managers, that said trial would be put off. Doth not know or believe that Mary Judd, Sarah Bonner, and Sarah Heath, mentioned in the affidavit of said Mary Heath, or any of them, were examined on the trial in ejectment, had in the Exchequer last Michaelmas term between the lessee of James Annesley and the earl of Anglesea. Saith, he doth not know or believe that Sarah Weedon, mentioned in said Heath's affidavit, is a material witness for her; but, on the contrary, is informed, said Sarah is a material witness against her. Saith, deponent being informed said Sarah Weedon was a material witness against said Mary, he, for that reason, and for no other ends, sent Edward Weedon, son of said Sarah, to the county of Galway, to colonel John Blakeney's, where deponent was informed said Sarah was, in order to bring her to Dublin, to give

evidence against said Mary; and said Edward, on his return, informed deponent, she was by force detained in the house of the said Blakeney, and that (though she declared her willingness to give her testimony) said Blakeney would not permit her to go, but forcibly kept her in his house, notwithstanding her endeavours to come away. Whereupon, deponent caused a Subpoena to issue, requiring said Sarah to attend to give evidence on the trial of said Mary, which deponent sent to be served on said Sarah, to oblige her to attend, pursuant to such Subpoena. Saith, deponent intended, before he sent said Subpoena to be served on said Sarah, to apply to this court for a writ of Habeas Corpus for her, she being confined and detained by force in the house of said Blakeney, as deponent was informed; and accordingly, said Edward and John Weedon, another son of said Sarah's, made severally an affidavit, as deponent believes, on the 8th of November instant, in order to ground a motion thereon for a writ of Habeas Corpus for said Sarah; which motion deponent would have made, but deponent afterwards thought it more proper to try whether by service of a subpoena, said Sarah would be permitted to come to Dublin, to give evidence on the trial, deponent believing, said Blakeney would not oppose an obedience to said Subpoena. Saith, the person sent by deponent to serve said Subpoena is not yet returned, that deponent knows or believes. Denies, he, or said James Annesley, or any other concerned for him, or who carry on the prosecution against said Mary Heath, to deponent's knowledge or belief, have lately, or at any time, by bribes, or otherwise, attempted to seduce or carry off said Sarah from said Blakeney's to prevent her from being examined on the trial of said Mary, as is untruly insinuated by the affidavit of said Heath; nor doth deponent know or believe, nor does said James Annesley, or any other person concerned for him, as deponent believes, know or believe, said Sarah is a material witness for said Heath upon her trial. Verily believes, said Sarah is detained in the house of said Blakeney, merely because she is a material witness against said Mary, and to prevent her from being produced as a witness; and deponent is convinced, said Mary could, if she pleased, have had said Sarah Weedon to attend on the 14th instant upon her trial. Saith, deponent's intention to send for and bring said Sarah to Dublin, was to give evidence against said Mary, and not to prevent her giving evidence, as is falsely insinuated by said Mary's affidavit; and denies he, by himself, or any other, attempted to bribe said Sarah; nor did deponent since he embarked in the affairs of the said James, attempt to bribe, or by any unfair or unlawful means, to seduce or prevail upon any person to give evidence in behalf of said James; nor doth deponent know or believe, that any attempts of bribery or other unlawful or unfair means were made use of (by said James Annesley or any person concerned for him) to give evidence for him in the suit be-

ween him and said earl of Anglesca, or to stifle or prevent the evidence of any person who could give evidence for said earl or for said Heath; but, on the contrary, deponent bath all along, since he engaged in the affairs of said James Annesley, carried on the same with all legal and fair ways and methods, and deponent is determined so to do in the conduct of said James's affairs. Believes, and is convinced by very sufficient proofs, that deponent has had of the same, that many unfair and illegal endeavours and attempts have been made use of by persons concerned for said earl and said Mary Heath, not only to bribe and corrupt witnesses, but also, by very unfair and illegal means, to intimidate and seduce several persons from giving testimony on behalf of said James, and to have said Mary acquitted of the perjury of which she is indicted."

On the 13th of November the matter was debated by counsel, and the Court were of opinion the trial ought to be put off. And afterwards, by consent of all parties, the day of trial was appointed to be Monday the fourth day of February, 1745.

On the 20th of November, 1744, the counsel for the prosecutors moved the court for an attachment against colonel John Blakeney, for his contempt of the Court, in not permitting Sarah Weedon to attend the Court on the 14th day of November, in obedience to a Subpoena, with which she was served; and grounded this motion on the following affidavits.

"THOS. CARTER, esq. Attorney and Coroner of the Lord the King against MARY HEATH.

"James Magrath, of the city of Dublin, came this day before me and made oath, that on the 13th day of this instant November, this deponent accompanied Andrew Ross, of Mary's-town in the county of Roscommon, gentleman, to Abbott in the county of Galway, where John Blakeney, esq. lives, the said Andrew Ross being employed to serve Sarah Weedon with a subpoena, commanding her to attend in his majesty's Court of King's-bench on the 14th day of this instant November, to give evidence in this cause. And this deponent saith, That the said Andrew Ross did, as this deponent believes, on the 13th day of November serve the said Sarah Weedon with the said subpoena; and this deponent having stood at a little distance from the said John Blakeney's house, to wait for the said Andrew Ross, the said Andrew Ross in some short time after he went into the said house, returned to deponent, and desired this deponent to get off as fast as he could; and that when the said Andrew Ross turned the corner of the avenue he would change horses with deponent. That deponent thereupon believing the said John Blakeney intended to have this deponent very ill treated for coming with the said Andrew Ross to have the said Sarah Weedon served with the said subpoena, this deponent therefore rode off, and at some distance from

the said house exchanged horses with the said Andrew Ross, and, in some time, deponent looked behind, perceived several persons on horseback pursuing, as this deponent apprehended, the said Andrew Ross and this deponent; and therefore this deponent rode forward as fast as his horse could carry him, and by that means deponent escaped any insult or danger intended him; and this deponent verily believes the said persons were sent in pursuit of this deponent and the said Andrew Ross by the said John Blakeney, with intent to treat them very ill, and to prevent their carrying the said Sarah Weedon to Dublin, to give evidence against the said Mary Heath, as this deponent verily believes."

"THOMAS CARTER, esq. Attorney and Coroner of the Lord the King, against MARY HEATH.

"Whereas there issued forth of his majesty's Court of King's-bench in Ireland, and under the seal thereof, his majesty's writ of subpoena in this cause, bearing date the 8th day of November instant, directed to Sarah Weedon, commanding her to be in the said Court of King's-bench on Wednesday the 14th day of November instant, to testify the truth concerning a certain trial between Thomas Carter, esq. attorney and coroner of the lord the king, and Mary Heath: now, Andrew Ross, of Mary's-town, in the county of Roscommon, gentleman, came this day before me and made oath, that on the 13th day of this instant November, in the forenoon of said day, this deponent personally served the said Sarah Weedon with the said subpoena, by delivering unto her, at the house of John Blakeney, esq. at Abbott, in the county of Galway, a true copy of the said subpoena, and at the same time gave the said Sarah Weedon a British shilling in silver, and shewed her the said original subpoena under seal as aforesaid; and this deponent saith, That before this deponent served the said Sarah Weedon as aforesaid, this deponent, as he was going towards the house of the said John Blakeney, met the said John Blakeney, with a gun in his hand, coming towards deponent; and deponent told the said John Blakeney, that deponent had a message to deliver, which deponent said he did not think proper to deliver until deponent had acquainted the said John Blakeney therewith; and upon the said John Blakeney's asking what it was, deponent told him, that deponent had a subpoena to serve upon Sarah Weedon; and deponent having shewn and produced to the said John Blakeney a copy of the said subpoena, the said John Blakeney having taken and read it, said, the said Sarah Weedon could not be there (meaning, as deponent believes, in the said Court of King's-bench) in that time; upon which deponent said, he had so provided for her, that deponent would engage she should be there the next day in time: whereupon, the said John Blakeney swearing, said, he would take care the said Sarah Weedon should not be there the next day. That deponent thereupon begged

he might see the said Sarah Weedon; to which the said John Blakeney in answer, said, with an oath, that deponent might see her, but that he, this deponent, should not take her away; but this deponent saith, that he, this deponent, went into the said John Blakeney's house, and there served the said Sarah Weedon with the said subpoena, as aforesaid. And upon this deponent's serving the said Sarah Weedon, as aforesaid, she said she thought she was to have been sent for a Thursday; upon which, deponent said, she, the said Sarah Weedon, might then come, for it would be time enough, and that deponent would take her very safe to Dublin. That thereupon, the said John Blakeney, who was present at the said service and discourse between the said Sarah Weedon and deponent, said, That she the said Sarah Weedon should go, and that he would take care to send her in a proper time. And this deponent saith, that the said John Blakeney having behaved and expressed himself in a very angry manner, and being greatly displeased, as this deponent understood by him, and as this deponent verily believes, that deponent had come on the aforesaid errand to serve the said subpoena; and the said John Blakeney having declared, with protestations and oaths, that he would send James Magrath to Galway gaol, and that he would let the said Magrath know, that there were courts in the country as well as in Dublin; the said John Blakeney having seen the said James Magrath with deponent, when deponent first met the said John Blakeney, as aforesaid; this deponent was greatly affrighted; and finding it to no purpose to expect to bring the said Sarah Weedon to Dublin, to give evidence in pursuance of the said subpoena, by means of the obstruction and opposition of the said John Blakeney, though this deponent verily believes, were it not for such opposition of the said John Blakeney, that the said Sarah Weedon would readily have come with this deponent in obedience to the said subpoena; this deponent therefore went away. And when deponent came up to the said James Magrath, who waited for deponent at a little distance from the said John Blakeney's house, this deponent apprehending from the declarations and threats of the said John Blakeney towards the said James Magrath, that it would be most prudent and safe for the said James Magrath to get off as fast as he could, this deponent therefore desired the said James Magrath to make the best of his way; and that when deponent turned the corner of the avenue, deponent would change horses with the said James Magrath, deponent believing the horse that deponent rode to be better than that rode by the said Magrath; and accordingly the said John Magrath and deponent rode off, and deponent changed horses with the said Magrath when they got some distance from the said John Blakeney's house. And deponent saith, that when the said Magrath and deponent had gone forward for some time, this deponent, looking

behind him, perceived several persons on horse-back pursuing, as this deponent apprehended, the said James Magrath and this deponent, which gave this deponent the greater reason to fear some danger, and thereupon deponent pushed forward as fast as his horse could carry him, and by that means escaped any danger or insult that might be intended by the said persons, who, deponent verily believes, were sent in pursuit of this deponent, or of the said James Magrath, by the said John Blakeney. And this deponent saith, that by the aforesaid means of said John Blakeney, this deponent could not carry the said Sarah Weedon to Dublin, to give evidence in pursuance of the said subpoena; and this deponent verily believes, the aforesaid opposition and behaviour of the said John Blakeney was merely to prevent the said Sarah Weedon's coming to Dublin to give evidence against the said Mary Heath."

But the Court made no rule.

On the 21st day of November, 1744, the counsel for the prosecutors moved the Court for a writ of Habeas Corpus to be directed to colonel John Blakeney, requiring him to have the body of Sarah Weedon before the Court; and grounded this motion on the following affidavits: sworn the 8th of November.

" *The KING against JOHN BLAKENEY, esq.*

" *John Weedon, of the city of Dublin, came this day before me and made oath, that Sarah Weedon, this deponent's mother, is now detained against her will, and without any legal process at law or warrant against her, at the house of John Blakeney, esq. at Abbott, in the county of Galway. And this deponent saith, that on Tuesday the 30th day of October last, this deponent was at the said house of the said John Blakeney, with deponent's said mother, in order to carry her away from the said John Blakeney, but this deponent could not. And this deponent further deposeth, that in the evening of the said 30th day of October, this deponent went with his brother, Edward Weedon, to the said house of the said John Blakeney, in order, if they possibly could, to carry their said mother away; but the gates of the said John Blakeney's yard, and the doors of his house having been shut and locked, this deponent and his said brother knocked at the gate, and the said Sarah Weedon looking out of a window up one pair of stairs in the said house, desired this deponent and his said brother to go off as fast as they could, for that the doors were locked upon her, and she could not get out; and that if this deponent and his said brother did not immediately go away, they would be knocked on the head. Whereupon this deponent and his said brother went away, being afraid of danger if they stayed any longer; and this deponent verily believes, the said John Blakeney will, for some unlawful ends and purposes, continue to detain the said Sarah Weedon against her will, and by force*

and duress, and without any authority for so doing."

" *The KING against JOHN BLAKENEY, esq.*

" *Edw. Weedon*, of the Gravelly-hill, in the county of Carlow, came this day before me and made oath, that Sarah Weedon, this deponent's mother, is now detained against her will, and without any legal process at law or warrant against her, at the house of John Blakeney, esq. at Abbott, near Castle-Blakeney, in the county of Galway. And this deponent further deposeth, that in the evening of the 30th day of October last, this deponent went with his brother, John Weedon, to the house of the said John Blakeney, in order, if they possibly could, to carry their said mother away; but the gates of the said John Blakeney's yard, and the doors of his house having been shut and locked, this deponent and his said brother knocked at the gate; and the said Sarah Weedon looking out of the window up one pair of stairs in the said house, desired this deponent and his said brother to go off as fast as they could, for that the doors were locked upon her, and she could not get out; and that if this deponent and his said brother did not immediately go away, they would be knocked on the head. Whereupon, this deponent and his said brother went away, being afraid of danger if they stayed any longer. And this deponent verily believes, the said John Blakeney will, for some unlawful ends and purposes, continue to detain the said Sarah Weedon against her will, and by force and duress, and without any authority for so doing."

Mr. *Thomas Blakeney*, attorney, informed the Court, That to his knowledge the material facts mentioned in the foregoing affidavits were false; and offered that colonel Blakeney should answer those affidavits, if those concerned for the prosecutors would agree he should do so at peril of costs, and would undertake to pay the costs. This offer Mr. Mac Kercher, then present in court, declined. Mr. Blakeney then desired, that Edward and John Weedon, who made the affidavits, should be ordered to attend, and undertook to falsify their affidavits, by affidavits. And accordingly, the Court put off the motion till next day, and ordered the said Edward and John Weedon to attend then, and Mr. Blakeney to make affidavit in the mean time.

On the twenty-second day of November 1744, the above affidavits of John and Edward Weedon were read; and the following affidavits of Mr. *Thomas Blakeney* and Edward Kilkelly were produced and read.

" *The KING against JOHN BLAKENEY, esq.*

" *Thomas Blakeney*, gent. maketh oath, that he very well knows John Blakeney of Abbott, in the county of Galway, esq. that he is this deponent's near relation, and lives within two miles of this deponent's place of residence in said county, and that he, his family, and this

deponent's wife and family frequently visit each other. Deposeth, That on the day but one after a verdict was given in the Court of Exchequer on a trial, which was had between the lessee of James Annesley, esq. and the earl of Anglesea, this deponent received a letter from this deponent's wife, wherein she mentioned that old Mrs. Weedon, who then lived at Abbott, said, That she lived for many years with lord and lady Altham, and that said lady never had a child while in Ireland; but that one Juggy Landy had a child called James Annesley, and that lord Altham was supposed or deemed to be his father, or to that purpose; which letter deponent shewed to several gentlemen, and was the first account deponent ever had of said Mrs. Weedon's knowing any thing of that matter, or of her living in said lord Altham's family. Deposeth, that some time about last Christmas holidays this deponent was at Abbott aforesaid, and there saw the said Mrs. Weedon, and asked her, whether she lived with lord and lady Altham, and if said lady ever had a son? And Mrs. Weedon declared that said lady never had any child whatsoever since her coming into Ireland, to the time that she and lord Altham had separated. That deponent asked said Mrs. Weedon if she knew Jemmy Annesley, or whose son he was; that said Mrs. Weedon said she did know Jemmy Annesley, and that he was the son of Juggy Landy, and not of lady Altham; wherefore deponent always did and does believe, that said Mrs. Weedon is a material evidence for the earl of Anglesea, and not for the said James Annesley. Deponent further deposeth, That the said Mrs. Weedon has been for several years past servant to the said John Blakeney, and lived with him at Abbott aforesaid; and deposeth, That on Saturday the third day of November instant, this deponent called upon the said John Blakeney at Abbott, in this deponent's way to Dublin, and there saw the said Mrs. Weedon, and deposeth, That she was so far from being confined, or under any manner of restraint, that she was at full liberty; that the doors of the house were open, and that she might have gone in or out, or to any place she thought proper. And deposeth, That deponent was at the same time informed by the said John Blakeney and his lady, which he believes to be true, that at 12 o'clock at night the Tuesday before, some people came about his house, and that they had taken or stolen away his servant John Weedon, and that he also believed, they also intended to take away the said Mrs. Weedon; for that he was informed they had a horse with a pillion, and that said John Weedon rode or travelled on the said pillion. Deposeth, That this deponent met said Mrs. Weedon in the common hall of said house at Abbott on the Saturday aforesaid; and that she begged of this deponent to enquire for her son Jonny, as she called him, as soon as deponent should arrive in Dublin, and to send him home, for that she was very

sure he would return to his service, if he got but once sober, but that she very much feared they would keep him always drunk; and seemed greatly troubled at his being taken away. That deponent promised to enquire for him, the said John, and to tell him what she desired. Deposeth, That on Thursday, the eighth day of November instant, the said John Weedon, together with deponent's servant, called upon this deponent at a house, where deponent was at dinner in Dublin; that deponent told said John Weedon, he was sorry he had quitted his service without his master's leave, and also told him what his mother said to this deponent as aforesaid, and that she expected he would go back. Whereupon the said John said, he never would, for that he was to be much better provided for. And deponent having asked him by whom? he, the said Weedon, said, it was by the young earl of Anglesea. Whereupon deponent smiled and said, he was not Earl as yet. That said John thereupon said, that whether he was to be earl, or not, he would provide for him, and, at the same time, wished that his mother would come up, for that, if she did, she would be much happier, and have much easier bread than she had where she lived. Deposeth, That he very well knows that the said John Weedon has been for several years past servant to the said John Blakeney, and lived with him in his house at Abbott aforesaid, until he quitted him in the night of the thirtieth of October last; and deponent verily believes, the said Mrs. Weedon never was, nor is she now, as this deponent verily believes, under any manner of restraint, or in any sort confined by the said John Blakeney, or any other person; but verily believes, she is at full liberty to go where she thinks proper. And saith, he knows that the said Mrs. Weedon has been applied to, on behalf of the earl of Anglesea, to attend at Wexford, there to be examined as a witness on his lordship's behalf, on a commission, which deponent believes, is, and has been speeding there for some time, in a cause depending in the High Court of Chancery in England, wherein the said James Annesley is plaintiff, and the said earl of Anglesea is defendant."

"The KING against JOHN BLAKENEY, esq.

"Edward Kilkelly, of Liss, in the county of Galway, cooper, came this day before me and made oath, That on Friday sevensnight this deponent was at the defendant's house at Abbott, in the county of Galway. And this deponent saith, That as he was going to the said house he saw Mrs. Sarah Weedon, who is, and for a considerable time hath been, servant to the defendant, and whom deponent knows very well, without the gates of the said defendant's yard, as if she was returning from the place where the cows were milking, and had, as deponent apprehended and believed, some milk in her hands carrying into the house. And this deponent saith, she the said

Sarah Weedon was alone, and not in any sort of restraint or confinement; and deponent afterwards, on the same day, saw the said Sarah Weedon going about her business in the said house, and in no restraint or confinement; and deponent conversed with the said Sarah at that time about several matters, and she did not mention any sort of restraint or confinement, but told deponent her son John Weedon was gone away, and seemed much concerned at it. And this deponent is very sure the said Sarah is not, nor was not at any time put into any sort of restraint or duress by the defendant."

Court. Call John Weedon.

John Weedon.

Mr. Harward offers to speak.

Court. We have nothing to do with the birth of James Annesley; here is affidavit against affidavit, we must hear which of these affidavits is true. We are imposed on by one affidavit or other; the honour of the Court is concerned, and therefore, before we do any thing, we will hear what John Weedon has to say.

Mr. Harward. With humble submission, I conceive the hearing of us after this person is examined is not a proper time; this is now my time to offer what I have to say; I shall have no occasion to speak after the examination is ended, and therefore beg leave to say a few words now, which are, that if this person is to be examined, I do apprehend it must be on the foot of some supposed transgression that he hath committed.

Court. No, Sir, it is to discover the truth. We will have no concealing of the truth in this court. Swear him.

Mr. Harward. I do not oppose your lordship's right to examine this witness; but—

Court. Read the affidavit to him.

John Weedon sworn.

Court. You are now to declare the truth, and nothing but the truth, and you are now likewise to declare the whole truth. You are not obliged to say any thing to criminate yourself.

Q. Is your name John Weedon?—J. Weedon. Yes, my lord.

Are you the son of Sarah Weedon?—Yes, I am, my lord.

Did you live with colonel John Blakeney?—I did live with him.

Is Sarah Weedon your mother?—She is.

When did you see her last?—I saw her the 30th of October in the house of my master.

Have you a discharge?—I have not.

When did you leave your master?—I left him the next day, the 31st of October.

Why did you leave him?—I was afraid to appear to him, because that I was with my brother.

What reason had you to fear appearing before him?—For fear he should use me ill.

Did he ever use you ill?—He never did.

How came you then to be afraid? Who

persuaded you to leave your master?—Nobody at all. I came away on my own accord.

Did you desire your mother to leave him before you came away?—I did.

And what did she say to you?—She said she could not.

For what reason did she say she could not?—I could not find out the reason.

Did she tell you she durst not?—She said, that she could not.

Did she tell you that her master kept her there against her will?—She did not tell me so.

What time of the evening was it that you went to colonel Blakeney's the first time?—It was between seven and eight o'clock.

Was your brother with you?—My brother came along with me.

What time did your mother speak to you out of the window?—About half an hour after eight.

What time did you come away?—I came away by day-light.

What! the next morning?—The next morning.

What time? Was the family up?—They were up, my lord.

Did you lie in the house?—I did not lie in my master's house, because I could not get in.

Where did you meet your brother?—I was sent from home to — for a bond of my master's. I went and got the bond, and came to take a mug of ale at Glentane, and there I met my brother; and my brother said, I am come for my mother; and I said, I would get her out of the house; and we went together, and when we came there, we found the doors and the gate locked, and she came to the window, and said, that she could not go out: with that I was afraid of my master, and a boy came running out and said, my master was coming with a whip, and I made off as fast as I could.

What time was this?—It was about eight o'clock.

Did you find the gate fastened?—I did, my lord.

What did your mother say to you?—She said she could not go with us: and, says she, Go away about your business, or you will be knocked on the head.

Was your brother there?—He was.

Was he a servant there?—No, but came to see whether my mother was alive or not.

Was your mother a servant there?—She was servant two years last Michaelmas.

Was she a servant at this time?—She was at that time.

She said that she could not go?—She did, my lord.

For what reason?—I cannot tell.

Did she say, that she would not go?—She did not say that she would not go.

Did you and your brother desire Mr. Blakeney to let her go?—No, I was afraid to go to him.

Did your brother?—My brother did not.

Where was it that you proposed to carry her?—To Ballynasloe, to one Bulkley's.

Where further?—We proposed to bring her to Dublin.

Where?—To Mr. Annesley's.

Are you in Mr. Annesley's service?—I am not.

Are you in any body's service?—I am in nobody's service.

Court. Hear your affidavit read.

Clerk of the Crown reads the affidavit.

Court. Does he write his name?

Clerk. No.

Court. Did your mother ever tell you that she would come away?—She did not.

Why did you ask her to come away in the night?—Because my brother came for her.

Did she ever tell you and your brother that she was compelled to stay where she was?—She did not tell us that she was compelled to stay.

Do you understand your affidavit? How came you to swear in your affidavit that she was detained against her will; and now you say she was not? What religion are you of?—A Protestant.

How came you to swear that positive affidavit? Did any body read it to you?—Yes, an attorney, Robert Reynell.

Who is Robert Reynell?

Mr. Nelson. He is my clerk, my lord, he read it to him.

Did your mother tell you she was a prisoner?—No; but she told me, she was afraid of her life.

Are you sure of that?—I am, my lord.

Of whom was she afraid?—She was afraid of my lord Anglesea, that she would be murdered by him.

Was my lord Anglesea ever in that country?—He never was.

Why should she run from her master's house without wages or discharge, because she was afraid of lord Anglesea? Is he a person of such authority and power over colonel Blakeney's servants, as to terrify them from their master's service?—I cannot tell that, my lord.

Was she discharged at that time?—She was not.

Was she paid her wages?—No.

Did she demand her wages, to come away?—She did.

How do you know that, were you by?—I was not, but she told me she could not get her wages.

Was she afraid of colonel Blakeney's doing her any harm?—She was not, my lord.

Why did she apprehend any harm from my lord Anglesea, did he send for her?—There was last spring a man and a chair came to bring her to Wexford, from my lord, but she was an old woman, and would not go.

Was she summoned, or did he send for her of himself?—He served her with a bit of paper.

Did he offer to force her to go?—He did not.

Did you ever hear that colonel Blakeney, or

any body in the house forced her to stay?—I never did.

More of the Affidavit is read.

Q. What time were Mr. Blakeney's outward doors usually locked in winter-time?—*A.* Sometimes at eight or nine o'clock, and sometimes not at all.

Court. Where is Edward Weedon?

Crier. Edward Weedon.

Court. Where does your brother live?—*A.* He keeps in town.

Is he in any service?—He is not.

Does he follow any trade?—He has no trade at all.

Did he follow nothing?—He followed a spade.

Where did you get that horse that you went to Mr. Blakeney's on that night, the 30th of October?—From my brother.

Where did your brother get him?—He brought him with him.

From whence?—From Dublin.

Edward Weedon sworn.

Court. Are you the son of Sarah Weedon, that lives with Mr. Blakeney?—*Edward Weedon.* Yes.

What time in October last did you go there?—The thirtieth.

What time of the day?—In the evening.

What time?—About 7 or 8 o'clock.

Were the gates shut?—They were.

Was it dark?—It was dark, my lord.

Did you see or speak to her that night?—I did not.

Did any body else?—My brother did.

What did she say?—She desired him to go off about his business, and bring me with him, or else I'd be knocked on the head, my lord.

Did she say she could not go?—She did, my lord.

For what reason?—Because the doors were locked.

Did she say she had a mind to go with you?—No, she said no more.

Did you or your brother ask her whether she would go, and what did she say?—She said no more than desired him to go off, and bring me with him, for if we stayed there, I would be knocked on the head.

Was she kept as a prisoner?—As far as I understand, she was.

How came you to understand so?—Because the gates were shut.

What time was this?—About 7 or 8 o'clock.

Were the gates open when you came there first?—No, they were not. My brother went up first to bring her out, and he told her that I was there, come from her; and she was coming out, and he came first, and he thought she was following him.

How do you know this?—My brother told me this.

Is it usual for gentlemen to shut their gates at night in the country?—It is in the country; my mother said she was shut up.

VOL. XVIII.

Did she say that she was shut up, or only that the gates were shut?—She said as this, she could not come out, and desired my brother to go off and take me along with him, for I'd be knocked on the head.

Did you hear her speak?—I heard her speak.

What did you hear her say?—I heard her bid my brother go off and bring me with him, for I should be knocked on the head.

Did she say nothing more?—She said no more, but shut the window.

Court. Read the first part of his affidavit.

Clerk of the Crown reads it.

Court. How did your mother know you were there?—My brother knocked at the gate.

Did any body come to the gate?—Nobody; but my mother opened the window.

Was she a servant at that time?—She was.

When did you see her before that time?—I went to her before that by myself, about a month or five weeks before, and she asked me if I heard any thing concerning Mr. Annesley and my lord Anglesea; I told her I did; and she said, For your life, do not speak a word, for you are in the midst of your enemies here.

Did you carry a horse with you the 30th of October?—I did, my lord.

Did your mother say any thing to you more, the time that you were with her before?—She said, I would be very desirous of seeing Mr. Annesley, if I was in Dublin.

Whose horse and pillion was it that you were furnished with?—I hired them by the way.

Who sent you to hire them?—I hired them by Mr. Annesley's orders.

Who gave those orders to you?—Mr. Annesley himself.

Your mother said no more the time you went by yourself, but that you were among your enemies there?—No more, my lord.

Was she a servant in the house?—She was a servant-maid in the house, and, as far as I understand, she was forced.

Who told you she was forced?—The doors were all locked.

Were they locked when your brother went there?—They were open when my brother came, my brother went in.

Where did you meet your brother that evening?—At a place called Glentane.

How long did your brother stay before he came to you again?—He came out to me again in about three quarters of an hour.

How soon after that did you return?—He told me that his master followed him out with a whip for to kill him.

Did he tell you so?—He told me so.

Did he venture to go back afterwards?—When he went back the gates were shut, and he went round to the backside of the house, where there was a door, and knocked at it; my mother looked out of the window, and said she could not go: and, says she, go your way and bring your brother with you, for he will be knocked on the head.

C

Did she tell you that she was confined or imprisoned?—She did not.

Are you or your brother in any body's service?—We are in nobody's service.

Court. Read the affidavit.

Clerk of the Crown reads it.

Court. How long is it since you lived at Gravelly-hill?—I left it about two months ago.

Were you a house-keeper there?—I lived there with a friend of mine.

Can you write?—No, my lord.

Nor read?—No.

How came you to make this affidavit?—Them that examined me, drew it.

Who were they?—Mr. Goostrey.

Is he here?—No.

Did you tell him that your mother was detained?—I told him as thus, that the doors were locked, and she said she could not come.

Did you tell him these words that are in your affidavit?—I told him no more or less than what I have given on my oath here.

To *John Weedon.*

Q. Did your mother tell you that she was confined?—She did not tell me that she was confined.

Nor you do not know it?—No, my lord.

To *Edward Weedon.*

Q. Did your mother tell you she was confined?—She did not tell me she was confined.

The matter was then debated by counsel, after which the Court delivered their opinion, as follows:

L. C. J. Marlay. We are of opinion, in the first place, That no Habeas Corpus can be granted in this case. A Habeas Corpus for the liberty of the subject is a writ of right, and may be applied for without an affidavit of the party, and was done in the cases of my lord Leigh, sir Robert Viner, and sir Robert Howard. In the case of sir Robert Viner, an Habeas Corpus was sued for, to obtain the liberty of a woman confined in his house; the woman said she was not confined by him, but chose to stay with him. But this does not appear to us at all to be the case here, that there is the least restraint upon Sarah Weedon; but on the contrary, that she is at her full liberty; for notwithstanding these affidavits of these men, it does appear so. Edward Weedon of the Gravelly-hill in the county of Carlow maketh oath, that Sarah Weedon is now detained (sworn the 8th of November) by col. John Blakeney at Abbott, near Castle-Blakeney in the county of Galway. John Weedon of the city of Dublin maketh oath, that Sarah Weedon is now detained at the house of John Blakeney, esq. at Abbott in the county of Galway; 'in terminis terminantibus' the same; both illiterate persons, and yet both make these positive affidavits of her being under restraint, when it appears she was at her full liberty, not only before, but after these affidavits were made.

These affidavits were made by marksmen, and therefore the Court sent for the person that drew the affidavits, to know why he drew them in the manner they appear to us; for upon the table, these men have declared that they do not know, nay, they cannot say they believe, that she is restrained of her liberty. Can we then, when they have declared that their affidavits are not true, grant the Habeas Corpus? By no means. Consider the consequences of these things: By taking a horse in a replevin, a man may be guilty of felony, if a person has a mind to knock down every body that stands in his way, and procures others to impose upon the Court by affidavits in order to prevent all opposition; in that case the Court will exert their authority, and punish the persons that imposed upon them. We are of opinion, there is not the least colour of granting the Habeas Corpus; for, to whom must it be directed but to Mr. Blakeney? If Mr. Blakeney does not obey the Habeas Corpus, he must be attached: If he does he must come to Dublin; and the prosecutor has declined to pay the expence of all this.

The next point to be considered is, whether these men could be attached for falsifying their affidavits? I am amazed to hear it said, there are no precedents of persons being attached for prevarication and imposing on the Court: May be not in this case, but in most great causes, that have been long depending, such things have happened. Suppose a man in an affidavit to put off a trial, should swear, that such a bond was perfected, and he explains himself, when he comes to be examined, that he heard such a one say so; is not he guilty in conscience of perjury, and ought he not to be punished for prevarication and for the imposition? I can give instances, where persons have endeavoured by artful affidavits to extort exorbitant bail, for which they have been committed by the Court.

Now as to these two persons, they have sworn in the most express terms in their affidavits, every thing which is necessary to induce the Court to grant an Habeas Corpus. I must own, if there was an inducement to do this from filial piety, I should be very tender how I committed them; but it is plain they are not induced by that motive; what they did, they did it, that they might be employed, as well as others, by Mr. Annesley, not out of filial piety to free their mother, whom they knew to be at liberty, nor is there the least appearance that they had such a motive. Therefore, as they have endeavoured to impose upon the Court, and injure an innocent person, Mr. Blakeney, I think they ought to be committed.

Mr. Just. Ward. The only thing to excuse them is their ignorance. But as the matter now stands, it is plain that the person who drew the affidavits, knew they were false, knew that these men swore to a fact they did not know to be true. Really, a man of business must know the practice in drawing affidavits,

and what kind of affidavits will serve the end proposed by them; but these men swear further, and say, that they told him the same story they did now: If that be true, he drew these affidavits most falsely; he led them into perjury, and is as guilty as they are, and should as certainly be punished, if we had him; but I find on inquiry, he is not here; therefore, as we have nobody else to punish, we must punish these men, who have thus prevaricated and imposed upon the Court.

L. C. J. It is a most wicked, profligate thing in an agent, to make an illiterate man swear an affidavit he knows to be false: Whether that be Goostrey's case or no I will not say, because he is not here to clear himself, but it looks very like it.

Monday, February 4.

Motions in behalf of the crown for putting off the Trial till next term.*

Sol. Gen. for the crown. My lord, the high sheriff has been applied to several times to give a copy of the pannel, according to custom, to the agent for the prosecutors; but he has not hitherto been able to procure one, though the other party has.

L. C. J. The sheriff could not give it without leave of the Court.

Sol. Gen. The Court is seldom or never applied to on that account, the sheriff usually gives copies of the pannel to the parties, without any application to the Court, two or three days before the trial; but supposing an application to the Court necessary, why should he give it to one party, and refuse it to the other?

Mr. Spring, for the traverser. The gentlemen concerned for the prosecution have served us with notice of a motion to put off the trial, and therefore we hope they will make their motion.

And desired the notice might be read.

Clerk of the Crown reads the notice as follows, viz.

"Counsel in behalf of his majesty will move the Court on Monday morning next, to put off the defendant's trial until Friday next; which motion will be grounded upon affidavits this day filed in the proper office, and upon the affidavits of Mary Heath and of Daniel Mac Karcher, esq. made in this cause in the last Michaelmas term, and the nature of the case and reasons to be offered.

"Dated this 2nd of February, 1744."

* In the motions for putting off the Trial, what is marked with inverted commas, are not in the trial printed by permission of the judges, but taken from two other copies of the Trial printed at that time (one in folio and the other in octavo), in order to render it more complete.—Former Edition.

Sol. Gen. We desire first to see if there be a jury; we have a right also to know if the jury have been rightly summoned.

'The bailiffs being called to prove the summoning the gentlemen mentioned in the pannel, they appeared, were sworn, and the pannel was called over.

Sol. Gen. I observe, my lord, that several of the gentlemen mentioned in this pannel are out of the kingdom, and well known by all of us to be out of the kingdom; several others live in distant counties, out of the county of Dublin; some are old and infirm, and incapable of serving on juries for several years past; others have been dead several years; and some are six clerks in Chancery, and officers in the Custom-house, who neither can nor are obliged to attend.

L. C. J. All persons summoned ought to appear, and then shew cause why they should be exempted from serving.

'The Jury being called over twice, eight of their number only appeared.

Sol. Gen. My lord, I see only eight gentlemen of the jury attend, and if eight more of these in the pannel had been in the kingdom they would not have attended. Members of parliament are exempted, and so are officers in the court of Chancery, and Custom-house. Others are disabled from attending by absence, the infirmities of old age and death; so that if both sides were prepared, as there is no jury, there can be no trial this day; for talesmen are not admitted on trials of this kind: therefore we are under no necessity of making our motion for putting it off to Friday next.

Court. We had some thoughts of bringing on the trial next Wednesday, but there is a sitting of Nisi prius that day, and other suitors are not to be injured. Let the trial therefore be put off until Thursday, if it should be put off longer there would not be time for judgment that term; but the attorneys should consent. Mrs. Heath, do you consent it should be put off?

Mary Heath. Yes, my lord.

The agent for the prosecutors was asked whether he would consent to bring it on a Thursday; but he said he would not come into any such consent, nor had he any authority so to do.

The counsel for the traverser informed the Court, that their witnesses were in town at great expence, and hoped the counsel for the prosecutor would agree to prosecute at the day prefixed, and not then move to put it off longer.

L. C. J. The reasons given to day for putting off the trial, I can tell you, will not be sufficient next Thursday for putting it off any further; if the great expences attending the trial are to be saved, the sooner the trial comes on the better.

Sol. Gen. We intended to have tried this

'question to-day; but Mr. Mac Kercher, who conducts this affair, and is the only person that thoroughly knows the evidence proper to be produced to prove the indictment, is on the other side of the water, detained by contrary winds; and so likewise are some of our most material witnesses, who are daily expected: there are seven packets due. If Mr. Mac Kercher and our witnesses come, we will immediately go to trial; if not, we cannot.

'Mr. Broadstreet, for the traverser. I hope, my lord, that both parties shall be confined to particular hours to examine their witnesses in; for if the prosecutors, who examine first, should take up a long time, the traverser might be thereby stinted in time for the examination of her witnesses: I humbly conceive both parties should examine an equal number of hours in turn.

'Mr. Harward. Such a rule was never made, my lord, I am pretty certain, on trials of this kind.

'Mr. Just. Ward. I have had the honour of being a considerable time on the bench; I cannot now pretend to bear fatigue as well as formerly; but I hope I shall take care that the jurors, or myself, shall not be in danger of being destroyed.

'L. C. J. Examining by hours is not so unprecedented. It was the old custom among the Romans to examine by the hour-glass. Gentlemen, I think proper to mention to you, that no witness shall be examined unless his evidence be previously opened to the Court, and that one counsel of a side only is to examine.'

Thursday Morning, February 7.

The Court being sat, 6

'Sol. Gen. for the Crown. My lord, I mentioned to your lordship last Monday, that Mr. Mac Kercher and several of our most material witnesses were on the other side of the water waiting for a passage; if they had arrived, we should willingly have tried this traverse to-day; but it has so happened contrary to our expectation that they are not yet arrived, and therefore as we are not yet furnished with our material evidences, or with any person acquainted with the evidence proper to be applied to prove the facts in the indictment, we cannot with safety go to trial. Colonel Weldon, my lord, who is known to be a gentleman of great worth and reputation, has been served with a Subpoena, but is extremely ill of the gout in his bed, and though a very material witness and willing to give his evidence, he is not able to travel to town without endangering his life, and the prosecutors, without the benefit of his testimony, cannot properly proceed to trial. I therefore only move your lordship that this trial may be put off till the first day of next Easter term.

'Serj. Marshall, for the crown. The traverser, my lord, removed this indictment in October last by Certiorari from the commis-

sion of Dyer and Termimer into this court on the very day it was to have been tried, after she had put the gentlemen for the prosecution to all the expence of a trial, for want of giving them previous notice of her intentions to put it off. And on the 7th of November when she appeared on her traverse in this court, on her bare allegation that she was not prepared to take her trial, she was farther indulged, and had till the 14th given her, to prepare herself for it, though the gentlemen were then also ready for trial.

'On the 13th, the day immediately preceding this last day appointed by the Court for her trial, the counsel for the traverser again moved to put off her trial on her single affidavit, that she had some material witnesses in England, and in remote places of this kingdom, and upon that foundation alone her trial was put off till this term. We, my lord, have given regular and timely notice to the agent for the traverser, that we would apply to your lordship to put off the trial. Affidavits we have to shew that we are not prepared to come to trial, and therefore we hope we shall have the like indulgence with the traverser to put it off till next term, especially as this is the first application of that kind we have made, and as we have formerly been put to so great inconveniences and charges by the traverser's affected delays.

'If your lordship pleases that Mr. Mac Kercher's affidavit sworn the 13th of November last, which was read upon the traverser's motion to put off her trial last term, may be now read.

'Court. Let Mr. Mac Kercher's affidavit be read.'

"The KING against MARY HEATH.

"Daniel Mac Kercher, esq. as page 4."

Mr. Marshall. I pray my lord, that Mr. Nelson's affidavit may be read.

Court. Read his affidavit.

The KING against MARY HEATH.

"Richard Nelson, of the city of Dublin, gent. maketh oath, that he, this deponent, being employed as agent on behalf of the prosecutors, he prepared briefs for counsel, and sent several Subpoenas for witnesses to several parts of this kingdom, to give evidence on behalf of his majesty against the traverser on her trial, which was, as deponent believes, appointed to be had on the 4th day of February instant. Smith, that by a letter, which this deponent lately received by post from Mr. Mac Kercher, dated London, the 10th of January last, this deponent verily believes said Mr. Mac Kercher did on or about the 17th day of January last leave London, in order to come to this kingdom, to carry on the prosecution against the traverser, the said Mac Kercher being one of the principal persons concerned in carrying on said prosecution; and verily believes, the said Mac Kercher is, and has been, at Park-gate or Holyhead for some days past, and would have

been here before this time, if the wind had served for a passage; and this deponent expects him in this kingdom as soon as the wind becomes fair for a passage from Holyhead or Park-gate. Says, he believes that William Goosey is a material witness to be produced against defendant, and believes said Goosey and others, who are witnesses, as deponent believes, to be produced against the traverser, are waiting with said Mac Kercher at Park-gate or Holyhead for a passage, and believes, that an effectual prosecution cannot be carried on against said Heath until said Mac Kercher comes to this kingdom.—Sworn the 2d of February, 1744.”

Mr. Marshall. I pray, my lord, that the affidavit of Robert Kennedy may be likewise read, which will inform your lordship of colonel Weldon's state of health.

Court. Read his affidavit.

“The KING against MARY HEATH.

“Robert Kennedy, of the city of Dublin, maketh oath, that on the 27th day of January last, he, this deponent, served Arthur Weldon, esq. with a Subpoena, issued out of and under the seal of this court, dated the 28th day of November last, by delivering unto the said Arthur Weldon, at his house in Raben, in the Queen's county, a copy of said Subpoena, and at same time shewed him the original, and offered him a British shilling in silver, which he refused to take. By which Subpoena, said Weldon, and others therein named, were required to be in this court on Monday, the 4th day of February then next, between the hours of seven and eight of the clock in the forenoon, to testify on behalf of his majesty concerning a certain perjury, whereof Mary Heath stands indicted. And saith, that at the time this deponent served said Weldon, he told deponent he would most willingly attend in pursuance of said subpoena, but that he was so ill of the gout, that he could not stand, or scarce stir, and that he would not venture his life; and that the week before he had the gout in his stomach. And saith, said Weldon then appeared to this deponent to be very weak and ill, and was not, as deponent believes, able to walk one step, nor was he, as he believes, able to travel in a coach or carriage from his house to Dublin without great danger and hazard of his life; and verily believes, said Weldon is not, nor has been able, without the greatest danger to his life, to travel in a carriage or otherwise to Dublin; and verily believes, said Weldon is a material witness to be produced on behalf of his majesty against the traverser, on the indictment for perjury against her; and verily believes the said Mary Heath cannot be effectually prosecuted upon said indictment without the testimony of said Weldon; and believes said Weldon would readily attend to give evidence on the trial of said Mary Heath, if he could do it without endangering his life; and verily believes, and doubts not but said Weldon will attend to give evidence on behalf of his majesty

on the trial of said Heath, in case the trial be put off to next term, and that said Weldon will be then able to travel with safety to his life.—Sworn the 6th of February 1744.”

Mr. Tisdal. My lord, it is the interest of society to bring offenders to justice: the gentlemen who conduct this prosecution were fully prepared for a trial before this affair was removed by Certiorari, and since it was removed into this court there was a day appointed for trial last term; the witnesses came to town from several parts, at great expence, and in regard the traverser was not then ready, the trial was put off, which put the prosecutors to great hardships in preparing at different times for the expected trial. The affidavits which have been read have mentioned that some of our witnesses are at the other side of the water, and that colonel Weldon has been served with a Subpoena, and would attend if possible. And for these reasons we hope your lordships will put off the trial till next term.”

Court. Was Mr. Weldon bound over?

Mr. Nelson. No.

Mr. Daly, for the traverser. I would humbly inform your lordships, that when the prosecutors applied to push on this trial last term, there was no pretence then offered, that colonel Weldon was a material witness for them. I pray that Mary Heath's affidavit may be read.”

Which was accordingly read, as likewise the others to oppose the said motion.

“The KING against MARY HEATH.

“The traverser, Mary Heath, maketh oath, that her place of abode is in London, in the kingdom of Great Britain, and deponent having lived for several years with Mary lady Akham, wife of Arthur late lord Akham, was prevailed upon to come to this kingdom in the month of October 1743, in order to be examined as a witness upon a trial, that was had at the bar of the Exchequer in this kingdom in Michaelmas term 1743, between Campbell Craig, lessee of James Annesley, and the right honourable Richard earl of Anglesea; and deponent was examined on said trial on behalf of said earl. And saith, that after said trial was over, deponent was prevailed upon to continue in this kingdom, in order to be examined as a witness on behalf of said earl in a cause depending in the Chancery in England between said James Annesley and said earl of Anglesea; and deponent was examined as a witness in said cause in or about October last, by virtue of a commission from England, which was then specifying at Wexford; but some time before deponent was so examined, she was arrested upon a warrant for perjury, alleged to be committed by her in her evidence on said trial; and the doors of the house, in which deponent lodged in Latten's-court, Dublin, or liberties thereof, were broke open when deponent was so arrested by a parcel of bailiffs or cutters, some of whom declared they had waited for an opportu-

nity to find deponent alone. And when deponent was so arrested, she was brought from her said lodgings to Henry-street, and from thence towards said James Annesley's house or lodgings in College-green; and in the road, some of the persons that arrested deponent, or attended them, directed that deponent should be brought to Castle-street; and deponent was accordingly brought to a tavern in Castle-street, and from thence to a public-house, as deponent believes it to be, in Christ-church-yard; where the person before whom deponent was brought, declared, he believed it was not a bailable offence; and several persons that appeared as agents for said James Annesley, seemed to doubt whether bail could be taken for deponent; but at length said person bound deponent in recognizance of 1,000*l.* and each of the securities in 500*l.* to the best of deponent's remembrance, and bound deponent to appear at the sessions of Kilmainham, and refused to bind deponent to appear at any other place. And deponent is informed and believes, that there were not any examinations returned to Kilmainham against deponent, but deponent was bound over to appear at the commission of Oyer and Terminer held in or about October last, and was obliged to give security for deponent's appearance there. And deponent, that deponent's business and affairs require her attendance in London, and her being obliged to stay longer in this kingdom will be very inconvenient and prejudicial to her; and saith, that the attempt to put off deponent's trial is made, as she verily believes, with intent to harass and distress deponent, and the said earl of Anglesea and Charles Annesley. And deponent is informed, and verily believes, there are at this time in this city at least fourscore persons that have been subpoenaed and brought hither from different parts of this kingdom at great costs and expences to attend and be examined as witnesses on behalf of deponent upon her trial. Saith, that several of said witnesses are old and infirm, and believes in her conscience, that if her trial should be put off to another term, several of her most material witnesses may die; and verily believes it will not be possible at a future time to get her said witnesses together, if they are once dispersed, or go to their respective places of abode. And saith, there are two persons lately dead, that were very material witnesses for deponent.—Sworn the 6th of February 1744."

" *The KING against MARY HEATH.*

" *Michael Lacy*, of Camolin, in the county of Wexford, gent. maketh oath, That he, this deponent, has been employed by the right honourable Richard earl of Anglesea in bringing several witnesses to this city from several parts of the country, to give evidence on behalf of the traverser upon her trial in this cause; and saith, there are now, and for some days past have been, in this city upwards of 80 witnesses, who have been brought from different parts of this kingdom, in order to give testimony on be-

half of defendant on her trial, many of whom are persons of figure and fortune, and have been brought and kept here at the expence of said earl and Charles Annesley, esq. And saith, he hath made the exactest computation he possibly could of the expences of bringing said witnesses and keeping them in this city, and the necessary expence that must attend their being sent to their respective places of abode; and saith, the same upon the most moderate computation, will amount at least to 700*l.*—Sworn the 6th of February 1744."

" *The KING against MARY HEATH.*

" *Mark Whyte*, of the city of Dublin, gent. one of the attornies of this honourable court, maketh oath, That he, this deponent, is employed as agent on behalf of the traverser in this cause, and was so employed by the right honourable Richard earl of Anglesea and Charles Annesley, esq.; and saith, he hath laid out and expended to lawyers, and other necessary preparations for the trial of the said defendant, over and above the expences of witnesses, attorney or agents fees, or preparing or copying briefs, the sum of 300*l.* sterling and upwards, and also paid a draft of 50*l.* English money, which was drawn on deponent, to defray the expences of some witnesses that live and reside in England.—Sworn the 6th of February 1744."

" *The KING against MARY HEATH.*

" *Edmond Bourk*, of Collumkill, in the county of Kilkenny, farmer, maketh oath, That since the beginning of December last he, this deponent, has been employed to serve subpoenas to testify and give notices to witnesses to attend and give evidence on behalf of the traverser, on the trial appointed to be this day; and that he attended several of said witnesses to Dublin for that purpose. And deponent knows there now are in and about the city of Dublin upwards of thirty persons, and believes there are upwards of sixty persons attending as witnesses on the part of the traverser, several of whom are persons of distinction and fortune, and have brought with them several servants and other persons and horses. And saith, he verily believes, and is satisfied in his conscience, that two hundred guineas will not defray the expences of the witnesses so in town, their lodgings, servants, horses and other attendants for the space of four days. And saith, he attended the execution of the commission for the examination of witnesses at Wexford, in the months of September and October last past, between the earl of Anglesea and James Annesley, and was himself examined as a witness on that commission, relative to the parentage and birth of said James Annesley, and the issue or supposed issue of Arthur late lord Altham by his lady; and saith, he was credibly informed and believes, that Dean Hughes, late of Ennisconrthy, gent. and Henry Giffard, late of Ross, gent. and the Reverend William Hervey, of Bargybridge, clerk, were examined on said

commission on behalf of said earl, and believes said Dean Hughes, and Henry Giffard are since dead, and that the said Mr. Hervey was about Michaelmas last taken ill and his life despaired of; and saith, that several of said witnesses now in Dublin attending said trial, are ancient and infirm persons, and live dispersed in several parts of this kingdom. Sworn the 4th of February, 1744."

"*The KING against MARY HEATH.*

"*John Campbell*, of maketh oath, That on the 30th day of January last this deponent left Park-gate, where he had been waiting for a wind eight days, and during his stay at Park-gate aforesaid, he heard nothing of Daniel Mac Kercher or Mr. Goostrey's being there, and believes, if they had been there, he could not but have heard of them. That deponent went from Park-gate aforesaid, across land to Holyhead, where he staid but one night, and got his passage in the packet, and arrived at Skerries the 4th instant in the evening; and that deponent heard nothing of them at Holyhead; and believes they were neither at Park-gate or Holyhead at the time aforesaid. Sworn the 6th of February, 1744.

"*The KING against MARY HEATH.*

"*Robert Kennedy*, of the city of Dublin, maketh oath, That he, this deponent, having received from Mr. Richard Nelson several subpoenas for witnesses to appear on the 4th day of February instant, to give evidence on behalf of his majesty against the defendant upon her trial, this deponent accordingly served a great many of said witnesses with said subpoenas respectively in the several counties in this kingdom, in which they live, and saith, a great many of such witnesses are come to this city in order to give evidence against said Heath on her trial. Sworn the 2d of February, 1744."

"*Mr. Recorder*, for the traverser. The bill was found in October by the commission of Oyer and Terminer; and the reason of moving the indictment by Certiorari was, that it was impossible for the traverser, in so short a warning, to prepare for her trial; and it so happening, that Michaelmas term was so close on the heels of finding the indictment, she could not, notwithstanding all her efforts, collect all her witnesses from the remote parts of this kingdom, and from England to prepare for this trial. And therefore could it be imagined that it was to delay justice, when the traverser was only endeavouring to have an opportunity of defence? The prosecutors then said they were ready; and pray why not the same reason now of being prepared? If they put themselves to unnecessary expences last term in preparing for trial, the fault of that is to be imputed to themselves; they had notice given them that application would be made to postpone the trial.

"*Counsel for the Crown*. It clearly appeared to the Court last term, that the traverser had

not made the least effort, or taken one step to prepare for her trial; and that we had very short notice of her intentions, and that only after they knew all our witnesses were sent for and come to town.

"*Mr. Recorder*, for the traverser. The traverser is at great expences, her witnesses being now in Dublin; and the reason that was offered last term for putting off the trial, cannot subsist now, because both parties have had sufficient time to make the necessary preparations for trial. Pray, my lord, what foundation have they now to put off this trial?

"As to Mr. Mac Kercher's affidavit, wherein he says, that Mrs. Weedon is a material witness for the prosecutor; he never saw her, yet he ventures to say this; she is here to be examined, and will clear up that matter, and obviate the objection.

"*Counsel for the Crown*. Mr. Mac Kercher was informed of it by her sons, and by many others to whom she had declared herself on that head.

"*Mr. Recorder*. The next thing to be considered, my lord, is the affidavit of Robert Kennedy, who swears, That Mr. Weldon is a material witness, without giving any account that he knows him to be so; this person, who is only a server of subpoenas, ventures, from his own knowledge, to know what is or what is not material. If the agent in the cause would swear it, there might be some reliance on it. If this trial is put off, my lord, another witness may be found next term, which might be thought as equally material; so that this gentlewoman, before she can have an opportunity of justifying herself, may die in the mean time, under the imputation of the indictment.

"If they had produced the affidavit of any physician who attended Mr. Weldon, to certify his illness and his inability to come to town, it would be more proper than the assertion of the server of subpoenas: besides, my lord, a man in the gout, though he cannot walk, might be able to travel. But how a person who is neither attorney or agent in the cause, and who is not to be presumed to be in the secrets of the prosecutor, can swear Mr. Weldon a material witness, is somewhat very extraordinary; besides, my lord, since the time of service of the subpoenas, which was the 27th of January, he may have so recovered as to be able to come to town, though indisposed then. But why was not this gentleman thought of last term, when the prosecutors said they were ready? Therefore, considering the circumstances of this case, I hope your lordships will not put off the trial.

"*Sol. Gen.* My lord, it appears that the bill of indictment was found against this woman the 24th of October, yet application was made on the 13th of November last to put off her trial; she had that interval of three weeks time to prepare; but because she swore she had some material witnesses who

'were wanting on her trial, it was put off. I hope, my lord, the reasons which we offer will have the same weight, till we can be properly prepared. Mr. Mac Kercher, who is one of the principal managers of this prosecution, and without whose presence it cannot be carried on effectually, is detained on the other side of the water by contrary winds, and if this cause should be put off till the next term, he may and probably will be here then; so that I hope we shall have the same indulgence that the traverser had, and that this trial may be put off till the next term.'

'L. C. J. In the affidavit of Robert Kennedy, there is no addition to his name, which is not very common in affidavits.'

'Sol. Gen. The identical person is in court, to be produced if required.'

Robert Kennedy sworn.

Mr. Daly. Do you know colonel Arthur Weldon?—Robert Kennedy. Yes, I do, Sir.

Q. How do you know that he is a material witness in this cause? Who told you so?—I saw him sworn to what he could say.

Where?—Before a Master in Chancery.

Have you any other reason?—I have not.

Court. Did you read his affidavit?—I read his affidavit, my lord.

Mr. Daly. What affidavit did you read?—An affidavit sworn before a Master in Chancery at Maryborough assizes.

Were you present?—I was.

Court. In what cause was it?—In the cause of Richard earl of Anglesea and James Annesley, esq.

Mr. Daly. Was there any cause depending at Maryborough?—No, I went there, and met him there and the Master in Chancery; Mr. Morton was present, and his testimony was wrote; he swore to it, and I witnessed it.

Court. In what cause?—They say, it was to be laid before the attorney general of England.

Are you used to business?—I am not bred to the law business.

Do you understand what is material in a prosecution for perjury, and what not?—I think what appeared in that testimony was very material.

Did you shew that affidavit to any of the agents of Mr. Annesley?—Mr. Morton read it.

Did you shew it to any agent of Mr. Annesley?—I brought it to Dublin, and gave it to Mr. Mac Kercher.

Do you know what is material evidence in a trial for perjury, and what is in another cause?—As far as my reason directs me, I do.

What employment do you follow?—I keep a beer-house and shop, my lord. I do import a great deal of beer, my lord.

Mr. Daly. I am sorry for it. Are not you a peruke-maker by trade?—No, I am not.

Did you ever see Mr. Weldon before that day you saw him at Maryborough?—I did.

Where?—In Dublin often.

'L. C. J. He is not a proper person to distinguish material evidence, and I observe that no affidavit was made till yesterday, that Mr. Weldon was a material witness.'

'Mr. Tisdall. The public is concerned in this prosecution; trials are put off frequently in behalf of the crown, on affidavits of witnesses not being able to attend: We hope the crown and the public are at least entitled to the same indulgence as was given last term to the traverser on her application to the Court; why should she, my lord, who by affected delays put off her trial so often before, be suffered to take advantage of our weakness at present?'

'Mr. Daly. I would observe to your lordships, that Mr. Levingsstone, on the 11th of November last, swore an affidavit before a Master in Chancery, in the suit of Mr. Annesley against lord Anglesea, that colonel Weldon was in so bad a state of health, that it was feared the plaintiff would lose the benefit of his testimony, unless he was examined *de bene esse*; yet on the 15th, two days after this affidavit, Mr. Mac Kercher pushed to have the trial brought on; so that it is plain they then thought they might proceed without Mr. Weldon's evidence. My lord, we have the copy of Mr. Levingsstone's affidavit, which we beg leave may be read.'

'Mr. Howard objects to the reading of Mr. Levingsstone's affidavit, which was made in the Court of Chancery, and says it is not an affidavit in the cause of his majesty against Mary Heath; therefore he hopes it won't be admitted to be read. Besides, this is only a copy of an affidavit.'

'Court. You do not object then to the reading the affidavit, but a copy of the affidavit. Pray is not the affidavit of record, and ought not the copy of a record to be admitted to be read? Pray in the Exchequer-chamber would not the copy of a record be admitted to be read?'

'Mr. Daly. Suppose an affidavit charging perjury was made in the Court of Chancery, could it not be laid before the grand-jury?'

'Court. Gentlemen for the prosecutor, shew us some precedents why a copy of Mr. Levingsstone's affidavit should not be read.'

'Mr. Howard mentioned the Case of Edworth against Edgeworth against reading the affidavit: and moreover, my lord, though colonel Weldon was in such a state of health, as made it prudent to examine him to preserve his testimony; yet he might have been well enough to attend the trial last term.'

'L. C. J. Are not affidavits in the spiritual court read here on prohibitions? There are no precedents shewn why the copy of Mr. Levingsstone's affidavit should not be read.'

'Arthur Mac Guire sworn to prove he compared the copy which he had in his hand with Mr. Levingsstone's affidavit on record, and that it was a true copy thereof, which was read.'

" *The King against MARY HEATH.*

" *Arthur Magwire*, of the city of Dublin, gentleman, came this day before me and made oath, that he compared the above copy of an affidavit with the original affidavit in the Usher's office of his majesty's High Court of Chancery in Ireland, and saith, the same is a true copy, and that he saw Hugh Swiney, the clerk in the said office, sign the name Ste. Sibthorp, usher, thereto; and saith, the said Hugh Swiney usually attests copies of affidavits, and believes he has a power so to do.—Sworn this 7th of February 1744."

" *JAMES ANNESLEY*, esq. Plaintiff; *RICHARD ANNESLEY*, called earl of Anglesea, and others Defendants.

" *William Livingstone*, esq. came this day before me and made oath, that on Sunday the 11th day of this instant November, this deponent saw Arthur Weldon, esq. at his house in the Queen's County, and that the said Arthur Weldon was then in a weak state of body, inso-much that he then seemed to deponent to be in danger of dying; and this deponent saith, the said Arthur Weldon is a very material witness on behalf of the plaintiff James Annesley in this cause; and deponent saith, if the said Arthur Weldon be not shortly examined in this cause, the plaintiff will, in all probability, lose the benefit of his testimony.—Sworn before me this 21st day of November, 1744—*THOMAS STROPPARD.*

WILLIAM LIVINGSTONE.

" True copy, Ex. by Bowden.

" *STE. SIBTHORP*, Usher."

" *Mr. Walsh*, for the Crown. My lord, if there was no other foundation to put off this trial but the affidavit that has been made of Mr. Weldon's being a material witness, I humbly apprehend, it would be a sufficient reason. The person who made the affidavit was examined before your lordships. He has mentioned why he was a material witness; and though he is not a person of great distinction, as Mr. Recorder would have him, he is a very creditable, honest man, and has a right to be believed on his oath, as well as any other man.

" My lord, there are several other witnesses who are very material to attend on this trial, who cannot possibly attend if it comes on now, and not proper to disclose who they are, or whether they are or are not material, it is sufficient that they are sworn to be material. We were ready to come to trial last term, and though we should not then have had the attendance of Mr. Weldon there, we might have had other witnesses to prove the point for which we now want his evidence. Those witnesses we have not at present, therefore considering the disabilities we are under at this time, we hope we shall be indulged for once, as well as the traverser has been before.

" *L. C. J.* Gentlemen, did you ever know of a trial under these circumstances to be put off without paying cost?

VOL. XVIII.

" *Counsel for the Prosecutors.* There was the same and stronger reason last term for the traverser's paying cost, and yet it was denied us.

" *Mr. Harward.* My lord, this bill of indictment comes here as well supported as any indictment that was ever brought into this court. I say it is supported by a verdict found by twelve gentlemen of as great repute and character as ever were upon any jury, who had it for fifteen days under their consideration. There is no imputation, my lord, of its being an idle or wanton prosecution. This indictment was removed by Certiorari. It is no writ of right that the subject has, but in reality it is an indulgence to the subject. The repeated indulgence given to the traverser in not bringing on her trial last term, has been mentioned already, and as this prosecution is in behalf of the crown, we hope an equal hand will be carried between his majesty and the subject. Mr. Mac Kercher has sworn in his affidavit, that some material witnesses to be examined in this cause had necessary calls to England; and that if the traverser's trial should be put off to this term, that it would be almost impossible for them to attend, nay it was plainly told the Court they could not attend: we find he is not here, and other material witnesses are at the other side of the water waiting for wind; which I say adds more credit to Mr. Mac Kercher's former affidavit, for it is fallen out as he said, that if the trial was postponed, it was next to an impossibility that they could attend.

" *Mr. Nelson* has mentioned a letter he received from Mr. Mac Kercher, that he expected him with the first fair wind. Kennedy has mentioned in his affidavit the ill state of health of colonel Weldon, and that he was a material witness.

" As to the objections that Kennedy was not agent, and therefore cannot know whether he was a material evidence, I humbly rely on it, my lord, that it can have no manner of weight; for Kennedy has told your lordships, that he was present when Mr. Weldon swore his affidavit, and had the custody of it; and therefore must know the purport thereof, and how far his testimony might be relative to this trial. I beg leave to say, that the single testimony of Mr. Weldon, as he is a gentleman of an unexceptionable character, might be put in the scale against many witnesses, not so well established in point of reputation; and the want of his evidence is a sufficient motive to postpone the trial.

" I must farther observe to your lordships, that last Monday there appeared in the box only eight of the jury mentioned in the panel; so that if both parties were prepared, the trial could not have come on that day; and as this day's application is the first and only one on our part for putting off the trial till next term, I hope your lordships will indulge us in it.

D

‘ Mr. *Robbins* mentioned, that the same cause of putting off the trial last Monday still subsists, and urged very strongly some of the reasons offered by the other counsel for putting off the trial.

‘ Mr. *Manus*. My lord, it fully appears from the several proceedings, the affected delays given by the traverser to postpone her trial to this term.

‘ The bill of indictment, as has been already observed, was found in October last; and the traverser, to postpone her being tried at the then commission of Oyer and Terminer, brought a Certiorari; so that I beseech your lordships to consider, that the indictment comes into this Court at the prayer of the traverser. The Court were bound of right to avoid it at the instance of the king; because every indictment being at the suit of the crown, he has a prerogative of suing in what court he pleases; but at the request of the defendant a Certiorari is seldom grantable for the removal of an indictment before the justices of gaol delivery, and very rarely if ever for removing an indictment for perjury, forgery, and other heinous misdemeanours, where the public is so nearly interested, in regard such crimes deserve all possible discountenance; and the Certiorari might delay, if not wholly discountenance the prosecution, and so delivered in 1st Syder. 54.

‘ It is likewise delivered there as law, if a cause be moved out of an inferior court, it ought to be tried the same term that it is removed, that the party may not be delayed by Certiorari. My lord, after it was removed, and the traverser appeared on her traverse in this honourable court, the 7th of November, she had time given her till the 14th; when the 14th came, she again moved to put it further off till this term.

‘ The prosecutors very justly opposed the motion last term, of delaying this trial any further, till this term, in regard they were at great expences, and had several times prepared for it; yet on the affidavit of Mrs. *Heath*, that she had not some of her material witnesses ready, it was postponed: so that I say, my lord, this trial was put off, at her instance, at a time when by law she should and ought to have been tried, and those gentlemen had a right to demand a trial.

‘ There have been affidavits read to your lordships how material Mr. *Weldon*’s evidence is, and that he cannot now attend, but that the next term it is hoped he will be able to give his attendance, which is a strong motive to put off this trial in behalf of the crown. I beg leave, my lord, to say, that the case of an indictment is not like that of an information. The promoters of an information may be guilty of a default, but no laches or default can be imputed to the crown, at whose instance all indictments are supposed to be.

‘ My lord, it is equally odious to punish the innocent as to let the guilty go free: your lordship put off the trial last term, lest the in-

‘ nocent should be punished, upon a presumption of innocence till the contrary appeared: and I am sure, my lord, you will be equally careful this day not to let the guilty go free, which may be the case if the prosecution be now hurried on, in the absence of several material witnesses, who by sickness and other accidents are now prevented attending at this trial, and in the absence of the person who conducts it. From these circumstances, I hope your lordship will put this trial off till next term.

‘ Mr. *Callaghan*. In all cases, my lord, where any indulgence is to be shewn, it is granted to the crown; yet I do not say but public justice should be properly and equally administered: the accusation founded on this indictment carries a great degree of presumption, though not conviction; the objection of *Kennedy*’s not knowing whether Mr. *Weldon* is a material witness or not, with great submission, can have no force; other persons may sometimes know who are material witnesses as well as men of business. If a person stands unimpeached in his character, there can be no objection to his testimony. It is every day’s experience to put off trials, if it appears that a material witness is visited with a disorder, and cannot attend; in the present case it appears several are absent.

‘ As to what is offered on the other side, that this may be a foundation for finding out other material witnesses that cannot be present next term; that, my lord, will have no great weight, for by the same reason no trial could ever be put off for want of material evidence. Moreover, my lord, if the trial be put off till next term, and the traverser should then happen to be acquitted, it will be so much the more to her honour; but if she escapes for want of due, proper, or effectual prosecution, she will not stand as unimpeached from public censure as otherwise she would.

‘ It has been already mentioned what expences we have been put to last term, which might have been saved if we had known in time that her trial was to be delayed; but care was taken that it should not be known, till the prosecutors had been put to as great charges as if the trial had come on: and as great mischiefs must arise if this trial should not be postponed, I hope, my lord, it will not be brought on till next term.

‘ Mr. *Harding*. All questions are to be determined by the importance of evidence: I say, my lord, in a case of this kind, that on the weight of material evidence all questions must ultimately depend. If it appears that we have material witnesses, who cannot attend at present, and if it so happen that we must lose the benefit of their testimony if this trial comes on, this matter must still remain in the dark; and if the traverser should be acquitted for want of such important evidence, she will in that respect stand under an imputation. And I must beg leave to say, that I admire why gentlemen from such circum-

'stances should be fond of trying this traverse
'now, since the prosecutors are not prepared;
'and that Mrs. Heath's pressing on the trial this
'day, when she knows the prosecutor is not
'ready, is an argument that she knows herself
'guilty. My lord, the gentlemen of the other side
'have laid great stress upon the objection that
'Robert Kennedy could not know that colonel
'Weldon was a material witness. The charge in
'the indictment is, that lady Altham was not
'with child, nor never had a child at Dunmaine.
'Surely, my lord, he may know how far this
'charge may be collected from the affidavit of
'Mr. Weldon, which he had seen, and had in
'his custody, and which must be relative to
'this matter. Besides, my lord, from the con-
'versation that Kennedy had with Mr. Wel-
'don, that he would willingly attend, but that
'he was so ill that he could not then venture
'his life to travel; I say, with humble sub-
'mission, from this very declaration he might
'know he was a material witness. Pray, my
'lord, if Mr. Weldon was not a material evi-
'dence, would not he have told Kennedy at that
'time that there was no occasion for his testi-
'mony?

'This is a matter of very great consequence;
'and if the prosecution cannot be effectually
'carried on, the traverser must be acquitted.
'The public have a right to a fair, impartial
'enquiry into this affair; and as it can be of
'no inconvenience to Mrs. Heath that this
'trial should be postponed, but will be of the
'greatest service to her if she be acquitted with
'honour on an effectual enquiry, but not so
'much to her honour if she be now acquitted;
'therefore we hope her trial will be postponed
'till next term.

'It was further observed by the counsel for
'the prosecution, that the traverser had put
'her trial off three several times; that these
'affected delays on her part, were by so much
'the greater hardship on the gentlemen who
'carry on the prosecution in behalf of the
'crown, as they had not only postponed busi-
'ness of the highest consequence to them in
'England, in order to attend it; but as the
'traverser's intention of moving for delays has
'always been industriously concealed from
'them until the very day that her trial should
'have taken place, or the day immediately
'preceding it; by which means they were
'each of these three times put to the same
'trouble and expence as if they had actually
'tried her with effect. This proceeding, my
'lord, to all disinterested persons, must appear
'not only vexatious, but calculated to promote
'the oppressive system of this unfortunate gen-
'tleman Mr. Annesley's too powerful enemies,
'of worrying him and his friends out by un-
'necessary expence and delay. This woman
'must have known her own intention of putting
'off her trial to this term, early enough to have
'given notice of it to those gentlemen, so as to
'have prevented the great expence of money
'and time, and the great trouble that they and

'their witnesses have been at in preparing so
'often for her trial; while she remained in a
'supine security of having her trial delayed,
'and relied on the indulgence of this court,
'without taking one step to prepare for it.
'We therefore hope, my lord, that for these
'and many other reasons already mentioned,
'we shall this day, for once, meet with the
'same indulgence of putting off this trial till next
'term, especially as this is the first application
'of that kind we have made, and as we have
'so good a right to expect it.'

After which the Court delivered their opi-
nion as follows:

Mr. Just. *Blennerhasset*. The prosecutor
has moved on two affidavits to put off this
trial till next term.

On Monday last he moved to postpone the
trial till Friday, which motion was granted.

The affidavits now moved on are, one of
Kennedy, an ale-seller and a server of pro-
cesses.

And the affidavit of Mr. Nelson, who is the
agent and attorney for the prosecutor.

The strength of Kennedy's affidavit consists
in this, that one Mr. Weldon is a material
evidence.

I must observe, that upon the motion to
postpone the trial till Friday only, there was
no affidavit made concerning Mr. Weldon;
for Kennedy's affidavit, in which only Mr.
Weldon's name is mentioned, appears to have
been sworn yesterday.

There was an affidavit of Mr. Mac Ker-
cher's, which he made the last term, in oppo-
sition to the motion to put off the trial then
made by the traverser.

This affidavit has been this day read.

There Mr. Mac Kercher swears, that he
had a great number of witnesses attending,
and that he was ready to prosecute.

At this time Mr. Weldon was not thought
of; he has been summoned since, but to this
hour he is not bound over to prosecute.

Nor was he examined on the trial in the
Court of Exchequer.

Now, as to the affidavit of Kennedy, though
it has all the parts which generally make up
affidavits to put off trials; for he swears to the
summoning of Mr. Weldon, and to his being a
material witness, and that he was not well
when he was summoned; yet he goes, in my
opinion, so far, that he cannot well receive
credit.

For he takes upon him to swear also, that
the traverser cannot be convicted without his
testimony.

So that Mr. Weldon is the only person who
can give evidence to convict this woman, if
we believe Kennedy.

But if we believe Mr. Mac Kercher, he
swears he had a number of witnesses ready to
prosecute the traverser to conviction, the term
before Mr. Weldon was thought of.

As to Mr. Nelson's affidavit, it relates to Mr.
Goostrey only, that he has given examinations

in this cause, and that he is in England; and to Mr. Mac Kercher.

I need not remark on this affidavit, it is made by a man of credit in his profession, and I believe it to be true.

But the force of this affidavit is taken away by an offer made by the traverser, who says, she will consent to have Goostrey's examinations read in evidence against her upon the trial, and that she will waive any benefit which she might have by a cross-examination.

As to that part of Mr. Nelson's affidavit which is relative to Mr. M'Kercher, it has no weight with me; he says Mr. M'Kercher is absent, and is a manager in this cause; he does not say he is a witness, so that there is no pretence to put off the trial on that account.

But the counsel for the prosecutor object that there is no equality kept, if this trial be not put off; say they,

The traverser put it off last term, and we should have the same indulgence now.

The case on the traverser's motion widely differs from the case made by the prosecutor on this motion.

The bill of indictment was not found till the twenty-fourth day of October, at the commission of Oyer and Terminer.

The traverser afterwards obtained a Certiorari to remove it to the King's-bench, which was not returnable till the first day of term. She then appeared, and immediately informed the prosecutor, that she could not be ready for her trial; she afterwards moved on affidavits to put it off, and suggested that a number of witnesses were in England, and many dispersed in remote parts of this kingdom; she named many of them by name; she swore they were material, and that it was not possible to have them that term, but that she hoped to have them by this.

Upon these affidavits the trial was put off, and a day of trial appointed for this term.

The prosecutors opposed this warmly, made affidavits that they were ready to prosecute, that their witnesses were all in town at great expence to them, and they do not say now, by any thing they have sworn, but that they have every witness now which they then had, except Goostrey.

This was sufficient notice to them to be prepared; they were not hurried as the traverser must have been, if her trial had been brought on before she could, from the circumstances of her case, have been prepared.

The Court, in my opinion, should consider the prodigious expence the party is put to; I think it is sworn, that no less than fourscore witnesses are now attending to give their evidence in behalf of the traverser, and that the preparing for this trial has cost her already above seven hundred pounds.

I consider also the heavy imputation which lies on her character, which she ought to have an opportunity of clearing up, if she can.

And for these reasons think she ought to

have her trial, but I submit to the opinion of the Lord Chief Justice and Mr. Justice Ward.

Mr. Just. Ward. The progress of this cause is easily recollected. The bill of indictment was found the 24th of October, at the commission of Oyer and Terminer for the county of Dublin, against the traverser for wilful and corrupt perjury; notwithstanding which, and although the verdict in the Exchequer was contrary to her evidence, I shall suspend my opinion until the present jury have found her guilty, or acquitted her. Justice and the public good require, that witnesses upon their oaths should always speak truth; yet I am apt to believe, were not private persons affected in the event of this prosecution, every circumstance, whether material or not, would not be so strenuously contended for.

Many reasons made it improper to try this indictment at the commission; therefore my Lord Chief Justice granted a Certiorari to remove it into this Court; it is owing to that I see many gentlemen upon this jury, who could not have been so there, being judges; it was fit the best gentlemen for fortune and character in the county should be had to try a cause of this consequence; it was incumbent on the sheriff to return such, and I believe he hath done his duty.

The 7th of November the traverser, called upon her recognisance, appeared, and the Court appointed the 14th for her trial; but on the 10th she moved the Court to put it off to this term, on her affidavit of several material witnesses, naming them, being in several parts of England, and remote parts in Ireland, whom she could not possibly have in time to make her defence. This motion was strongly opposed; but her affidavit was so full, that it could not be refused her; and I must say, that in a common case it would have required no longer time than to read the affidavit; and the Court appointed the 4th of February for the trial. On this motion Mr. Mac Kercher made an affidavit, which now is become necessary to be considered; he swears that he is embarked in this cause, and, as I understand him, an agent; that he was then ready to prosecute and go on with the trial of the traverser. As it was obvious to object, if he was then ready, why should he not be so this term? To answer which he goes on and swears, that several persons interested, and witnesses, were going to England, whom he apprehended he could not have next term, and could not bring on the trial without them. This looks like giving notice he could not be ready this term, and I confess if he, or the visible agent on this side the water, had applied the beginning of term, and made the necessity of their witnesses going to England appear, and that they were not returned, and if the traverser had been at no expence, I should have gone as far as the practice of the Court would allow to delay the trial. But instead of this, Mr. Mac Kercher, in his affidavit, did not mention the name of

any one of his witnesses that were going to England, which renders it impossible to examine whether they did or did not go there, or were since returned, or ever would; besides, they seemed to acquiesce, and continued silent until the 2nd of February, when notice was given, the prosecutors would move on the fourth to put off the trial to Friday following. No other notice hath been since given; nor did the prosecutors move to put off the trial on Monday, until the jury was called; and only eight appearing, it must go off on course to the next day, on which they only pressed that it should be put off to Friday, without assigning any reason from Mr. Weldon's disability to attend, or indeed any reason at all that I know of. However, through much importunity, the counsel on both sides agreed to put it off to this day, when a full jury appearing, they now move on new affidavits to put it off to next term, and assign for reasons the absence of Mr. Mac Kercher the agent, and also of Mr. Goostrey and colonel Weldon, two witnesses. As to Mr. Mac Kercher, he was here last term, and might have been here now; for though Mr. Nelson swears he acquainted him by letter that he would be here, yet Campbell swears he came last week from Parkgate and Holyhead, and heard nothing of Mr. Mac Kercher at those places; besides, Mr. Nelson has always appeared to us as the known agent, and is of known abilities and sufficiency to conduct any cause. As to Mr. Goostrey, the counsel for the prosecutors say he was here last term about the end of it, when Edward Weedon and his brother, being examined in court, charged him on oath with drawing affidavits for them, being illiterate, to swear to their mother Sarah Weedon's imprisonment by colonel Blakeney, when they only told him, as they, with great simplicity, swore in court, that Mr. Blakeney's gates were locked at the usual hour of the night, and they never looked on their mother as a prisoner there; and when the Court required Mr. Goostrey's attendance, they were told he was then in England; he is bound over to prosecute, and ought to have attended: however the traverser hath absolutely removed this objection, by consenting his examinations should be read against her. But the main objection rests upon colonel Weldon's absence, who, as Kennedy swears, was served with a subpoena the 27th of January, and was then so ill of the gout, that he could not attend, and that the traverser cannot be convicted without him. Kennedy appearing in court, acknowledged himself to be a beer-seller, and, by his appearance, he is a man of low station and little knowledge. I think him very sufficient to swear to what he sees and hears; but I must say, I do not think his judgment or belief any way sufficient to ground mine on. An attorney or agent is the proper person to swear a witness to be a material one to convict the traverser, but the agent and attorney, who certainly must be informed of the witnesses for their clients, have declined this. Kennedy,

indeed, told us on the table, he read an affidavit of colonel Weldon's at Maryborough, and thought it material; but to obviate this, the traverser's counsel have consented this affidavit be read in evidence against her, so that if it be material, it will have its weight. In the next place, how comes colonel Weldon to be now so material a witness, when last term Mr. Mac Kercher pressed to go on to trial without him? And I presume he knew what he could say, the affidavit he made being, I think, at the summer assizes preceding.

Besides, though colonel Weldon was subpoenaed the 27th of January, and Kennedy made an affidavit the 2nd of February, in that he is silent as to Mr. Weldon's illness, nor was it mentioned by the counsel on Monday; but when nothing else would do, on the sixth of February he swears to his illness, and something like his being a material witness; this I have considered already: but I must observe, what has missed the counsel, that though colonel Weldon should be ill of the gout on the 27th of January, it no ways appears but he may be now on the 7th of February well recovered, or at least able to travel; it is admitted he lives but one day's journey from Dublin, why then was not a messenger sent down to bring us an account in what state of health he was a day or two past? Since they have neglected this, I shall not look upon him as a necessary witness. The counsel for the prosecutors allege they have above sixty witnesses, and the traverser's eighty in town; I think it is full time to go on with the trial, and I see no reason for putting it off. I should not have been so tedious, but for the great earnestness with which the counsel have pressed this motion.

L. C. J. *Marlay*. I am of their opinion, that we must not put off this trial. I will mention the several steps taken in this proceeding. It appears here by affidavit, That on the 10th of August Mrs. Heath was arrested on a warrant, grounded upon examinations of perjury committed by her in her evidence on the trial in the court of Exchequer; fifteen witnesses are first bound over to prosecute at the sessions of Kilmainham, and afterwards at the commission of Oyer and Terminer. The commission sat on the 23d of October, and a bill of indictment was found against her the next day, which she traversed, and the traverser moved for a Certiorari to take her trial in the King's bench; upon affidavits so full, that it was not to be refused without the greatest injustice; there being an estate depending of 6,000*l.* a year, and that there were examinations carrying on in the Chancery here, and in England. I do believe that neither side can shew, where the testimony of witnesses has been anticipated by an indictment of perjury, but something like that step was taken in this cause. The Certiorari was granted by the Court upon an affidavit of the traverser, and the trial put off upon her affidavit of the 10th of November. The

affidavit of Mr. Mac Kercher is sworn afterwards on the 13th of November, shewing cause for bringing on the trial the next day, but no court could possibly bring on the trial when that affidavit was offered. The traverser swore that several witnesses, whom she named, were in England; and that Mrs. Weedon in particular, was a material witness, and lived in a remote part of this kingdom. Mr. Mac Kercher swears, that Mrs. Weedon was a material evidence for the prosecutor, that she was detained by force, and moved for an Habeas Corpus to bring her hither. That motion was brought on, and examinations were taken after the day appointed for the trial, and a motion made to attach Mr. Blakeney for detaining this Mrs. Weedon. It appears, that she was summoned to attend here on behalf of the prosecutor on the 14th of November, just the day before; and that the place she then lived at is above 70 miles from Dublin. There came two witnesses upon the table, who had sworn affidavits, in order to found an Habeas Corpus and an attachment against Mr. Blakeney, and they having sworn false, they were both committed. Both those illiterate witnesses swore her, in their affidavits, to be under a restraint, when it appeared she was at liberty. This they confessed, and also, that those affidavits were prepared by Goostrey, the person now said to be in England. This is a very extraordinary proceeding, and a sort of indictment not usually brought into this court. The first trial was put off, on the affidavit of the traverser, that she was not prepared for her defence: the question now is, whether the reasons offered for putting off this trial to Easter term be of equal force. It appeared then by the affidavit of Mrs. Heath, that several witnesses, necessary for her defence, could not possibly attend at the day prefixed for trial; the bill of indictment was found the 24th of October; the trial was to be on the 14th of November; how could witnesses in England be brought by that time to appear here? But Mr. Mac Kercher swears that Mrs. Weedon was a material evidence for the prosecutor, and not for the traverser, as she insinuated. She is now here, you have no want of her, if she be that material witness; and then the question is, whether the affidavits made now can put off this trial. The affidavit of Mr. Nelson is general, and only says, that he had a letter from Mr. Mac Kercher, dated the 10th of January, acquainting him that he would leave London on the 17th of that month. There are several affidavits made on the side of the traverser, and one in particular, that there was no such person upon the road from London to this place, but however, as he is no evidence in the cause, there can be no colour for his absence to put off the trial. Then the whole matter is reduced to the affidavit of Kennedy. He swears those three things that are material to put off a trial; but I must observe that this affidavit is in fact contradicted by the affidavit of Mr. Mac Kercher, who swears on the 13th of November, he was ready to bring on

the trial the next day, and yet Mr. Weldon is not one of the witnesses for that trial, and he is not bound over to prosecute; Mr. Mac Kercher knew his evidence, for he had then his affidavit in Chancery; therefore that part which is necessary to put off the trial, that a material witness to be produced cannot attend; is wanting in Kennedy's affidavit, for it appears that it is not well grounded by Mac Kercher's affidavit. There is another objection against Kennedy's affidavit: he swears, he does believe Mr. Weldon is to be had the next term, and that he believes he is a material witness. Consider, that though this be proper if it comes from the agent, yet it is not proper, when an ale-seller makes this affidavit, and a man that confesses he was never bred to the business. You know, that if a person be accused for a violent assault, in case there be no danger of death, there is bail taken; but if instead of sending for a surgeon, the person who applies for bail, sends for a cobbler, and the cobbler swears he had searched the wound and found it not dangerous, nobody can say, but the Court would refuse bail upon the affidavit of this cobbler. Therefore Kennedy's affidavit is of no consequence. As to Goostrey, his examinations are here, the counsel for the traverser desire they may be read against her. But I must tell you that his examinations are no more, than that Mrs. Heath did say such and such words on the trial in the Exchequer. I have the trial here, and Mr. Goostrey can prove no more than what all present at that trial can prove; and therefore, gentlemen, upon account of Mr. Goostrey, I think not proper to put off the trial. But what makes me think it improper to put it off is, the great expence on the side of the traverser. It appears by the affidavits on account of the traverser, that they have been at a vast expence; one person swears to 700*l.* another swears to 300*l.* besides a 50*l.* bill. Now, if you can delay trials, and put traversers to this expence, you will soon have what you desire in carrying on this cause, for nobody will dare to appear as a witness, when they know it is so dangerous and expensive. But it has been urged by Mr. Harward, that she should have a full and fair trial; and let me tell you, it is as much for the credit of the prosecutors that there should be a full and fair prosecution, and that where witnesses bound over may be had to appear, and do not, it creates a suspicion of the justice of the prosecution; people will be apt to say, that jugglers cannot play so well the same trick twice. There is no doubt but a verdict was found for the prosecutor by a jury of undoubted credit; but it does not follow that the traverser is guilty, and the best and the wisest jury may be deceived. This matter can be delayed no longer, because by this delay there can never be any time fixed for a trial; but as this motion has taken up a great deal of time, so it would be impossible to go through it this day, therefore we will defer it till to-morrow morning.

The Jury prefixed over to Friday the 8th of February at 8 o'clock.

Serj. Marshall. I beg leave to observe, that the examination of Mr. Goostrey does not go to all parts of this indictment.

Court. To every one of them.—You do in effect confess her innocent, if you do not prosecute her.

Counsel for the Traverser. We consent Mr. Goostrey's examination may be read in evidence, and waive our right of cross-examining.

THE TRIAL

OF

MRS. MARY HEATH,

FOR PERJURY.

Counsel for the Prosecutor.

Warden Flood, esq. Solicitor-General.
Robert Marshall, esq. 2nd Serjeant at Law.
Philip Tisdall, esq. 3rd Serjeant at Law.
Philip Walsh, esq. one of his Majesty's Counsel at Law.
William Harward, esq.
Joseph Robbins, esq.
James Mac Manus, esq.
Cornelius O'Callaghan, esq.
Ambrose Harding, esq.
John Morton, esq.
Thomas Fitz-Gerald, esq.

Counsel for the Traverser.

Eaton Stannard, esq. one of his Majesty's Counsel at Law, and Recorder of the City of Dublin.

John Smith, esq. one of his Majesty's Counsel at Law.

Anthony Marlay, esq. one of his Majesty's Counsel at Law.

Peter Daly, esq.

Simon Bradstreet, esq.

Thomas Le Hunte, esq.

Thomas Spring, esq.

Thomas Morgan, esq.

Richard Malone, esq.

Edmond Malone, esq.

Edward Lee, esq.

James Maddox, esq.

Thomas Cooley, esq.

Robert Hamilton, esq.

Robert Ford, esq.

Friday, February 8, 1744.

The Court being sat before nine o'clock, the jury were called over, when fourteen appearing, and no challenges being made, the following twelve were sworn to try the issue of traverse:

Sir Samuel Cooke, of St. Catherine's, bart.

John Rochfort, of Newpark, esq.

Eyre Evans, of Portrane, esq.

Nicholas Archdale, of Mount Eccles, esq.
David Chaigneau, of Corka, esq.
Quaile Somerville, of Cookstown, esq.
Edward Ford, of Davidstown, esq.
Mark Synnot, of Drunconder, esq.
Thomas Baker, of Newtown, esq.
George Evans, of Newport, esq.
Narcissus Chas. Proby, of Damestown, esq.
Charles Burton, of Dubber, esq.

The Indictment on which this Trial was had is as follows, viz.

" *The KING against MARY HEATH.*

"County of Dublin, to wit. The jurors for our lord the king upon their oaths say and present, That in a certain bill of a plea of trespass and ejectment of a farm depending as of the term of the Holy Trinity, in the 16th and 17th years of the reign of our said lord, the now king George the 2nd, of Great Britain, and so forth, and in the year of our Lord, 1743, in our said lord the king's Court of Exchequer in Ireland, then being at the king's courts in the said county of Dublin, before the barons of our said lord the king, of the said court, and brought into the said court, and prosecuted by Campbell Craig, gent. debtor of the said lord the king, plaintiff, against the right hon. Richard earl of Anglesea, defendant; who was present then in the said court, by his attorney, Thomas Burroughs, for 30 messuages, 30 tofts, 50 cottages, 2 mills, 50 gardens, 800 acres of arable land, 300 acres of meadow, 600 acres of pasture, 50 acres of furze and heathy ground, 50 acres of moory ground, with the appurtenances, in Great Stramine, otherwise Stameen, Little Stramine, otherwise Stameen, Little Donacarny, Shallon, Killcarvan, otherwise Killebarvan, Cruffey, Annagor, otherwise Annager, and Little Gaffney, situate, lying and being in the county of Meath; all which said premises were formerly the estate of the right hon. James earl of Anglesea, deceased; and lately the estate of the right hon. Arthur earl of Anglesea, also deceased; and which had been demised to him, the said Campbell Craig, by James Annesley, esq. and had been also demised to him the said Campbell Craig, by the right hon. James earl of Anglesea, and had been also demised to him, the said Campbell Craig, by the hon. James Annesley, only son and heir of Arthur late baron Altham of Altham, deceased, otherwise the right hon. James baron Altham of Altham, on the first day of May, 1742, at Trim in the county of Meath aforesaid, for the several terms of 21 years, to commence from thence in manner and form as in and by the declaration of the said Campbell Craig, in the said bill of the said plea of trespass and ejectment of a farm, is mentioned and set forth; in and to which said bill of a plea of trespass and ejectment of a farm, he the said Richard earl of Anglesea, by his said attorney, took defence in due form of law, and for plea thereto, said that he was not guilty of the trespass and ejectment aforesaid, in manner and form as the said

Campbell Craig complained; and of that he put himself on the country, and the said Campbell Craig likewise; and issue being so joined in said plea of trespass and ejectment, in due form of law, by and between the said parties, it was afterwards so proceeded upon thereon that the said issue afterwards, to-wit, on the second Friday after the morrow of All-Souls, in the term of St. Michael the Arch-angel then next, that is to say, on the 11th day of November, in the 17th year of the reign of our said lord, the now king, in the Court of Exchequer aforesaid, before the said barons of the said court, at the king's court aforesaid, in the county of Dublin aforesaid, was tried by a certain jury of the country, for that purpose, in due form of law, then and there elected, tried and sworn in said court, to try the said issue; and on the said trial, it was then and there admitted, as well by, for and on behalf of the said Campbell Craig, as by, for and on behalf of the said Richard earl of Anglesea, that the said lands and premisses, mentioned in the said plea of trespass and ejectment and declaration of the said Campbell Craig, were the estate of inheritance of Arthur lord baron Altham of Altham, late deceased, and that he died seized of the said lands and premisses; and the said Campbell Craig, then and there, upon the said trial, produced witnesses on his part, who being then and there duly sworn on God's holy evangelists, by the said barons of the said court of Exchequer, to testify the truth, the whole truth, and nothing but the truth, in the said plea of trespass and ejectment so depending, the said barons having sufficient power and authority to administer the said oath to them on that behalf, gave in evidence, and then and there swore, and deposed upon their oaths aforesaid, to the jurors of the jury aforesaid, before the barons aforesaid, that James Annesley aforesaid, the lessor of the said plaintiff Campbell Craig, was the only son and heir of the said Arthur late lord baron Altham of Altham, by his wife, Mary the late lady Altham; and that the said James Annesley was born and christened at Dunmaine, in the county of Wexford, in the kingdom of Ireland. And the said now jurors so sworn for our said lord the king, upon their oaths, further say, and present, that Mary Heath, of the city of Dublin, in the county of the said city, widow, upon the trial aforesaid, in the court of Exchequer aforesaid, before the barons aforesaid, at the king's court aforesaid, in the county of Dublin aforesaid, being then and there produced as a witness, by and on behalf of the said Richard earl of Anglesea, on the said trial of the said issue, she the said Mary Heath was then and there sworn, upon God's holy evangelists, in due form of law, by the said barons of the said court of Exchequer, to testify the truth, the whole truth, and nothing but the truth, in the said plea of trespass and ejectment; the said barons of the said court of Exchequer having sufficient power and authority to administer the said oath to the said Mary Heath in that

behalf; and the said Mary Heath being then and there so sworn, then and there falsely, voluntarily, knowingly, wilfully, maliciously, corruptly and illicitly swore and deposed upon her oath aforesaid, to the said barons and to the jurors of the said jury, who then and there were in due form of law elected, tried, and sworn as aforesaid, to try the said issue as aforesaid, that lady Altham, that is to say, the aforesaid Mary lady Altham, who was wife of the said Arthur late lord baron Altham of Altham, never was with child, while she the said Mary Heath lived with the said Mary lady Altham. And,

Further, the said Mary Heath then and there, before the said barons of the said court, gave in evidence and swore upon her oath aforesaid, to the said barons and to the jurors of the said jury, that the said Mary lady Altham never had a child at Dunmaine, that is to say, Dunmaine aforesaid, in the said county of Wexford, in the kingdom of Ireland. And,

Further, the said Mary Heath then and there, before the said barons of the said court, gave in evidence and swore upon her oath aforesaid, to the said barons and to the jurors of the said jury, that there never was a child, as the child of that family, that is to say, of the said Arthur late lord baron Altham of Altham, and the said Mary lady Altham his wife, either christened or living at Dunmaine house, that is to say, the aforesaid Dunmaine house, in the said county of Wexford, while she, that is to say, the said Mary Heath, was at Dunmaine aforesaid. And,

Further, the said Mary Heath then and there, before the said barons of the said court, gave in evidence and swore upon her oath aforesaid, to the said barons and to the said jurors of the said jury, that she, that is to say, the said Mary Heath, never saw a child in the hands or care of Joan Laffan, while she, that is to say, the said Joan Laffan, was at Dunmaine house aforesaid. And,

Further, the said Mary Heath then and there, before the said barons of the said court, gave in evidence and swore upon her oath aforesaid, to the said barons and to the jurors of said jury, that the said Mary lady Altham did not miscarry of a child at Dunmaine aforesaid. Whereas really and in fact, the said Mary late lady Altham, who was wife of the said Arthur late lord baron Altham of Altham, was with child while she the said Mary Heath lived with the said Mary lady Altham. And whereas also really and in fact, the said Mary lady Altham had a child at Dunmaine, that is to say, Dunmaine aforesaid, in the said county of Wexford, in the kingdom of Ireland. And whereas really and in fact, there was a child, as the child of that family, that is to say, of the said Arthur late lord baron Altham of Altham, and the said Mary lady Altham his wife, christened and living at Dunmaine house aforesaid, in the said county of Wexford, while she the said Mary Heath was at Dunmaine house aforesaid. And whereas also really and in

fact, the said Mary Heath did see a child in the hands and care of Joan Laffan, while she, that is to say, the said Joan Laffan, was at Dunmaine house aforesaid. And whereas also really and in fact, the said Mary lady Altham miscarried of a child at Dunmaine aforesaid. And so the now jurors sworn for our lord the king as aforesaid, upon their said oaths say and present, that the said Mary Heath on the said trial of the issue aforesaid, upon her oath aforesaid, before the barons aforesaid and jurors of the said jury, elected, tried and sworn to try the said issue between the parties aforesaid, in the said Court of Exchequer at the king's courts aforesaid, in the county of Dublin aforesaid, in manner and form aforesaid, did falsly voluntarily, knowingly, wilfully, maliciously, corruptly, and illicitly, commit wilful, voluntary, malicious and corrupt perjury, in great contempt of the said now king and of his laws, and contrary to his majesty's crown and dignity.

Court. You, gentlemen of counsel for the traverser, offered yesterday that Mr. Goostrey's examination should be read in evidence against the traverser, and that you would waive her right to cross-examine him; you must admit it now.

Mr. Daly. Admitted.

Court. (On motion for separating the witnesses.) The witnesses were ordered to be separated, and not to come into court till they are sent for; nobody is to be admitted to them, but each to have a guard on the other's witnesses.

Court. Gentlemen, for the ease of the jury, and necessity of finishing the trial, I must tell you, that we will not, on either side, have a multiplicity of witnesses; the meaning of the law is, that the trial should be had in one day, and we won't sit here to hear any evidence that is immaterial. Whoever protracts a trial, is by the law supposed to dare not to stand it.

Mr. Recorder. My lord, we shall endeavour to make the trial as short as we can, but there are many cases that depend upon circumstances, which must be made appear, and wherever your lordships find that it is a necessary defence, you cannot think it is too long.

Mr. Just. Ward. It is in the power of the gentlemen of the bar to shorten this trial, and I hope you will observe the rule laid down yesterday, for one gentleman to confine himself to each witness.

L. C. J. I make no doubt of laying that down as a rule.

Sol. Gen. Our resolution is to observe it; and we will shorten the trial, in all respects, as much as we can.

The lists of the witnesses are given in to the Court, that they may be separated, and the Clerk of the Crown numbering them, there were 80 on the side of the traverser, and 86 on the side of the prosecutor.

Court. Do you imagine, that the law supposed that any body should produce fourscore
VOL. XIII.

witnesses? Two witnesses are enough to prove any fact, if it be a good one, for by the mouth of two witnesses shall a thing be established; and 200 will not prove any fact, if it be a bad one.

The officer of the court charged the jury with the indictment in the usual form, and was directed by the Court to take out the five points or assignments of perjury, and give them to the jury; which was done.

1. That Mary, wife of the late lord Altham, never had a child, while the traverser lived with the lady Altham.

2. That lady Altham never had a child at Dunmaine.

3. That there never was a child christened, or living at Dunmaine, as the child of lord and lady Altham, while the traverser was at Dunmaine.

4. That the traverser never saw a child in the hands or care of Joan Laffan, while the said Laffan was at Dunmaine.

5. That lady Altham did not miscarry of a child at Dunmaine.

Sol. Gen. (Counsel for the Crown.) May it please your lordships, and you gentlemen of the jury, I am of counsel in this case for the crown, against the traverser Mary Heath, who stands indicted for wilful and corrupt perjury, a crime of the deepest dye, on the discountenance and due punishment whereof the lives, liberties, and properties of all men, nay the very being of society depend; for no man's life, liberty, or property can ever be safe, if such are either countenanced, or escape for want of due prosecution. And before I proceed to state the case, I must beg leave, my lord, first to mention, that by hurrying on this trial so prematurely, in the absence of our principal witnesses, in the absence of the gentlemen who carry on the prosecution, particularly of Mr. M'Kercher, who has the conducting of it, who alone is acquainted with the nature and strength of the evidence, and the due application thereof, and is now detained on the other side of the water by contrary winds, we proceed to it under manifold and great disadvantages: yet under these circumstances, I make little doubt but we shall be able to convict the traverser, to the satisfaction of all unprejudiced persons, if the witnesses to be produced are able to prove the matters contained in my instructions. I shall therefore proceed to state the case as briefly as I can.

Arthur Annesley, first earl of Anglesea (so created by king Charles the 2nd, with a limitation to the heirs male of his body) had issue five sons, James his eldest, Altham his second, Richard his third, Arthur his fourth, and Charles his fifth son.

The first earl having made very large acquisitions, sufficient to support two distinct families, procured the baronage of Altham for his second son Altham, and his issue

'male, with a remainder over to his third son Richard.

'As to the Altham title, Altham, the first lord Altham, died without issue male, whereupon that dignity became vested in his brother Richard, who had issue Arthur, afterwards lord Altham, and Richard now in possession of the Anglesea titles and estates.

'With regard to the eldest branch, James, eldest son of the first earl, was, in his father's lifetime, married to a daughter of the earl of Rutland, on which marriage, a settlement was made in common form, and the estates limited to lord James for life, remainder to his first and other sons in tail male, remainder to the other sons of the said first earl in tail male, remainder to his right heirs.

'The said first earl was accordingly succeeded, both in the title and estate, by his said eldest son James, who afterwards also died, and left issue three sons, James, John and Arthur.

'James, the eldest of these, and third earl of Anglesea, levied fines and suffered common recoveries of his estates, and thereby docked the entail created by his father's marriage-settlement, and made himself absolute tenant in fee-simple; afterwards he made several wills and codicils, and having no issue male of his own, he thereby limited his estates, upon the failure of issue male of his brother Arthur, to go to the Altham branch.

'Accordingly it happened that the said Arthur, who was afterwards earl of Anglesea, died in 1737, without issue; so that if Arthur lord Altham had been then living, he would undoubtedly have succeeded to the Anglesea honours and estates: but as he happened to die in November 1727, it is indisputable, that if he had left a son, such son would have been entitled to those honours and estates.

'The principal question therefore at the late trial at bar, and the single question now is, Whether the said lord Altham left a son or not? We that are concerned for the crown, did then maintain the affirmative, and this we shall now endeavour to prove, though a fact already established by the solemn verdict given at that trial, by twelve gentlemen of the greatest characters for integrity, capacity and fortunes in this kingdom. A verdict not precipitately given, but after 14 days attention and deliberation, and which therefore ought to carry the greatest weight.

'Had the person, who claims to be the son of Arthur lord Altham, been in the kingdom, when Arthur earl of Anglesea died, he might have asserted his right, while many of his witnesses were living, and the facts recent. But he had the misfortune, gentlemen, not only to be out of the kingdom, but out of Europe.

'But as we are not at liberty to lay that fact before you, I shall not presume to observe upon it any further.'

'L. C. J. No such evidence ought to be opened here. Prove that the lord Altham had a son.'

'Mr. Daly. The evidence offered by Mr. Solicitor is quite illegal, and I will shew it to be so.'

'Mr. Recorder. I have a great regard for whatever Mr. Solicitor General says, but no fact should be opened to the jury, but what properly relates to the matter of the indictment.'

'Court. The matter of perjury contained the indictment, is the single question before us; what Mr. Solicitor mentions might be proper to be shewn in the Court of Exchequer, in an action for the recovery of the estate. But we are not now to try the right to an estate, but a single fact: if lady Altham had a child, Mary Heath is perjured, and this the jury are to try.'

'Mr. Archdale. (one of the jury) I apprehend the question before us is, whether Mary Heath is perjured or not?'

'Court. Yes, that is the point, gentlemen.'

'Sol. Gen. Mr. Annesley brought an ejectment in the Court of Exchequer, in order to try his title to an estate in the county of Meath, which action was accordingly tried in Michaelmas term, 1743. The sole question on that trial was, by the admission of all parties, Whether Mr. James Annesley was the lawful son of Arthur lord Altham? and the jury, who were gentlemen of undoubted credit and fortune, after fifteen days trial and deliberation, found upon their oaths, that Mr. Annesley was the legitimate son of Arthur lord Altham: Upon this trial, gentlemen, Mrs. Heath, the traverser, was examined, as a principal witness, on the part of the defendant the earl of Anglesea, and it is for the evidence she then gave, that she now stands indicted for perjury, in the five following particulars:

'First, That she swore, that Mary lady Altham, who was wife of Arthur late lord Altham, never was with child, while she Mary Heath lived with the said Mary lady Altham.

'Secondly, That she swore, that the said lady Altham never had a child at Dunmaine in the county of Wexford.

'Thirdly, That she swore, that there never was a child, as the child of the family of lord and lady Altham, either christened or living at Dunmaine house in the said county of Wexford, while she Heath was at Dunmaine.

'Fourthly, That she swore, she never saw a child in the hands or care of Joan Laffan, while the said Joan Laffan was at Dunmaine house.

'Fifthly, That she swore, that the said lady Altham never miscarried of a child at Dunmaine aforesaid.

'And although it will be enough for us to prove Mrs. Heath guilty of perjury, in any one of the said points, yet notwithstanding the great and many advantages gained against us by our being surprised, and hurried on to trial at this juncture, I doubt not of our being able to convict her of the whole. We shall begin, by proving, that Mrs. Heath, at the

' trial at bar, swore the several particulars mentioned in the indictment, and then shall proceed to shew, that those particulars are false.'

Court. The first assignment of perjury is, that lady Altham never was with child while the traverser lived with her.

Serj. Marshall. My lord, we shall first produce the record. Upon the trial in the Court of Exchequer the single point was, Whether the lessor of the plaintiff was the son of lady Altham, wife of Arthur late lord Altham? and there was a verdict found for him.

Mr. Daly. We admit the record, and we admit Mary Heath was produced as a witness upon that trial, and that she swore that lady Altham had not a child, whilst she the traverser lived with her.

Serj. Marshall. Do you admit the several assignments of perjury?

Mr. Daly. We do.

Serj. Marshall. My lord, the next thing that we shall lay before your lordship is a person (Mrs. Cole) to prove, that after lady Altham's arrival in this kingdom, in the year 1713, she came to the house of Mr. Briscoe, in Bride-street, in this city; that after staying there some short time, she removed to the house of one Mrs. Vice, in Essex-street; that from thence she went to the late lord Altham's house at Dunmaize, in the county of Wexford; and it will appear to your lordship and to the gentlemen of the jury, that at the late lord Altham's house at Dunmaize she was with child, and did miscarry of a child.

Mr. Daly. We admit, if you please, that Mrs. Heath came over with my lady Altham in October 1713, and lived with her to her death in the year 1739.

Court. Gentlemen, call your witnesses.

Mrs. Henrietta Cole sworn.

Serj. Marshall. Mrs. Cole, did you know Arthur late lord Altham?

Mrs. Cole. Yes, Sir.

Did you know Mary lady Altham, his lady?—Yes.

At what time did you first become acquainted with her?—In the year 1713.

Do you know any place in the county of Wexford, where they lived?—Yes, at Dunmaize.

Were you at any time at that house, and when?—I was, Sir.

Can you recollect about what time, madam?—I believe it might be about February that my mother and I went there.

In what year?—In the year 1713.

Do you know of any remarkable accident that happened while your mother and you were there?—Yes, I do.

Give an account to the Court and the jury, what that accident was.—My lord was in a very great passion one day, at some saucers being brought to the table; his passion was very great, and he had ordered them never to come upon the table on any score, for they were not fit for modest people to see; and all

on a sudden he threw them between my lady and me, and put my lady into a violent fright.

Court. What were they?—China saucers, my lord.

Serj. Marshall. Pray, madam, what happened upon that occasion?—My lady fell a trembling; into a violent fit of trembling and tears.

Was there any, and what consequence from this accident?—My lady was exceedingly ill in the night.

Mr. Edm. Malone. My lord, before she goes on any further, I hope she will say what she knows of her own knowledge, and nothing more.

Serj. Marshall. Whatever may be an inducement to the material point is necessary for her to say.

Court. Go on.

Mrs. Cole. I say it from Mrs. Heath the person coming to my mother, and I in bed with my mother.

Court. Then you heard Mrs. Heath tell your mother my lady was very ill?—I heard her, my lord.

Serj. Marshall. Did any and what consequence happen from that illness?—My mother told me in the morning—

Court. Stop you there. You must only tell what you know yourself did happen.

Serj. Marshall. Well, tell what did happen of your own knowledge.—My lady miscarried, as I understand.

From whom were you informed that my lady was so sick?—From Mrs. Heath.

Where were you at that time that you were informed of it?—In bed with my mother.

What did she say to your mother then?—She came to the door, and said, 'For God's sake, Madam, get up, my lady is exceedingly ill, make haste and get up.'

Pray, Madam, do you know what was the consequence of that illness?—My lady miscarried, as I take it.

Why do you apprehend that she miscarried?—I saw an abortion in the bason the next day.

Where did you see it, madam?—In my lady's closet.

Who shewed it to you?—I believe, my mother; as to that particular I cannot be positive.

Where was Mrs. Heath at that time?—Indeed, I cannot be positive as to that; but she was ever at my lady's elbow whenever she was ill.

How was she in that family, a servant or relation?—She was a servant, I think; I cannot tell whether she was a relation or not.

Was she my lady's woman?—She was deemed as such.

Had you any and what discourse with the traverser concerning my lady's sickness at that time?—Indeed, I cannot charge my memory with having any; we might have had discourse about it, but I cannot charge my memory.

How long was lady Altham confined afterwards to her chamber?—That is a question I cannot exactly tell you,

Was she confined to her chamber after that accident of the saucers?—She was confined to her chamber; my lord wanted her down to supper that night, and sent for her several times; and my mother went up for her, and she was too ill to come down.

Mr. Recorder. What night?—The night of the day that the saucers were thrown.

Serj. Marshall. You say, madam, that my lady was confined, pray how long was she confined?—Whether it might be a fortnight or three weeks, I cannot positively say, but she was confined to her chamber.

In what manner was she confined, in bed, or up, or how?—She kept her bed for some time, and sat up in her chamber at other times.

Did you give an account of this affair to any body whatsoever since the time this accident happened?—I have spoke of it frequently, and my mother has spoke of it.

To whom, madam, can you recollect?—Indeed, I believe there is Mr. Monck's family, that I believe may remember it perfectly well; there is in Gorey several that may remember it from my speaking of it before ever this affair happened.

Where was Mrs. Heath during the time that lady Altham was confined in her chamber?

Mr. Recorder. Oh! she said already, that she was about her.

Pray, madam, did Mrs. Heath know any thing of that matter, or not?—She was in the house, she was immediately at her elbow, she was the person that came to my mother.

Court. Did you go into my lady's room when she called your mother?—I did not, my lord, I lay in my bed.

Serj. Marshall. But she desired your mother to make haste, for that my lady was exceedingly ill?—She did, Sir.

Jury. What time of the night was it that Mary Heath came to your apartment?—I really cannot recollect.

When was it that you went into the closet, and saw this abortion you mention?—The next morning about nine or ten o'clock, I believe; to be certain I cannot.

Do you take upon you to say, that at the time when your mother shewed you the abortion, that the traverser was in the closet?—I cannot say, she might or might not.

Did Mrs. Heath constantly attend lady Altham?—She did constantly.

Did you ever see her attend her?—I have seen her, and was often sent to call her.

Serj. Marshall. When she called your mother up, did she express any and what apprehension concerning my lady's illness?—I cannot say that she expressed any at all, only that she said, For God's sake, madam, get up, my lady is exceedingly ill.

Do you know how it was understood in that family, what the occasion of that sickness was?

Court. Supposition or hearsay is nothing.

Cross-examination.

Mr. Recorder. Pray, madam, do you re-

member the time that my lady Altham came to Ireland, the month I mean?—*Mrs. Cole.* About October.

Where did she lodge when she came to Dublin? Did not she come to your father's house?—She came to my father's house.

How long did she continue in your father's house before lord Altham came?—Whether a month or six weeks in town, before he came to town, I cannot tell.

Pray, madam, where was it that my lord and she first met?—At my father's house.

Can you recollect the month that was in?—I cannot be very certain; but I think that it must have been in November, the latter-end of November, or in the beginning of December, which I cannot tell.

Do you fix it in November?—I cannot fix it more than what I say.

I ask you now, madam, did my lord and lady Altham lodge at your house till they went to Dunmaine?—I do not believe they did.

I ask you, upon your oath, did they lodge in your father's house till they left town?—I think they did not.

It is a material question, and you must answer it; I ask you, did they or did they not? for you that remember things so well, must know whether they did or no. Did not they lie there the night they were reconciled?—They did, and some nights after.

Did not they till they left town?—No, Sir, I do not believe they did.

Cannot you say whether they did or not?—I cannot say positively.

Can you say they did not lodge there while they staid in town? You that know they were reconciled by your father's means, cannot you recollect whether they left your father's house before they left town?—I do not think that they staid there while they lived in town.

You do not think; but can you say whether they did or not?—I tell you, Sir, my father was uneasy at their being in his house; my lord was a man that had a great many freaks, and my father prevailed on him to take lodgings.

And did he take lodgings?—I think I may say it, I am not certain; but I think I may be positive that they did not lodge at my father's house till they went to the country.

Well, then, madam, do you recollect their going away from town? Did the coach come to your father's house to carry them away?—I do not remember.

Were they at your father's house when they went away?—I do not believe they were.

Did the coach come for them?—I remember no coach coming for them. Indeed I do not remember any equipage.

Now, Madam, you say that your mother and you went to Dunmaine; what time was it that lord and lady Altham left this city?—I cannot ascertain the time of their going.

You did not go with them?—I did not.

I think you said your mother and you went to Dunmaine in February?—I believe it was.

Pray, Madam, when my lady was at your house, did she hire any servants to go down with her?—I do not remember one.

Do not you remember that she hired one Mrs. Setwright?—I remember Mrs. Setwright at Dunmaine, but do not remember my lady's hiring a servant in the house.

Were you a gossip to Mrs. Setwright at Dunmaine?—I know she was brought to bed.

Did you stand to the child?—Indeed I do not remember I did; if I did, it is more than I know, or can remember.

Was your mother sick while you were at Dunmaine?—Not to my knowledge.

You do not remember that neither?—Indeed I do not.

Was she so ill as to take vomits there?—I do not remember any vomit she took, nor do I remember her to have taken two vomits in all her life.

Did not you lie with your mother at Dunmaine?—Part of the time I was bed-fellow to Mrs. Heath, and part to my mother; for my father was there for a while, and as soon as he went, I lay with my mother.

Pray, madam, did your father go with you there?—No, he did not.

Was your father in the house when these saucers were thrown down?—He was not.

Did that happen before or after he was there?—It was after he was there.

How long were you there before your father came?—I cannot tell.

How long, a fortnight?—I believe we might; more or less, I cannot tell.

Was it the beginning of February, or the latter-end that you went down?—I believe towards the beginning; I cannot tell.

I see you can tell nothing but one point. Was it the beginning, the middle, or the latter-end of February that you went there?—I cannot say; but I believe it was in February.

Well, but I ask you now, what time was it that this accident of the saucers happened?—I cannot tell whether in March or April.

Which month was it?—If I could remember the day, the hour, or the minute I would tell you.

How long was it before your father came?—I think it was after.

How long did he stay there?—He stayed but a very short time.

Can you say how long he stayed?—Whether a week or ten days I cannot say.

How long after he went away did it happen?—I cannot tell how long.

Were not you examined in this cause once before; can you recollect what time you fixed then for your going to Dunmaine?—I cannot tell.

Did not you say it was in March or April?—I do not know whether I did or not.

Court. Did you say in February or March then, or when?—I cannot tell; my lord, whether I did or not.

Mr. Recorder. When you were examined on the trial in the Exchequer, did you say, you

went in February, March or April?—I said that my lady miscarried in March or April.

Did not you swear that it was in March or April that you went down?—Not to my knowledge.

Why, had not you as good a knowledge then as now?—I might; if I said it I mistook.

Pray, madam, I ask you another question; you say, you mistook if you said so; upon your oath, how long after you went down was it that this accident happened?—It was some time after; it either was in March or April, but I believe rather it was in April.

Court. You do remember you were examined in the Court of Exchequer; by virtue of your oath, did you swear then, it was in the beginning of spring that you went to Dunmaine?—I do say, that I believe I said that it was the spring.

Do you call the month of February spring?—I might mistake in that.

Mr. Mac Manus. My lord, I apprehend it is an improper question to ask a woman now, what she said another day; to examine her at this time to what she swore then.

Court. I ask your pardon, Mr. Mac Manus, it is very proper.

Mr. Recorder. Recollect the time; how soon after you got down did this accident happen, for it is a most remarkable one, in a fortnight, or three weeks, or a month, or how long?—It was more than a fortnight, three weeks, or a month; as I take it, it was about two months after we got down.

Can you recollect the month?—It might be something more than two months, I cannot be positive.

And might not it be something less?—No, I do not think it was.

Can you recollect the company there at the time of this accident?—I have endeavoured my recollection as much as I could. There were four gentlemen at the table besides my lord, my lady, my mother and I; but to tell one of their names I cannot, and whether dead or alive, I do not know.

Court. Was your father there?—No, he was not at the table.

Mr. Recorder. Was there any quarrel between my lord and my lady at this time?—There was none that I know of, for it was the saucers that occasioned the quarrel.

How were the company placed at the table; I suppose my lord sat at the lower end of the table?—My lady sat at the upper end, my mother sat by her, and I on the other side, and I do believe, as well as my recollection can serve, I believe my lord sat the very next person to me; I am not positive, but I think he did.

Were these four gentlemen that were at dinner, people of any fashion?—I suppose some were, and some were not.

Can you be positive whether my lord sat next you?—Upon recollection, I think he did sit next me.

Court. Where did my lady sit?—At the

upper end of the table, and the chimney was behind me.

Mr. Recorder. Did you sit the next to her?

—I sat the very next to her.

On which hand?—The right hand.

Was your mother there?—My mother was there.

And did you sit on the right hand of my lady?

—I can give you a very good reason for it.

Tell it.—It is that my mother had got some cold, and her eyes were weak, and she did not care to face the light.

What room was it you dined in? Describe Dunmaine.—I have not been at Dunmaine lately; but however, the room, as you come in at the street-door, was on the right hand; there was a bed in the other room opposite to it.

What was the use of those saucers?—There was something upon every one of them.

How were they brought to the table?—They were brought in on a dish, a desert, and those saucers were intermixed with other things.

What had they upon them?—I believe there were sweat-meats upon them.

Were you daubed with them when my lord threw them by you?—He took them in this manner, and emptied them all; and as he emptied them he threw them between my lady and me, he would empty a saucer and throw it, and so one after another till he had thrown them all.

Where did he empty them into?—In the dish that they were standing on.

Did he know that my lady was with child?—I believe he did; and I am pretty sure he did.

And yet he threw those saucers directly between you?—Sir, my lord was unaccountable in his temper.

Court. Do you say that my lord knew my lady was with child?—I do believe he did know it.

What is your reason for that belief?—I have no reason, only because of the abortion.

But had you any reason to believe he knew it before that time?—I do say thus far, that the very first words that Mrs. Heath said to my mother—

Court. You are only to say what you know yourself.

Mrs. Cole. I heard my lord say that my lady was with child before the accident.

Mr. Recorder. Did you hear him say so?—I did hear him say so.

And yet he threw the saucers in this manner; how did he throw them?—My lady put her head one way, and I put my head the other, as they were throwing.

Now, madam, you say you went into the closet the next morning, your mother carried you there?—No, she did not.

Who carried you there?—I went of myself.

Was your mother there?—She was in the closet.

And your mother shewed you this abortion?—She did.

Now, how old were you at that time?—I

believe this will shew (holding a bit of paper in her hand); when I was here before I was quite uncertain as to my age.

You then said you were 12 or 13?—There is a fault in that trial, for I was asked my age, and I could not be certain; I was asked why I could not, and I said I could not, because there was always—

What did you say your age was then? Did you say how old you were?—Forty-five or thereabouts.

Did not you say you were then twelve years old?—I was led into it; I said I was, and could not tell how much more; I was asked how old then was I, 10, 12, 14, or 16; and said I might be 10, 12, 14, or 16, which I cannot determine.

How old were you at the time of the trial; did you not say 45 or thereabouts?—Here is my age (shewing the paper); I have now got it, and it is vastly more.

When were you born?—I was born in the year 1691, but then I did not know.

Court. What is your reason for saying you were born in the year 1691?—I got my age out of the registry.

What registry?—Of St. Nicholas.

What parish of St. Nicholas?—St. Nicholas, Dublin.

Which, there are two parishes called St. Nicholas?—This St. Nicholas next us here.

Whereabouts is the church, in what street?—St. Nicholas hereabouts, I do not remember the street.

Court. That is St. Nicholas within.

Mr. Recorder. Why then you were 22 at that time?

Court. There is 10 years difference, and that is a great while to be mistaken in.

Mrs. Cole. I tell you, that here was the thing just as I was asked; when they asked me my age, I said I cannot tell, take so many out of so many, and then you will know; there was some of the lawyers immediately talking, she's perjured, and that struck me to the heart, that I did not know what I said.

Court. Were you asked that question but once on the trial, or twice, or thrice?—I know I was asked it once, and when I was on the table the last time, that was the second time, I had then recollected myself.

Mr. Recorder. Were not you asked how it came that your mother shewed you the abortion when so very young?—I do not know indeed.

Do you remember when you came to the age of one-and-twenty? Did you never reckon your years?—I did not, and there was a constant dispute and debate what year I was born.

Were you of age when you went to Dunmaine?—To be sure I find by this registry I was.

That is no evidence; were you one-and-twenty when you went to Dunmaine?—I was to be sure.

You say it positive?—I do say it positive.

How came you to mistake so prodigiously?

—I do believe every one of you may remember that I said, take so many out of so many, and then you may know.

Well, madam, when your mother shewed you this in the bason, had it any figure or shape?—It seemed to me to have it.

What figure had it?—It had head and limbs, Sir.

Could you distinguish them plainly?—It was but very little.

Did you take and examine it?—I do believe my mother shewed me the limbs, I did not take it to examine it; I looked at it as it lay there.

Did your mother do any more than shew it to you as it lay?—I do not know but she might to shew the limbs.

Did she take it in her hand?—I do not remember that she did.

Did she stir it in the bason?—She might stir it with a feather.

Did she, or did she not?—I cannot say.

Had she a feather in her hand?—I cannot say that she had.

Had it all its limbs?—I might see the limbs and the large eyes.

What did you take it to be when you saw it first?—My mother told me it was an abortion.

That was in the closet?—In the closet.

Is there a window in the closet?—There are three windows.

Did your mother speak to you about it before you went into the closet?—Before I went into my lady's room my mother told me she had miscarried.

Was that all she told you?—That is all, Sir.

Did your mother or you go into the closet first?—When I went into the closet my mother was there; we went into the room together, and I believe my mother went into the closet before I did.

Did your mother speak before she went into the closet about the abortion?—I don't recollect; my mother told me my lady had miscarried.

But did she tell you of the abortion before she went in; did she say that there was one in the closet?—No, she did not.

You are sure it was not before she went in?—Indeed I really do not know, Sir, she told me there was one, but whether before or after I cannot be positive.

Did you, when you were formerly examined, say it was before or after, or that you could not tell?—My confusion was so great, I did not know what I said.

Did she, or did she not tell you before she went into the closet?—She told me my lady had miscarried before I went in, and when I went in I saw the abortion.

What carried you into the closet if you did not know it was there?—My mother and I went in; my mother was there, and I might go to her; when she had made her compliments to my lady, she went in, and I followed her.

When you were asked before how you came to go into the closet, did you not answer this,

that your mother told you the abortion was there, before you went in?—I believe I did say it, I might mistake in the term.

Did you, or did you not say so?—I believe I did say it. I know my mother told me my lady had miscarried.

Pray, madam, when did you leave Dunmaine?—We left it, I believe, the latter end of May, or beginning of June, which I cannot tell, and went to Burton Hall.

Did not you swear upon the former trial, that my lord sat at the lower end of the table, opposite to my lady, for now you place him next yourself?—I believe I did say it. But I say that I was in that confusion when I was here before, that I might; I might mistake in that, for not a mortal had spoke to me what I was to be examined about; but when I came on the table, I was in the greatest confusion that any body could possibly be. If I did say it, it was owing to downright confusion.

Court. What time did you leave Dunmaine?—We left it the latter end of May, or beginning of June, I cannot be positive which.

That was in the year 1714?—In 1714, my lord.

Mr. Recorder. When did you come to town?—We did not come till the latter end of July, for we stayed at Burton Hall.

How long did you stay there?—I cannot tell whether six weeks, or how long.

Recollect as near as you can.—I believe till quite the latter end of July.

And you came to town when?—The latter end of July, as near as I can recollect it.

When did my lady come to town? Was she in town when you came?—I do not know whether she was or not.

Did not my lady and you visit after?—When I came to town a sister of mine was in the small-pox, I never had it, and my mother sent me out of the house directly, which makes me as to any thing after that quite uncertain; and I was not at home after in my father's house till the year 1718, but with one relation or other.

Pray, madam, when you came to town, was not the first news you had of the death of the queen?—I know I was not at my father's house at the death of the queen.

Where were you then?—At Mr. Monck's in Dawson-street.

Was not it soon after you came to town that you heard of the queen's death?—It was soon after; I believe it was.

How soon after was it that you heard that news?—Indeed I will not be certain, nor cannot.

Was not it the first public news you heard?—It might.

Do you believe it was?—I do believe it was.

Did not you ascertain your time of coming to town by that?—I believe I did; I do not know whether I did or not, but I know by my sister's being in the small-pox.

Was lady Altham in town then?—Indeed I cannot say whether she was or no, for I tell

you I left the house; my lady might be in town and I not know it, for I left the house on my sister's being ill.

Can you say whether she was in town when you heard of the queen's death?—I cannot tell; but I believe she was not in town.

Pray, madam, when my lady came to town, where did she lodge the second time? Did she come soon after you?—I saw her in town to be sure, but what time of the year I cannot be certain; but I think, it was at Mrs. Vice's.

Did not you swear upon the last trial that you were positive that my lady went to Vice's after the reconciliation?—I do not know whether it is positive or not, or whether I swore it positive or not.

Did not you swear it, that they went to Vice's before they went to Dunmaine?—I believe I did.

Can you now be positive?—I can so far, that they stayed but a few days at our house, and did not go from our house to Dunmaine.

How many days did they stay in your house; was it three, or ten, or how many?—I believe about four or five days after the reconciliation, indeed I cannot tell.

But you are sure my lady went to Mrs. Vice's?—She went to my lord's lodgings, wherever that was.

Did you visit there before she went out of town?—I did see my lady once.

Was it before or after Christmas, that they went to the country?—I believe it was before; I cannot tell.

Court. Did you ever see my lord and lady at my lord's lodgings?—I did, my lord.

Did you go there?—I went.

Where was it they lodged?—It was a house, as near as I can remember, next to the Slip at Temple Bar.

When was it that you saw them there?—It was after the reconciliation before they went to the country.

Did you visit them a second time?—I did.

Was it at the same house?—To the best of my knowledge it was.

Whose house was that?—They call it Vice's house, to the best of my knowledge.

Mr. Recorder. Now, madam, what time of the year was it you saw them the second time at Vice's, in what month? Pray recollect, for it is very material.—Indeed I cannot tell.

You came to town you say in July, and the first news you heard was the death of the queen; was it before or after that you saw her there?—It was after that I saw her.

How long after?—I cannot say.

Was it that year?—I believe it was that year, but I cannot ascertain the month.

Are you sure it was that year? See and recollect the month, if you can.—It was that year, but I cannot ascertain what month.

Was Mrs. Setwright at Dunmaine when you were there?—She was.

What was she there?—She was house-keeper.

Did you know Sarah Weedon there?—I knew nothing of Sarah Weedon at all.

Did not you know John Weedon the coachman's wife?—I never knew that John Weedon the coachman was married until of late.

Was John Weedon the coachman there at that time?—He was there.

Who was house-maid there then?—I do not know.

Do not you remember Nelly Thomas?—No, I do not.

Do you know Bourk the postillion?—I do not know him.

Did not you go abroad and stay a fortnight at Mr. Boyde's house, and Bourk carry you?—I went abroad, but how long I stayed I cannot tell.

Where did you go?—To Mr. Boyde's.

And did not Bourk carry you there?—I do not know who carried me there.

Was not it one of my lord's servants?—It was, but which I cannot tell.

How soon after your being at Dunmaine was it, that you went to Mr. Boyde's house?—I cannot tell; but it was while I was at Dunmaine.

How long did you stay at Mr. Boyde's?—I cannot tell that neither; but I believe a very short time.

What Boyde was it?—Boyde of Roelar.

Pray, madam, who was butler at Dunmaine when you were there?—Rolph.

Did you know Anthony Dyer?—No, I did not.

Who was my lord's gentleman?—Indeed I cannot tell.

Had my lady a page?—Indeed I do not know that I ever saw any thing in the equipage that was a page.

Had my lady a page or not?—She might have a page for aught I know, but I do not remember.

Was this visit to Boyde's before or after you saw the abortion?—Indeed I cannot tell.

Were you at Dunmaine in the month of April?—I was there.

On St. George's day?—I cannot tell.

Were there any races while you were there?—There might be, but I cannot tell.

Were you at any races with lady Altham?—Indeed I do not remember.

Did any girls run for a smock there? Was there a smock-race?—To my knowledge, I never saw any such thing in the country.

Do you know Mr. Mark Whyte?—Yes, I have seen him.

Had you any discourse with him at any time?—Yes, he was at Gorey, and we had some discourse, I cannot particularly tell what.

Cannot you remember what you said to him?—I told him some servants' names that were at Dunmaine; and he asked me if I remembered my lady to be ever with child; I told him I did, and that she miscarried; and his answer was, as to her miscarriage we do not go upon that, for we do not suppose my lady a barren woman.

Was that all that passed between you?—Mr.

Mark Whyte asked me, if I remembered any of the servants of the family; I told him I did, and named all I knew.

Did not you tell him that you would swear for my lord Anglesea if he would renew your husband's lease?—Indeed I deny it absolutely.

Did you ask the renewal of the lease?—Yes, I'll tell you how it was asked. Mr. Cole had been employed for captain Annesley for a long time, and had a promise for a lease from him long before that; and when Mr. Whyte was spoke to upon this former promise of this lease, I desired the captain would make good his promise.

Do you know Mr. Frank Annesley of Ballysax?—I have very little acquaintance with him.

Did not you tell Mr. Whyte that you could be a very material witness for my lord, but that you would not tell him what you could say, until your lease was renewed?—I did not, unless in this manner; if the proving a miscarriage can prove of any service to my lord I can prove the miscarriage.

Court. And did you say no more?—No indeed, I cannot say that I did.

Mr. Recorder. Had you any discourse with Mr. Frank Annesley?—He came one day to sister Briscoe's house, and wanted to speak to her, and she was not ready for going down, and desired that I would; and I went down stairs to him, and a little while after she came down, and I shewed him the subpoena that I was served with.

Jury. Madam, do you recollect the night that Mrs. Heath awakened your mother in order to see my lady?—I do not, Sir.

Do you remember that she came to awaken her?—I do remember that she came.

Was there a light in the room?—There was not.

Had Mrs. Heath a light with her?—She might have a candle in her hand.

Was there light or not?—There was not, I believe there might be a fire.

Had she a candle in her hand?—Indeed I cannot tell, I had been asleep and she awakened me, and I cannot tell.

Was there light of any kind in the room?—There might be a candle, and there might not.

The reason of the question is this; look at that woman.—[The witness looks at Mrs. Heath.]

Will you swear positively, that that is the woman that came into the room to call your mother?—Mrs. Heath was the person, and I believe that is the same.

How can you tell it was her, when there was no light?—I knew her voice.

Mr. Recorder. Did you see lady Altham in Dublin in the year 1715?—I don't think I did; I do not know that I did at all; if she was in town I saw her; but I cannot tell whether she was or not.

Court. Did your mother shew you the abortion?—I went into the closet and saw it.

Did your mother call you to see it?—I do not know that she did.

VOL. XVIII.

Did she desire you to look at the abortion? I do not know that she did.

When were you married?—I was married in the year — I shall be next March 14 years married.

Can you recollect your age when you were married?—Indeed I cannot, except I count.

Court. I only ask, because young women generally keep account of their age.

Mrs. Cole. Well, I never did, and I tell you the reason, there was a constant debate about my age, the leaf was torn out of the Bible.

Did you ever see an abortion before that time?—No, nor for some time after.

Mr. Recorder. Did any body attend my lady on this miscarriage?—I cannot remember one.

Mr. Solicitor. My lord, I only beg leave to make one observation on the examination of this witness; it seemed to be apprehended by the Court, that we concerned for the crown had a mind to lengthen out this trial unnecessarily; you will please to recollect what little time we took in the original examination, and how much the Recorder has spent in cross-examining her, and I beg leave to say, that he did not ask one improper question.

Court. Since you acknowledge he did not ask one improper question, you cannot think the time has been taken up unnecessarily.

Mr. Solicitor. I only mention this, to shew how necessary it is for us to take up as much time in our examinations, if we find it material.

Court. You shall have all the time you can desire, to examine any witnesses that are material.

N. B. The examination of Mrs. Cole held from six minutes before nine, to twenty minutes after eleven.

Court. Call your next witness.

Cryer. Doctor Jemmat.

Mr. Spring. My lord, I desire before Dr. Jemmat comes upon the table, what he is to be examined to may be opened.

Serj. Tisdal. My lord, the next witness we shall produce is doctor Jemmat, a doctor of physic, who attended lady Altham in the year 1714, at Mrs. Vice's, at the time she was with child.

*Dr. Samuel Jemmat** sworn.

Mr. Daly. I desire to ask a previous question, which is this; did not you make an affi-

* This Dr. Jemmat was a gentleman of a Sussex family, and in his younger years, practised as a physician in England; but some private affairs calling him over to Ireland, he met with such encouragement, as induced him to continue there, and was long settled at Dublin, where he was chosen an Honorary Fellow and President of the College of Physicians, and attended lady Altham in the winter 1714, when her ladyship was supposed to be with child, and prescribed for her; and would have been a material witness for Mr. Annesley, in

davit of the testimony you could give in this cause?

Dr. Samuel Jemmat. Do you mean in this court or any other?

Court. Before any person?—Before a Master in Chancery I gave in an examination.

Mr. Daly. Upon what occasion, Doctor?—They asked me what I had to say in this affair, and I told them.

Who asked you?—One Mr. Cooper, a Master in Chancery.

Court. What Cooper do you mean, Doctor Cooper?—He was a stranger to me.

Where was it that you were examined?—It was in the Queen's county, my lord.

What time was this?—I cannot tell whether in August or September, or July the last year.

Serj. Tisdal. Did you know the late lord and lady Altham?—I did.

Were you employed in that family in any capacity, and what?—I was employed by Arthur lord Altham, as his physician for some years.

Pray, Sir, did you ever attend lady Altham, as a physician?—I did attend her ladyship.

Court. Do you remember when she came from England into this kingdom?—I did not know when she came first, but I think about the latter end of November, 1714, lord Altham came to my house in Angelsea street in a chariot, and desired I would go with him to see my lady, for he was afraid she had a fever.

And did you go?—I went in the chariot with Arthur lord Altham, to one Mrs. Vice's in Essex-street, where they then lodged.

Serj. Tisdal. And did you visit my lady then?—I did, and found her very hot and feverish, and I asked how long she had been so; and my lord told me, (for only he, and she and I were in the room) he told me that they had been out late at night, whether at a ball, or play, or music-meeting I do not remember, and he was apprehensive my lady had got cold that way; but I forget whether he said it was at a play, or concert of music, or any other diversion.

The remarkable trial 1743, had he been known to him, or Mr. Mac Kereher, who, in some measure, conducted the cause; but they not knowing of him at that time, were deprived of his testimony; but the Doctor being afterwards found out, came over in 1752, with several others to England, to be examined in relation to the Angelsea title and estate. He for many years had a complication of diseases, and was troubled so violently with the gravel, that he rarely quitted his bed, or could be moved without exquisite torture; nevertheless, when he was acquainted with the consequence his testimony would be of, he determined, though at that season of the year, and so late in life, to undertake the journey. But he died at Bristol the second night after his landing, in the 78th year of his age, November 1752, and retained his senses to the last. [In a letter from Bristol, dated 21 November 1752, printed in the public papers at that time.] *Former Edition.*

Pray, Sir, did you prescribe for her?—I did; I told her, I thought a little blood taken away would be proper, and a gentle purge necessary; but her ladyship calling for a bason, I thought she had an inclination to vomit; but instead of that, she made what the understanding women call, long spits, as if she was with child. I asked her ladyship then if she was with child; she told me she had all the reason in the world to believe that she was so: I then asked how long, and she said three months. I asked her ladyship upon that, if she had been regular; she told me that she had as any woman living, till about three months before that time my lord came for me. Upon which I altered the prescription I had before given, and ordered such mild medicines, to mitigate the fever, as might not endanger her ladyship, or the infant within her.

Do you remember whether Mrs. Heath lived there with my lady?—My lords and gentlemen, whenever I was sent for to any noble family, or gentleman's house, my business was to attend what I was sent for about, and I never took notice of any servant.

Do you know whether lady Altham was with child then, or not; have you any other reasons?—Upon her telling me this and examining of her, I had reason to believe she was. I had breakfasted with them before, but I found her countenance change, and she had yellow spots and livid spots came out upon her; and I felt her breasts, and found they began to grow turgid; upon which, I found that she was with child, and that made me alter the prescriptions, that they might not hurt the one or the other.

Do you know whether she went on in her pregnancy?—I gave her directions how to manage herself; but her disorder being what we call a *Febris Ephemera*, which lasted but three days, my wife and I dined with them at a third place, and after dinner, my wife, who saw her condition, went out with her, and returned again in a few minutes; and my lady told my wife—

Court. You are not to say what my lady told your wife, but only what you know yourself of her being with child.

Doctor Jemmat. But I say, I gave her directions how to manage herself, and my lord told me—

Court. You are not to say what lord or lady or any body told you. Do you believe her to have been then with child?—I do.

Serj. Marshall. My lord, I must insist that we have by law a right to ask that question; in the very chapter of Perjury in Hawkins you will see it laid down as a rule, that hearsay evidence, that serves to illustrate what is the proper evidence to be given before the Court, shall be admitted.

Court. Hearsay-evidence may be made use of to introduce material evidence, but when a witness has said all that is material, we shall not admit that.

Cross-examination.

Mr. Spring. As well as I recollect, you said,

Sir, that lord Altham carried you to see his lady?—He called upon me, and I went into the chariot with him; he did not carry me in, I assure you.

Well, Sir, if he did not carry you, you went with him?—I did.

You said, I think, that you made an affidavit before Mr. Cooper, to what purpose did you make that affidavit?—I had given in an examination; I do not know to what purpose.

Do you recollect what you have said there with respect to the manner and time of attending my lady Altham?—I believe I might.

Did not you say there that it was in November?—I say so now.

Did not you say that the chariot was sent for you?—I believe not; if the master in Chancery put it down that I was sent for he mistook me, for I remember that my lord came for me himself; and I will tell you why I remember it. I was then in mourning for queen Anne, and I had only one weeper on when he came; and he came into the parlour and sat by the fire till the other was put on.

Would you have this understood, that if it was mentioned in the affidavit that the chariot was sent for you, it was a mistake?

Court. He says the Master was mistaken.

Mr. Spring. Did not you read it before you swore it?—I believe I might.

Mr. Walsh. Pray, Sir, how long have you been a physician?—I took my degree of doctor of physic in the year 1711, and I think that is about 33 years; I have been 27 years a fellow of the college of physicians, and an honorary fellow above four years.

Mr. Spring. Upon your oath, Sir, are there any rules in your profession, by which a pregnancy can be discerned from a tympany, or any the like disorder?—By virtue of my oath, that question would puzzle not only the colleges of physicians of England and Ireland, but the Royal Society too.

Jury. Is there such a thing as a false conception?—Very often, a mola there is.

There is such a thing?—No doubt of it.

Are the symptoms the same? Have women grown big with a false conception?—They have done it.

Mr. Walsh. The next witness that we shall produce to your lordship is one Hellena Moncrieffe. We produce this witness, to shew that in the year 1714, she was recommended by sir Chamberlaine Walker, a famous man-midwife of this city, to my lady Altham, whilst she lodged at Mrs. Vice's, for a nurse; that she was hired and agreed with her ladyship; had been several times with her on that occasion; and will give your lordship an account that my lady was then with child, and the reasons of her knowledge.

Hellena Moncrieffe.

Mr. Walsh. Pray, what business do you follow?

Hel. Moncrieffe. My business is to attend ladies that lie-in.

How long have you followed that business?—Twenty-seven years next March.

Tell what ladies you have attended that way.—The honourable Mrs. Mary Moore; Mrs. Ludlow, counsellor Ludlow's lady, of eight children; lady Mountjoy; lady Antrim; lord Beesborough's family entirely.

Well, did you know sir Chamberlaine Walker?—Very well.

What profession did he follow?—Midwifery.

Do you remember to have met him in the year 1714, any where?—I did, Sir.

Where?—In Stafford-street.

When did you meet him there?—To the best of my knowledge, in and about November, or beginning of December, 1714.

Where did you meet him?—In Stafford-street, at a Jew's house, one Solomon.

Had you any discourse with him there?

Mr. Malone. My lord, I object to that as an illegal question.

Mr. Walsh. I insist upon it to be a legal question according to the evidence opened, that she was recommended to my lady by him; is not it proper to ask what discourse he had with her on that occasion?

Mr. Malone. It is proper to examine her to that fact, but they have opened it a great deal further.

Mr. Walsh. Did you see lady Altham?—I had the honour of seeing lady Altham.

Where did you see her?—I saw her first at doctor Walker's at that time, he was doctor Walker then, and was after knighted in the duke of Grafton's time, and he spoke to me, and recommended me to her ladyship; and said if I had a mind to nurse, he would recommend me to a very good one. I made very little of it then; I was giving suck in January to a child of six months old.

Did you go to my lady Altham?—I was three different times with her; the last time she talked to me a good deal about her being with child, and what time she reckoned. Says she, I am at a loss, as I have had some illness, how to reckon; and then she lifted up her night-gown, it was of sattin, with green flowers in it, and shewed me her belly: Your ladyship, says I, seems to be as big as any woman gone seven months.

And did she say she was?—She said, she believed not.

Jury. What time was this?—In January 1714-15.

Court. How many times were you with my lady?—Three different times I was with her.

Did she lift up only her night-gown, or all her clothes?—(Only her night-gown.

What was it you said to her then?—I told her that I thought she was as big with child as any lady that was six or seven months gone; and she said herself that she was not so long with child as seven months.

What were you recommended for to her?—A nurse.

By whom?—By doctor Walker.

A wet nurse or dry nurse?—A wet nurse, Sir.

How came you not to accept of that nursing?—As I went there the last time I met two or three friends, and they asked me where I was going? I told them where; says one, Moncrieffe, take my advice, lord Altham is a bad man, you have no necessity, and do not engage; and for that reason I went unto her no more, but heard she went out of town.

What reason had you to believe she was with child?—By her appearance and conversation, and the laying my hand upon her belly, I had reason to believe she was with child.

From these circumstances, as you are now a woman of skill, can you positively say she was with child?—Upon my word, I do not know either of the gentlemen, it was Mr. Arthur Hill brought me into this by telling it by accident above two years ago; but upon the word of a Christian, both by the judgment that I have had since and before, my lady Altham was as much with child as ever I was, and I have had 21 children.

Mr. Walsh. Do you know Mrs. Heath?—No far I have recollected, that the last time I breakfasted with my lady, there came in a gentlewoman they called my lady's woman, she looked opposite to me, and she was a thin-faced black woman at that time; and there came Mrs. Tilby, a mantua-maker, an eminent mantua-maker at that time, and brought a gown with her, but whether my lady's or no I cannot tell; but she stayed at the dining-room door and asked me what I was doing there.

Tell the discourse you had with Mrs. Heath.—I had none at all.

Did you see her there?—I saw her come to tell the mantua-maker was come to her ladyship.

Do you remember what lady Altham called her?—I do not remember upon my word, I know she was a thin black woman, very swarthy, and had black hair.

Mr. Daly. We admit that Mrs. Heath was my lady's woman.

Mr. Walsh. Do you remember on what occasion Mrs. Tilby came?—To alter a suit of black silk.

To let them out or take them in?—I cannot tell that; it was the queen's mourning.

How do you know it was mourning for the queen?—The child I was giving suck to was born the 20th of July, I have it in my Bible, and the queen died in August following.

How many times did you go to visit my lady?—Three different times in Essex street; the first time she was indisposed.

Every time that you came there did you see this lady?—Never to my knowledge but once; I had no reason to retain it.

[Cross-examination.]

Mr. Daly. You waited on lady Altham, had you ever seen her before that time?—I had, as I had been woman to lady Louth, they were intimate, and I had seen her.

Where did you wait on her first?—First I waited on her in Dr. Walker's house, in Capel-street.

Where did you wait on her at the time you conversed with her and handled her belly?—At Mrs. Vice's in Essex-street.

What year was that in?—In the year 1714.

What time?—Between the beginning and 23d of January, because I put out my own child to nurse the 23d, and it was my second child.

Who shewed you into my lady's room the first time?—To the best of my knowledge a man servant.

Name him.—Indeed I cannot. I go very often to ladies now, and do not know their servants.

What sort of man was he?—He was an elderly man, I have seen him afterwards.

What time was it that lady Altham and lady Louth were intimate, and you saw her there?—It was when they were in Dublin.

Where did lady Louth lodge?—She lodged at one Farrel's upon the Quay.

Did you see lady Altham there?—I did.

At what time?—I cannot recollect my lady's visitors.

What year was it?—To the best of my knowledge, it was 1713.

Pray, how often did you see her there?—I believe three or four or five times, I know they were very intimate.

Was there any servant of my lady's present when you were in the room and handled her belly?—I cannot tell; there was no servant, it is not common now, and let alone at that time: Yes, there was a woman that went with me, and she was by.

Was she present?—She was.

Had she any trade or calling?—She was a creditable man's wife.

Did she understand midwifery?—She did not.

And though it is not common for a servant to see her lady's belly handled, yet a lady that went with you was present, you say?—Yes, she was.

Can you recollect what time of the year 1713 it was you saw my lady Altham at lady Louth's?—I cannot indeed.

Was it in summer? I believe it might be in summer; I am not positive as to that.

What was the woman's name that was present with you when you handled my lady's belly?—Her name was Classou.

But you do not know the servant that shewed you up stairs?—Indeed I do not.

And none were present?—None that I saw.

Do you know any person in the house that has seen you there?—Mrs. Vice's servant saw me there.

What was her name?—Her name was Peggy.

Did Mrs. Vice see you there?—She did; I sat half an hour in her room.

Had she any children?—I think a girl or two.

You saw her daughter?—I believe so; they were little, and her children.

Upon your oath, did you see lady Altham before Michaelmas 1713?—I cannot tell, because it was no way material to me to recollect that.

When did you leave lady Louth?—In the year 1713.

About what time?—I believe it might be February, for I lay-in of my first child in February.

Did you make any affidavit concerning this affair?—Yes, Sir.

Before whom?—I was brought by a gentleman to Essex-street to a commission, I think it was, for I know nothing about it: I think about two years last summer Mr. Arthur Hill began a discourse about this Mr. Annesley. He asked me if ever I saw my lady Altham; I told him I did, and saw her with child, and he told it to somebody that sent for me.

What age were you in 1713?—I was born the 12th of March, 1688.

Was not it in summer before that, that you left my lady Louth?—No, Sir, it was in February.

Did not you say it was in summer?—I say, that it was in summer that my lady Altham visited lady Louth.

Court. You have attended a great many women, pray can you tell the difference between a false conception and a real one?—Yes, Sir, by the conversation of the woman.

But can you any otherwise?—No, really, but by discourse.

Did you feel the child stir?—No, really, my lord, I did not; but I remember my lady, when I said, she seemed to be seven months with child, said, No, she was not.

What child was you nursing at that time?—My second child I nursed then.

Jury. You say, madam, that when you waited upon lady Altham, she told you she was gone about seven months?—I told her so.

How came you to tell her so?—Because she asked me the question; she told me she had some illness, and could not tell how to reckon, but said she found herself very big and uneasy: I said she seemed about six or seven months gone with child.

But why should she ask you, if she could not tell herself?—There are a great many questions asked by ladies, when they are with child.

You were unexperienced then. Was your hand upon her naked belly?—No, above her under-petticoat.

I think you said you felt nothing stir?—I never said I did.

What was the occasion of putting your hand upon her clothes?—To judge by her bulk; it is a mighty common thing.

You were at Mrs. Vice's?—I was.

You say you sat there above an hour?—I said half an hour.

Did you see any of her children?—I think I saw children.

What were they?—It was a girl.

How old might it be?—Why indeed very little, about five or six years old; I do not know whether they were hers or the neighbours children, but they came into her room.

Mr. Daly. How long have you been a nurse?—Seven-and-twenty years very near; not all out till March next.

Court. Do you know whether you would know my lady's woman now?

Witness looks at Mrs. Heath, and says, I cannot say that I have any knowledge of the gentlewoman's face at all; the woman then was a thin, swarthy woman with black hair.

Mrs. Margaret Bushe sworn.

Mr. Harward. We call this witness, my lord, to the same purpose; she was an intimate acquaintance of my lady Altham, and will prove that she was with child, and afterwards was delivered of a child.

Q. Pray, madam, did you know my lady Altham?

Mrs. Bushe. I did; I was acquainted with her.

Pray, madam, did you ever see her at New-Ross?—I did.

When you saw her at New-Ross, in what condition was she?—She seemed to be with child, pretty big.

Was this madam, at New-Ross?—At New-Ross.

Pray, madam, did you see her but once there, or more frequently?—I saw lady Altham three times at New-Ross, to the best of my memory.

Pray, madam, in what year, or about what time was it that you saw her there?—To the best of my recollection and memory, it was February, in the year 1714-15.

Have you any particular reasons that induce you to recollect that it was about that time?—Yes; I was at that side of the country until a little before Christmas that year. It was about half a year after the death of queen Anne, they were all in mourning when I visited her, except one or two that went out, and I do not know whether they were in mourning or no; and I do believe it was for queen Anne.

Pray, madam, did this lady stay for any time at Ross, or go any where else?—The day I visited her I saw her twice then, first at captain Butler's; there Mrs. Butler introduced me to lady Altham.

Where did captain Butler live?—He lived in Ross.

Where did you see my lady next?—A day or two after I visited my lady at her own lodgings in Ross.

Pray, madam, did she continue for any time there, or did she leave it soon after?—The day I visited her, she talked of going out of town next morning.

Court. Did she go?—I do not know, I left the town in a few days myself, and did not see her in Ross after.

Mr. Harward. How soon did you return to New-Ross?—I was frequently there to and fro, for I lived at my father's within three miles of it, and I cannot tell how soon; but I am sure towards the latter end of the month of April, and to the best of my memory, either the Saturday in Easter week, or early the next week it was, that I went there.

Pray, madam, recollect whether this lady was a lady far gone with child, or was early in her pregnancy?—She looked big, and that is all the memory I know of it, and I asked her no questions.

Did not you enquire about her being with child?—Several gentlemen were by, and I did not think it proper.

Do you know of her being delivered of that big belly?—I was at my father's, and some of his servants went to town—

Court. You must only speak from your own knowledge, madam, not what you heard from any body.

Mrs. Bushe. I wished my lord joy of that child on the Quay of Ross.

Mr. Recorder. That is nothing.

Mrs. Bushe. I know nothing more of myself, but they both told me so.

Court. Madam, you come here to declare the truth, the whole truth, and nothing but the truth; and if you swear to what you heard from other people, you may swear false, for they might deceive you.

Mrs. Bushe. I may be deceived, but I will swear the truth, and nothing but what I know.

Mr. Harward. I shall put to her a legal question. Pray, madam, you say you saw her big bellied, did you ever see her afterwards when she wanted that big belly?—I did.

Court. How soon after?—To the best of my recollection, I will not be positive, I saw her here in Dublin towards the latter end of the month of June that year.

What year?—In June 1715.

In June 1715?—To the best of my recollection, about the latter end of June, in the year 1715.

Mr. Harward. How did she appear then, was she with child or not?—She was very slender, and looked pale when I saw her.

Give an account of what happened when you saw her in Dublin?—I went to visit her; I was just upon leaving town, and thought proper to visit her before I went; I found her undressed, and she told me she had been busy packing up into the country, and was going to Dunmains. It is to no purpose, I find, to tell you what she told me.

Mr. Harward. The nature of all evidence must be to discover the truth, and there is no way of coming at the truth but by the essential and circumstantial parts of every fact; she now says she visited my lady Altham in Dublin.

Court. That is material.

Mr. Harward. I ask her then, my lord, whether lady Altham gave any account of what became of that big belly of her's? I have a

right, I think, to know that; or otherwise our ears are to be shut against the truth.

Court. If you were upon a trial of who was heir to the estate, your question would be proper; but in a case of perjury, your question is not proper, for what lady Altham says is no evidence for or against the traverser.

Mr. Harward. I would always be in your lordship's judgment about the legality of any question, but I beg leave to mention what I understand I have a right to insist on; I humbly apprehend I have a right to introduce the material part of evidence by every thing that precedes it and is relative to it.

Court. You have the material part of your evidence already; the witness says she saw lady Altham big-bellied at Ross, and soon after in Dublin without a big belly; that is all she knows, or has to say that is material; if lady Altham told a thousand people she had a child, that is no evidence against Mrs. Heath.

Mr. Harward. What do you apprehend became of that big belly?

Mr. Daly. My lord, I must insist upon it, that the witness's apprehensions are no evidence.

Mr. Harward. I am pretty confident I cannot be mistaken in this point, I have a right to have the apprehensions of every body, on oath.

Court. I beg your pardon, Mr. Harward, shew your authority.

Mr. Harward. I will, my lord; I beg leave to lay it down as an established rule, since I am called upon, and I hope they will indulge me to give account of myself. My lord, I lay down this as a rule of evidence, that in all crimes whatever, the apprehensions of a witness are admitted as evidence; suppose if a man was indicted for murder, and a witness against him gave account of facts that he had seen concerning that murder, it is every day's experience to ask that witness what he apprehended upon those facts. This is the law, and I must humbly submit it to be so, that when a witness gives account of particular facts, he is asked what he apprehended upon those facts; but he cannot tell what he apprehended unless he lays facts before you, which are the ground of that apprehension.

Mr. Recorder. It is the first time that ever I heard that a man is said in a court of law to be examined to his apprehension of facts by the prosecutors of a criminal cause; the plaintiff can never ask belief or apprehension; I may, but you cannot.

Court. I see the doctrine, and whither it tends; I tell you how I apprehend the law to be, and to be very clear in the point. The apprehension of a witness is asked, where no other evidence can be had in capital cases, as where a witness is produced to prove a wound given, he is asked whether he apprehends that wound was the cause of death. That must be asked, for he cannot tell otherwise. It is the best evidence that can be had in that case. But as to a fact, if you make the apprehension of a witness necessary, it takes away all proof of fact.

Mr. *Harward*. Then I understand I am not to ask her any thing concerning this big belly.

Court. Yes, if she knows any thing of it, you may ask her.

Mr. *Harward*. Aye, but not from lady Altham.

Court. No, not as to that.

Mr. *Harward*. Since I am debarred of asking that question, I hope I shall have better luck in the next.

Pray, madam, what was the common reputation of the country concerning lady Altham's being brought-to-bed?

Mr. *Smith*. I object to that question, my lord.

Court. You have much more reason to object to that, after what I have just now said.

Mr. *Harward*. I acquiesce also in that, because that will settle what hereafter will be a very great debate, when these gentlemen come to produce their witnesses.

Court. The reputation of the country is not evidence here. You lay down your rules too large, Mr. *Harward*.

Court. Pray, madam, where in Dublin did you visit lady Altham?—At whose house I do not know, for I never was there but once; the chairmen know where she lodged, and carried me there; and I did not know the name of the people where they lodged; it was in Essex-street I know, a little beyond the post-office; between that and Fleet-street, to the best of my knowledge.

Mr. *Harward*. Do you know, madam, whether there were any preparations made for her lying-in?—I know, when I was in Ross, the midwife that was said to lay lady Altham, came to the house where she lodged, and sent out some wines to my lady.

Court. Do you know that these wines went out to lady Altham?—Indeed I did not send out the wines myself.

[Cross-examination.]

Mr. *Spring*. Pray, madam, you said you saw my lady Altham at Ross?—I did, Sir.

I think you say it was in the year 1714 or 1715?—In 1714-15, in February I first saw her.

Where did she lodge then?—At Mr. Samuel Stephens's.

How long did she remain in that town during that time?—I cannot tell, for I do not know whether she or I went away first.

Do you know one Mrs. Butler, that lives on the Quay in this town?—I do.

Had you any conversation with her?

Serj. *Marshall*. My lord, I must object to that question.

Court. What the witness has said to any body is evidence against her on cross-examination; but not what others have told her.

Mrs. *Bush*. There was some conversation.

What did you tell this Miss Butler in relation to lady Altham's having or not having a child?—I tell you what I said on that head. I told her that upon enquiry after this child, some

years after my lord and lady parted, I was told it was dead, and never hearing any thing to the contrary that could convince me, I always thought he was dead.

Did you never tell her, upon your oath, that lady Altham had had no child?—I never did; but I told her that I was a good while before I could think, after Mr. Annealey's coming over, that he was my lady Altham's child.

Court. Gentlemen, call your next witness.

Mr. *Robins*. My lord, the next witness we produce is Alice Betts, to prove lady Altham was with child, and the traverser's whole account to her of her being with child.

Alice Betts sworn.

Court. Were you examined on the former trial?—*Alice Betts*. Yes, I was.

Mr. *Robins*. Did you know Arthur lord Altham?—Yes, I did.

And lady Altham his wife?—Yes, Sir.

Do you know any thing of my lady's being with child?—Yes, Sir, I did.

Tell what you know of your own knowledge. —Why, I went to see my lady at Mrs. Vice's in Essex-street, and my lord met me and clapped me on my back, and said, By G—d, Alley, Moll is with child?

What do you know of your own knowledge concerning her being with child?—I know, by seeing of her with child, and that is all I can tell, by seeing of her big, and joked with her, and wished her much joy, and she did not deny it.

Do you know Mrs. Heath?—I knew Mrs. Heath that waited on my lady, but I cannot tell at this distance whether it be her; I am near-sighted. [The witness goes nearer to her, and says, I think it is her, to the best of my knowledge.]

Had you any discourse with her about my lady? Tell when and where.—I used to joke with her about my lady's being with child at Mrs. Vice's.

When?—In November, and after.

In what year?—In the year 1714.

Was it before or after queen Anne died?—After the queen died.

What did she say?—We used to be talking and joking that way, we were glad my lady was with child; but I never used to ask Mrs. Heath seriously about it. It is no more than jest.

Do you know any thing more of this matter?—My lady came one day to our house.

Whose house was that?—Captain Briscoe's.

Were you servant there?—I waited on Mrs. Briscoe. And my lord and lady had a little falling-out, and she came in a little pet to our house, and went into Mrs. Briscoe's room and cried; she cried most terribly; and a little after Mrs. Heath came in with a blue box in her hand with my lady's head-clothes, for my lady came undressed in a long scarlet cloak; and I helped Mrs. Heath to dress and undress her, and she had a long silk coat upon her.

What were the words Mrs. Heath said about

my lady's being with child?—I cannot remember the particular words, any more than that we were jesting in a little way.

How?—Why, we were pleased to see that my lady was with child; Mrs. Heath knows it herself; Mrs. Heath knew me mighty well, we were intimately acquainted, and always in my lady's room together, dressing and undressing her together, and I attended my lady with her very often.

Did Mrs. Heath ever tell you that my lady was not with child?—No, she did not, for I never asked her such a question.

What did she, from her discourse to you, appear to think of my lady?

The question objected to.

Court. Had you any other discourse with her, about my lady's being with child?—No, indeed.

Mr. Robins. Can you remember the words Mrs. Heath spoke to you?—I cannot remember the words; but we used to joke with my lady; little common way of talking that way with my lady; and Mrs. Heath and I went once to the Change to buy muslin together, and there we were talking of my lady; and Mrs. Heath knows very well of an affair that happened to her and me there.

What do you know of Mrs. Heath's knowledge about my lady's being with child?—I have no more to say than that.

What is that?—That she did know that my lady was with child.

How do you know she knew it?—Because we joked about it, and we were praising my lady, as it is the way of waiting-maids to please their ladies oftentimes: indeed it is.

Court. My lady, you say, was in Bride-street, at Mr. Briscoe's, when you dressed her?—It was there my lady was dressed.

You say that she was dressed there; did she lodge there then?—No, at Mrs. Vice's, she came there in a pet, because she had a falling-out with my lord; she called Mr. Briscoe father, and came to him with all her grievances.

How did she come there?—In a long velvet hood and scarlet cloak, Mrs. Heath came with the box, a little blue band-box.

And was it there that this jesting with her was?—There and at Mrs. Vice's too.

Mr. Robins. Did you make any observations about my lady's size?—She was a middling woman, full-breasted here, and swarthy.

How did her belly appear?—As a woman with child, and it was very easily seen.

That was in November you saw her?—It was, when my lord told me she was with child; I saw it then, and I saw her all the time she was in Dublin.

Court. Was she a broad woman?—She was a full-made woman, very full-breasted and high-hipped.

Mr. Robins. Did her belly alter?—I never observed any way, but that she was growing big.

Court. How soon did you see her again after she went from Dublin?—Never again.

How long did she stay in town from the first time you saw her?—I believe just before Christmas, or after, she went out of town.

Can you tell how long after you first saw her, it was that she stayed in town?—I cannot indeed.

Can you name the particular times you saw her?—I cannot.

Mr. Robins. Did you ever see my lady undressed?—Twenty times, dressed and undressed.

Who used to dress and undress her?—Mrs. Heath, and I with her, when she lodged at captain Briscoe's first.

How did my lady's belly increase?—That is a thing impossible for me to tell.

Did you observe a difference?—Yes, I did, that she rather grew bigger than otherwise.

[Cross-examination.]

Mr. Recorder. When did my lady come to captain Briscoe's first?—In the year 1713, I believe in October.

When did she go away from Briscoe's?—I think she went to the country with my lord just before or just after Christmas, I cannot tell exactly, in the year 1713.

Now I ask you, did she go from Briscoe's to the country?—No, she did not; they went from captain Briscoe's to Mrs. Vice's, for our house was too little, and my lord had a vast number of people after him.

How long did they stay at captain Briscoe's after their reconciliation?—I do not know whether they stayed four or five days, I cannot tell that itself.

Did they stay two or three days?—Two or three to be sure they did.

And they went from your house to Vice's?—They went to Mrs. Vice's.

When did my lady return again to Dublin?—She came up the latter end of the summer.

What do you call the latter end of the summer?—My lady was in Dublin at August 1714, when the queen died.

Did you ever dress my lady but at captain Briscoe's?—I never did at Mrs. Vice's.

But at Briscoe's you did?—I dressed her after she left captain Briscoe's.

When?—That day that she came to our house that my lord and she had a pique.

Never but that time?—That was the time.

And you did not undress her at Vice's?—I was then but a stranger; when I went to Mrs. Vice's it was only to visit her.

Did you ever dress or undress her at Mrs. Vice's?—I never did.

Court. I thought you said you dressed her twenty times at captain Briscoe's?—Yes, and so I did.

When was that?—That was some time before Christmas, in short dirty days; for before we had done dinner it would be night.

Mr. Recorder. So that the time you dressed and undressed her was about Christmas?—I cannot justly tell the month; it was in the short dirty days.

But was it in December?—I cannot tell the month. Is not it a long time to remember 30 years?

Was it after the quarrel that my lady came to Mr. Briscoe's house?—It was.

When did that happen?—Before or after Christmas, I cannot tell the time.

Do you know the reason of that quarrel?—My lord gave her a slap on the face; Mrs. Heath knows.

Were you by?—No; but my lady said so.

How long then did my lady stay in town?—She went out of town in the year 1713, before Christmas.

When did she leave town the second time?—Either just before or after Christmas she went from Mrs. Vice's to Dunmaine, and I never heard of her since till now lately.

Did you ever speak to Mrs. Heath about this big belly?—Nothing but what I told you, I never asked her seriously.

Did you ever put the question to her, whether my lady was with child or not?—No, I did not ask her seriously about it.

Had you no other discourse about it?—We had none but what I told you, and that was joking; telling and pleasing my lady that she was with child; and Mrs. Heath and I laughing, and pleased it was so.

Court. Did you ever see my lady after she went into the country the second time?—Never after; and that was the year 1714.

Mr. Recorder. You say my lady came to town in August?—She was in town in August.

Did you see her in August?—I cannot be positive to the month.

When you saw her in November was her belly big?—Not very big.

Court. Had you had a child at that time?—No, but I was with child, for I was married the 24th of August, and quickened at that very time, and that makes me remember November.

Mr. Recorder. Was my lady's being with child so visible in November that any body might know she was with child?—Indeed, I believe so; I saw it, I know.

Did Miss Henrietta Briscoe visit my lady at this time, in November?—I believe so, I know she came home before then, and the small-pox was at our house, and she left the house.

What sort of girl was Mrs. Cole then?—A pretty young lady of a good size.

What size?—Not so big or so tall as she is now.

Did she grow much afterwards?—To be sure she did.

I ask you again, did not she grow much after?—She did.

Court. Were you a servant in the same house with her?—I was.

Mr. Recorder. What age might she be then?—I cannot justly tell you, she was not at her full growth.

About what age do you think she was?—I cannot tell. How can I tell?

Was she 13, or 14, or 20?—Twenty! no, she was not twenty.

VOL. XVIII.

Was she 14?—Yes, to be sure she was.

Did Mrs. Cole visit my lady at that time?

—They all visited her, and my lady came constantly to our house; but she was at her aunt Monck's at the Green, because of the small-pox.

Did she stay there all the time my lady was in town?—She used to come now and then.

Was my lord Altham in town in August 1714?—Yes, he was along with my lady.

And was he here in November?—Yes, he was in November; it was in November I saw him.

Was it in November he told you that my lady was with child?—It was in November, after the queen's death, that he told me my lady was with child.

I ask you, upon your oath again, was my lord in town in August?—Yes, he was. He was in town all the while that my lady was in town.

Court. They came to town together?—Yes, they did, as well as I can remember.

Now, you say my lord came to town in August; did not you swear upon the former trial, that my lord never was in town from the time he went into the country after the reconciliation, till November 1714?—I assure you the trial is not right, it is wrongly, falsely, printed.

Jury. Did you ever find the lady out of order, as women commonly are, when they are with child, when you were dressing and undressing her at captain Briscoe's?—I never did.

You say you thought she was with child?—I did.

Did you see her out of order?—Yes, Sir, I saw her big belly.

Did you put on her shift?—I helped to put it on, and her stays too.

Court. Call your next witness.

Mary Sutton sworn.

Mr. Mac Manus. The next witness produced to your lordship is to the same point, to prove my lady Altham's being with child.

Mr. Mac Manus. Did you know the late lord Altham?—*Mary Sutton.* I did indeed.

And the lady Altham?—I did, upon my word. Where do you live now?—In the county of Kilkenny.

Where there?—In a place called the Rowree.

Pray, Madam, were you ever at Dunmaine?—I was indeed once.

Where did you live then?—In a place called —.

When did you first know lady Altham?—I knew her when first she came to Dunmaine.

What year was that in?—I cannot exactly tell the year, but I knew her with child, and saw her with child.

What were you at that time?—I was a farmer's wife, living in the neighbourhood.

How came you to go to Dunmaine?—My lord frequented my house, and often invited me there.

G

How far distant was your house from Dun-
maine?—About two miles.

Did you ever dine there?—I dined there
that day.

What day?—That one day that I visited
my lady.

Did any thing particular happen that day?
—When I went in first, there was none but
my lord and lady in the room; I was glad of
it, as I was but a farmer's wife, that there was
no more company; and after dinner the
glasses were laid round, and a bottle of wine
brought upon the table. They called for my
lady's toast first; and she toasted Church and
King. They then called for mine, and I toast-
ed The Boy in the Basket, meaning my lady
Altham's being with child.

Pray, can you recollect what year this was
in?—I cannot well tell, but as well as I can
remember, it was after the queen died, for I
was in mourning for the queen.

Do you know of any enquiry made by my
lady about hiring a nurse?—After dinner as we
were drinking the wine, I sat by my lady;
and she said, Mrs. Sutton, as you are acquaint-
ed with the country, can you recommend me
to a good nurse? I told her—

Mr. Daly. What she told my lady Altham
is no evidence.

Mr. Mac Manus. My lord, this is very full
evidence; she is telling of a conversation that
passed between my lady and herself concern-
ing my lady's being with child, and her en-
quiry after a nurse.

Court. Did you see lady Altham at that
time?—I did.

What did you observe about her?—I ob-
served her to be big with child.

When was this?—It was the Monday or
Tuesday before Shrovetide.

In what year?—I cannot exactly tell the
year, but it was one of them two days.

Mr. Mac Manus. My lord, I apprehend
this question to be a proper and material one.

Court. The question is, whether I will ex-
amine the witness to what my lady said, whe-
ther she was with child or not.

Serj. Tisdall. My lord, any circumstances
of my lady's making baby-clothes, or enquiry
about a nurse, is evidence to prove that she
was with child.

Court. Not at all in this case.

Mr. Mac Manus. I apprehend that pre-
sumptive and circumstantial evidence is the
strongest evidence that can be given in this
case.

Court. You say that you have positive wit-
nesses to this point; if you have, we shall
readily hear them. Have you any other that
are positive testimony to lady Altham's having
a child, or that she miscarried? The first as-
signment of perjury is, whether lady Altham
ever was with child while the traverser lived
with her? The question then is, whether my
lady's saying she was with child is evidence
upon that point? If you will argue the ques-
tion, I will hear you.

Court. Might not the woman appear to
you to be with child, and might not be so?—
To all appearance she appeared to me to be so.

And might not she be not with child?—I
cannot tell, Sir, she appeared to me to be big
with child.

Was it certain that she was?—There was so
much certainty of it, if one can believe their
eyes.

Do you know that she hired a nurse?—In-
deed I do not know it; I cannot say that.

Serj. Tisdall. My lord, we apprehend we
have a right to have this question answered.
The question proposed is, Whether she knows
any inquiry to be made by lady Altham to hire
a nurse?

Mr. Daly. Indeed if you had asked whe-
ther Mrs. Heath made such an inquiry, there
would be something legal in it, but inquiries
of a third person are most illegal evidence.

Court. We are not trying the filiation of
this family, who is heir to the estate of it, but
whether Mrs. Heath is guilty of perjury. There
is much more reason to keep to the
strict rules of evidence in this court than ever
was; the time of trial is short, and we cannot
adjourn. Have you any real, positive evi-
dence?

Mr. M^cManus. We have produced positive
evidence that my lady appeared to be with
child.

Pray, Madam, in what degree did she ap-
pear to be with child?—Very big with child.

Mr. M^cManus. Why then the next natural
question is, whether there was an inquiry about
a nurse?

Mr. Daly. My lord, is this a legal question
in this case? I have not an opportunity to
cross-examine what a third person says, and
shall that be evidence to deprive me of my
estate? Ask if Mrs. Heath made any enquiry
about a nurse.

Serj. Tisdall. The question proposed is,
whether she knows of any enquiry made by
lady Altham for hiring a nurse, of her own
knowledge?

Jury. Do you, of your own knowledge,
know any thing of the hiring a nurse?—No,
gentlemen, I do not.

Mr. M^cManus. Did my lord and lady ever
visit you?—They did, upon my word, and had
the child with them.

What child?—A boy, master James we
called him.

Pray, whose child was it?—It was their
child in all appearance, for my lady was very
fond of the child as any mother could be.

Give an account of what passed about that
child, as to any particular instances of fondness.

Mr. Daly. You cannot ask that question;
it is *Res inter alios acta*, and foreign to this
woman's prosecution.

Mr. M^cManus. Pray, how old was he?—
I believe a year and half, and if a month more
I cannot exactly tell.

When was this visit made you?—I cannot
exactly tell, it was a very fine day.

What time of the year was it?—In harvest, the latter-end of harvest.

How long was it between the time you saw my lady with child, and the time you saw him at your house?—It was more than a year.

How old was the child when you saw it?—It was a year and half old when I saw it.

Court. How did my lord and lady treat that child?—As a father and mother would treat their child; and my lady was as fond of him as a mother could be of a child, kissing and embracing him, and calling him dear.

In what year was that?—Nay, faith, it is hard to tell.

You must tell.—I believe the child was born in the year 1715, I think he was, as well as I can remember.

What reason have you for thinking so?—By the latter end of April after I was to visit her, I heard next day that she was brought-to-bed of a son.

Were you by at his birth?—I was not. I heard there was great joy and bonfires.

Did you see the bonfires?—No, I was not there.

Mr. M^r Manus. How came they to bring so young a child to your house?—When my lady came, she said, Mrs. Sutton, since you would not bring your daughter to see my son, I brought my son to see your daughter.

Mr. Recorder. I insist that the declaration of my lady is no evidence at all.

Court. Gentlemen, we are of opinion that the declaration of lady Altham is not evidence against Mrs. Heath, and therefore do not let us waste our time so to no purpose.

Mr. Solicitor. We are mistaken if we would put the declaration of lady Altham as evidence, but we have a right to know the witness's apprehension of her declaration.

Mr. M^r Manus. This witness has spoke very materially, that my lady had a big-belly, and was with child; I hope the jury will take notice of it, that being one of the assignments of the perjury.

Cross-examination.

Mr. B. Malone. I think you have said that lord Altham frequently invited you to Dunmaine?—He did.

And you were never there but once?—Never but once.

You said that nobody was there in the room but them two?—Yes.

And that you were glad of it?—Yes.

And that a bottle of wine and glasses were brought, and my lady toasted, Church and king?—I did.

You gave a toast after, of The boy in the basket?—I did.

Now I ask you, before your giving that toast, was there any conversation about her being with child, or any thing said about it?—Not at all.

Was you told in the parlour that she was with child?—Not at all; there was no discourse of it but after,

What condition of life were you in?—My husband was a farmer indeed.

Who did he derive his interest under?—Madam Pigot.

How much land did he hold?—He paid 10*l*. a year to Madam Pigot at that time.

How much land had you?—It was an old lease, we held above 200 acres.

What was the land worth an acre?—Why, really, at that time it might be worth four shillings an acre.

You say that they frequently visited you?—My lord did, but my lady never was there but once.

When they visited you, what time of the year was it?—As well as I can remember, the latter end of harvest.

Do you know the year?—I cannot tell.

Was it the harvest after you visited them?—No, not at all.

Was it more than one?—It was more than one.

Or two, three, or four after?—O dear! it was not so much; the child was about a year and half old, or within a month or two, I cannot exactly tell.

Can you say in what reign it was?—Really, I believe it was after queen Anne died.

In what manner did they go to your house?—My lady rode in the chariot, and had a maid that carried the child, and my lord rode with servants.

What was the servant's name in the chariot?—She was a good tight, clean, well-dressed girl, and that is all I know.

In what manner was the child dressed?—He had a red coat, and cambrick frock, and fine quartered cap, and I think, a red ribbon in it.

Was it a coat and breeches?—Not a coat and breeches; a frock.

Where do you live now?—I live now in the county of Kilkenny.

Where there?—In the parish of Rowree, at Ballyvally.

Is your husband living?—My husband is not living.

Do you live by yourself there?—I live with my daughter, and we live under my lord Mountgarret.

What harvest is this you speak of when my lord and lady went to your house?—It is so long ago, it is hard to know, I must study a while to think of it.

How can you recollect to the being at Dunmaine to a day, and not now recollect the year they went to see you?—As it did not meddle with me, I did not mind it.

Jury. Do you know any thing of Mrs. Heath?—I never had any acquaintance with her, I heard my lady had such a woman.

Court. Who do you call next?

Mr. Callaghan. My lord, we will now produce one Evan Thomas; he is a basket-maker; he saw my lady with child, saw her increase in her pregnancy, and made the cradle after she was brought to-bed, and was paid for it.

Evan Thomas sworn.

Mr. Callaghan. Pray, did you know the late lord Altham?

Evan Thomas. Yes, and please you.

Did you know my lady?—I knew her very well.

Where did you live in the year 1713?—In that year I lived in Ross.

Where did you live in 1714?—I worked in Ross the most of the year 1714.

Did you see my lady in those two years?—I have seen her at our church some several times; in the year 1714 I have seen her there, to the best of my knowledge.

How often did you see her there?—I seen her two or three times, to the best of my knowledge; but she might be there oftener, for any thing I know.

Did she appear to be a slender woman, or with child?—She appeared to me as if with child, to the best of my knowledge.

Did she appear to be big with child?—Not so very big because of their hoops; I saw her handed into the coach, or the chariot, or one of them.

What trade do you follow?—I am one that makes all sorts of basket-work that are made in the kingdom.

Mr. Daly. What, all sorts of basket-work?—I do not say the best of all sorts.

Mr. Callaghan. Did you ever do any work for lady Altham?—I did.

Tell what it was?—She sent a servant to me.

Court. How do you know she sent him?—He told me.

Did you carry any work to her house?—I did not.

What was it you made?—I made in the year 1715, to the best of my knowledge, a cradle.

Did you carry it to lord Altham's house?—No, please your lordship, I did not.

Who did you deliver it to?—I delivered it to a man.

Name him.—They told me he was one Rowley, a house steward.

Did you know him?—I was nothing acquainted with the man, but he told me—

Do you make the same kind of cradles for poor people as for people of fashion; what sort of cradle was it?—A good cradle, I delivered it to the servant, as I suppose, his name was Rowley, I was told so.

Did you see the cradle carried to any particular place?—No, he took it from me out of the house and gave me two crowns for it.

Jury. What became of the cradle?—I do not know, but he took it away.

Court. Where is Rowley?—I do not know.

Mr. Callaghan. For whom did you make that cradle?—Why, the man came to me—

Do you know whom you made it for?—He bespoke it for my lady Altham.

Mr. Harward. It is strange to my imagination, my lord, that it should be suspected, that

a man employed 30 years ago, to make a cradle, could be guilty of any contrivance.

Court. But this contrivance may be within these four months, these six months, or these twelve months, and if hearsay-evidence will convict a person of any crime, it may of treason, and who is or can be safe?

Mr. Just. Blennerhasset. If you have Rowley, there would be something.

Mr. Harward. With submission, my lord, the Court cannot know whether we are out of the way or not; whatever secrets are in this cause are only revealed to us by the managers of it, and we advise them in the best manner we can to prosecute it.

Court. As the time is far spent, we only beg of you to go on in your own way. Call your next witness.

Martha Tenant sworn.

Mr. Harding. My lord, I am instructed that this witness was in company with lord and lady Altham the winter after the queen's death, and saw my lady with child, and that she was quick with child at that time.

Court. I never heard that there was safety in a multitude of witnesses; I have heard it, read it, and you know it, that in a multitude of counsellors there was safety, but never in a multiplicity of witnesses.

Mr. Solicitor. For my part, my lord, I think we have established very fully the first part of this indictment, not to take up any more time; but curiosity makes people glad to see the bottom of it.

Mr. Harding. Pray, did you know Arthur late lord Altham?

Martha Tenant. I did not know him, I saw him once, and to my knowledge never since, nor before.

Did you know his wife?—I saw her at the same time at dinner.

Where did you see them, and when?—I saw them at one Arthur French's in Fleet-street, they lodged in Fleet-street.

When was it you saw them there?—I will tell you how I came to visit there—

What year was it you saw them there?—Well! I cannot justly tell the year, but it was about the time that they were Whig and Tory, and that way.

Pray, recollect yourself.—I believe it was about—I cannot exactly tell; I believe the year queen Anne died, there or thereabouts.

Was it before or after the queen's death?—And that I cannot tell you neither; but I'll tell you the time of the year, it was about Christmas, but I cannot tell whether 1714 or 1715.

Did you observe whether my lady was or was not with child?—I will tell you what brought me there, the whole truth is this: Mr. French, every one knew, married my lady Davis's daughter, and she was a relation of mine; and upon the marriage I entrusted him money, and went to dunn him, and when I came there I saw a great dinner and preparations making, and asked the reason of it. Says

I, what is the meaning of all these doings, and you have not got your wife's fortune into your hands yet? It is very ill done of you—

Tell what you know of lady Altham there. Tell what you know yourself.—I will tell you all I know myself. I stayed there, and when dinner was over I saw in the drawing-room my lady Altham as they said she was.

Did you know her?—Not I indeed.

Can you say it was she?—They said it was.

But you must only say what you know?—Well, I cannot tell you any more then.

Did any remarkable incident happen while you were at dinner there?

Court. Did she take the title of lady Altham?—She did, and my lord was there.

Did you ever see them before?—I never saw them before or after, nor knew none of those lords or ladies.

Mr. Harding. What sort of a woman was she?—A lusty woman, but my lord had two eyes at that time, and they say he had but one after.

What did you observe of my lady that day?—She came out after dinner and was sick; she came into the drawing-room and they unlaced her.

Who?—My lady Altham, she was called so. Mr. Harding. Inform the Court and the jury, whether any remarkable incident happened while you were at dinner there.—She was taken sick after dinner, and came out into the drawing-room, and we unlaced her, and my lord said, Mrs. French, it will be your turn soon to be in the same condition; and that is all I had to say.

What was the occasion of his saying so?—The occasion was, that Mrs. French was a new-married woman.

Mr. Recorder. She says, she did not know either lord or lady.

Martha Tenant. Nor the young man, nor the old man.

Mr. Harding. Inform the Court, whether any body fainted away, and whether any account was given of that.—My lady was sick, and unlaced, and my lord said, Mrs. French, it will be your turn next; and that is all I know.

Anastace Toole sworn.

Mr. Morton. We produce this witness, my lord, who is a mantua-maker by trade, to prove that she made a silk gown for lady Altham, and fitted it on in the presence of the traverser, and that my lady was then with child.

Mr. Morton. Did you know my lady Altham?—Anastace Toole. I did, Sir.

What business did you follow?—Mantua-making.

Were you at any time, and when employed by her to do any work for her?—I lived with Mrs. Wright the year that queen Anne died, for my husband went to live in the county of Carlow; I went to her the latter end of the year 1714, queen Anne died in August, and the Candlemas following—

What year?—The Candlemas after queen Anne died. And my mistress sent me with the coat.

To what place?—To Dunmaine.

What did you observe when you went there?—That her ladyship was big-bellied.

Did you ever fit any gown upon her?—I did.

Who was present when you fitted the gown?—Her own maid, Mrs. Heath.

Would you know her, if you saw her?—Yes, that is she, I believe.

Now, pray, what condition did my lady appear to be in then?—Her ladyship seemed to be in her last quarter, or pretty nigh it, for she was a tall woman, and carried her belly very well.

Court. You observed that she was big-bellied?—I did.

Had you had a child at that time?—I had had a child and had buried it.

Were you an apprentice girl then?—No, my husband was gone to Mr. Wall's in the county of Carlow, and I worked with Mrs. Wright.

Mr. Morton. Were you married at that time?—Yes, Sir, I was.

You were not an apprentice?—I was not.

Do you know any more of my lady's being with child?—I saw my lady in Ross with the child, and made a coat for the child.

How long was it after that you saw the child in Ross?—I cannot tell how long.

Who gave you the stuff to make the coat for the child?—My lord himself, he bought it at Mr. Harvey's.

What stuff was it?—One side was a blue satten, and the other a yellow.

How long after you fitted the gown on my lady was it that you saw this child at Ross?—After my lady came to my mistress to lodge in Ross.

Was it three months, or four months, or six months?—Oh! it was more to be sure.

Can you tell how long?—I cannot tell more than what I know:

Was it a year after you fitted the gown that you saw the child at Ross?—It was.

Was it any more?—Indeed I cannot justly tell you as to that part of the story.

Was Mrs. Heath present when you fitted on the gown?—She was by, and gave me a piece of white ribband to tie the shoulders of it.

Had my lady left my lord at this time when you made the gown for the child?—She had.

Was it a new gown you made for my lady, or did you alter an old one?—It was a new one, a new white damask.

How often did you see the child, and where?—Never but once.

Where was that?—At my mistress, Wright's.

Where is that?—At her own house in Ross.

Was that before or after the coat was made for him?—It was after.

Did you never see him before?—I never saw him before, but that one time.

Court. Did you see the child at the time my lord gave you the silk to make the coat?—No, my lord, I did not.

[Cross-examination.]

Mr. *Recorder*. How long after you made the gown was it you saw a child?—I cannot justly tell how long.

Did you not say it was a year?—I believe it was.

Was it more, a year and a half, or two years?—I cannot tell whether a year and half, or two years.

Was the child weaned?—He was at that time.

I ask you, upon your oath, was it two years after you made the gown?—I cannot justly tell you how long; it was two months after my lord gave me the silk.

But I must know how long after you made the gown for my lady?—I cannot tell that.

When was it that my lord gave you the gown for the child?—After my lady came to Ross.

When did she come to Ross?—I do not know when she came to it; I know she came on a Sunday evening.

Where did she lodge when you saw the child?—She lodged at Ross then.

Where there?—At Mrs. Wright's.

Did you hear of the separation of my lord and lady?—I did.

Was it before or after they parted that you saw this child at Mrs. Wright's?—It was after they parted.

Who brought him to Wright's?—I cannot tell who brought him.

Did my lady lodge at any other place before she went to Wright's?—Yes.

Where, and how long?—At captain Butler's, I believe six weeks or two months.

Where did she go from captain Butler's?—She then came to my mistress's.

How long did she stay there?—To the best of my knowledge, a twelvemonth.

When was it that this child came?—After she had been a considerable time at Mrs. Wright's.

How long?—I cannot tell how long?

How old was he?—About two years old.

Was it half a year after my lady came to Wright's that you saw the child?—I cannot justly tell you.

Do you know Mrs. Heath?—I have seen her before; yes, I know her.

Where was the first time you saw her?—The first time I saw her was at Dunmaine, and every day after she came to lodge at my mistress's.

Jury. You say you saw a child at Wright's about two years old?—I did.

Whose child was it you saw there?—My lady's, Sir.

Who told you it was my lady's child?—My mistress, Mrs. Wright.

Did my lady herself tell you it was her child?—I had no conversation with my lady. I was working at doctor Elliot's on the other side of the way.

Court. Are you going, gentlemen, to the same point?

Mr. *Mac Manus*. I believe, my lord, every evidence that goes to the first point, will go to the second.

Serj. *Marshall*. The next evidence that we shall produce is Anne Bennet; she was a servant to Mrs. Giffard of Ballysop, a lady who appeared at a former trial; she lived with her some years, and often saw my lady with child, and heard her mistress talk of her being big-bellied.

Anne Bennet sworn.

Serj. *Marshall*. Did you know my lord and lady Altham?—Anne Bennet. Yes, I did.

When did you know them?—The latter end of the year 1714.

Where did they live when you knew them?—In Dunmaine.

And where did you live then?—I lived at Ballysop.

With whom there?—Mrs. Giffard.

Can you say in what circumstances lady Altham was, in respect to her health, when you knew her?—When I saw her first of all, gentlemen, it was about Christmas time, whether before or after I cannot tell; and the next time it was after Christmas, and she looked pretty round; and I said to my mistress, had my lord and lady never a child? No, says she, she never had.

Court. Did you see my lady with child?—I thought she looked very round, my lord.

Can you say whether she was with child or not?—Indeed I believe in my heart she was.

For what reason did you think so?—Because I was the mother of a child myself, and knew how she was, she took a distaste to victuals at the table.

How old were you then?—Twenty years of age, I was the mother of a child, and a married woman too.

You do not appear now to have been that age at that time?—Indeed then I am 58 years of age.

Do you know any more than that?—No.

[Cross-examination.]

Mr. *Je Hunte*. You say you lived with Mrs. Giffard?—I did.

How often did my lady Altham visit Mrs. Giffard?—She visited three times while I was there.

And how often did your mistress visit my lady?—She visited my lady twice.

Was there any great intimacy between them?—There was no great intimacy, more than that.

Did your mistress lie in while you were in the service?—She never did, nor I do not believe she had a child after I left her.

When did you leave her?—I left her in February, 1714.

And how long before had she had a child?—I cannot tell, the child was running about.

Was she with child in your time?—I cannot tell whether she was with child, for I did not wash for her.

Serj. *Marshall*. What reason had you to induce you to believe lady Altham was with child?—Because she took a distaste against victuals, and was very round.

Did you see her after in any place?—Never saw her before or after.

Court. Whom do you call next?

Mr. *Solicitor*. I have taken up a witness, one Edmond Howletts, who brings the matter directly home to the traverser. My lord, he is a pedlar, a man that sells diaper, and other cloths about the country, and he will shew that she bought diaper for the child's use just before the birth.

Mr. *Edmond Malone*. Every one knows that the material perjury is the birth, and if they had not a mind to raise a dust, they would go to that directly.

Edmond Howletts sworn.

Sol. *Gen*. Did you know my lord and lady Altham?

Edmond Howletts. Yes, I did, Sir.

Do you know any thing of a child that they had?—Yes, I did, Sir.

Give an account of what you know about it.—The first time I was resorting that house with goods on my back, and the first I sold there, there was a woman there, a waiting-maid, they called Mrs. Heath.

Do you know her?—I do not know whether I would or no.

Well, go on and tell your story.—And she bought a piece of diaper from me for my lady's service against her lying in. There is a brogue upon my tongue, Sir, I cannot speak very proper.

What did she buy the diaper for?—The diaper was provided for lying in, for clouts.

For whose lying-in?—Lady Altham's.

Who told you so?—The woman they called Mrs. Heath.

Would you know her if you were to see her?—I did not see her these many years.

Do you know that gentlewoman there?—She is fatter now than she was at that time.

Is that she?—Why, Sir, I could not swear.

Is that woman like her?—Why then, she is like her sure enough, to the best of my knowledge.

How often did you see her before that time?—Several times after that.

What time was that? Recollect as near as you can.—Why then, Sir, it was a little after Christmas.

What year?—I believe it is 30 years now, to the best of my knowledge.

Do you keep any book of your business?—I do not keep a book, nor I do not know how.

What goods did you carry to sell?—I carried linen cloths, and cambricks, and holland, and handkerchiefs.

Do you follow that trade now?—I left off that trade about seven years ago.

How long did you follow it?—I followed it 35 years, and I was a customer at that house that time.

Did you see any thing relating to this child at any time after that?—After that, I was there, Sir, and my lady Altham, and her maid, and the nurse, and the child were coming out of the pleasure garden, and when they saw me they went back, and they bade me come in and open my pack there? and my lady bid the nurse ask what she would have; and said, Mrs. Heath, we will see if he has a white silk hood or handkerchief, and she bought a white silk handkerchief, and red border about it.

Was it bought for the nurse?—It was.

Who bought it?—Mrs. Heath cut it off of my piece, and paid me the money that my lady gave to her.

And who gave it to the nurse?—Mrs. Heath gave it to the nurse before my face, and my lady bought a ribband, and Mrs. Heath put it on the child.

Pray, give an account, do you know any thing else about the child? Do you remember that my lord and lady parted?—They parted to my sorrow, Sir.

How so?—There was four pounds two shillings due to me: my lady bought a piece of holland for five pounds five shillings, and she gave me a guinea in part; and the day the dispute came between them I was going that way about some affair of my own, and I heard of it within half a mile of Dunmaine.

How far did you live from Dunmaine?—About two miles I lived from them; and I was going about my business, and I heard the noise, there was a great deal to do; and on account of my money due to me, I went to the house to see after it, if I could get it; and when I came near the house, all the servants were going to and fro, and I was looking on them, and I saw my lady in a coach or chariot, I do not know which it was. God forbid I should wrong my own soul!

Court. Take care that you do not; have a care what you say.

Howletts. I stood there and saw my lady, and Mrs. Heath, and the child in the coach. My lord came down stairs in a great passion, and asked Where was the child? And some of the servants said, My lady has it in the coach; and just as he was going to throw down every thing about him, he took the child from her. And my lady said, Pray, my lord, did not you give me your word and honour that you would let the child go with me wheresoever I would go? says she; and took her white silk handkerchief out of the place where it was, and wiped her face, and kissed the child at parting.

Did you see Mrs. Heath there; was she present at this transaction, or was she not?—She was the same person that was with my lady Altham that day.

Court. Did the child go in the coach?—Not at all, Sir.

Jury. What day was it that this happened?—To the best of my knowledge, it was Sunday.

I ask you the day of the month?—I do not keep the month at all, I am no scholar.

What time of the day was it?—To the best of my knowledge, about ten or eleven o'clock in the morning.

Was it a coach or a chariot?—I cannot tell.

[Cross-examination.]

Mr. Spring. How long have you been a dealer in the linnen-trade?

Howletts. I believe these 35 years.

How old are you?—I am 55 years old.

Where did you live at the time you saw this child?—At Ballyteskin, within three miles of Ross.

Where in 1713 did you live?—I cannot tell; I am no scholar.

Where in the year 1718?—I cannot tell that year; I do not understand your years that way.

Where did you live twenty years ago?—In the town of Ross.

Do you know one Eleanor Murphy?—I did, Sir.

What relation is she to you?—I have one Nelly Murphy a sister of mine.

How long has she been married?—I believe she is married these 20 years, or near it.

Is not she married 30 years?—I cannot tell whether she be or no.

Is she married 29 years?—Indeed I cannot tell, Sir, whether she be or no; I was not by when she was married; she married in the county of Dublin here.

What name did she go by 30 years ago?—Only her own name.

What was that?—Howletts.

What name did she go by 29 years ago?—I believe Howletts.

Can you write or read?—No, I cannot, Sir, and I am sorry for it.

Were you ever agent to any gentleman in the county of Wexford?—I am after looking after some land belonging to Mr. Bailly.

Were you ever agent to him?—No.

Did you ever make any affidavit by the name of agent to Mr. Benjamin Bailly?—Hah!

Did you ever call yourself agent?—My lord, it was a mistake if I called myself so.

Who drew that affidavit for you?—I cannot tell any such thing.

Court. Now tell me truly, who wrote that affidavit? Did you make an affidavit?—Only what I swore before the commissioners.

Who were they?—Upon my word, I cannot tell.

Mr. Spring. Was there a paper wrote for you to swear, or put your mark to it?—Hah!

Did not you swear an affidavit before Dr. Stopford in August last?—Yes, I do not know but I did.

But you know whether you did or not?—Why, I believe I did.

Was it read to you before you swore it?—It was read to me sure enough.

Who read it?—There was a gentleman there.

What is his name?—Somebody belonging to Mr. Annesley.

What is his name, man?—Upon my word I cannot tell.

Upon your oath, who was he?—Upon my word I cannot tell the person.

Court. Gentlemen, this man was asked whether he made an affidavit by the name of agent to one Mr. Bailly; he would not answer for a great while, but seemed to prevaricate, and at last said it was a mistake if he called himself an agent. He then was asked if the affidavit was read to him, and after some hesitation owned it was read, but does not say by whom, but says he was sworn by Dr. Stopford, in August last.

Mr. Spring. Upon your oath, Sir, who was it that read the affidavit to you?—I cannot tell you, upon my oath.

Was it drawn in Dublin, or the county of Wexford?—To the best of my knowledge, in Dublin.

Where was it drawn?—I told you all I had to say.

Who wrote it for you?—If I knew that, I would tell you. There was a clerk there.

Who was he?—Somebody that was belonging to Mr. Annesley.

Did you tell all you knew in the county of Wexford, or city of Dublin?—In Dublin.

Did you likewise tell it in the county of Wexford?—I did not till I told it here.

Was your affidavit read to you?—Yes, it was.

Who read it?—I cannot tell.

Were you there called agent to any body, and whom?—It was a mistake, if I was.

Were you called so, or not?—I told them I minded some land belonging to Mr. Bailly.

Court. Did they call you agent, or not?—To the best of my knowledge, they did not call me so. All the world knows I was no fit man to be an agent to a gentleman.

Mr. Spring. Had the coach two wheels, or four wheels, you saw my lady go away in?—There was four wheels.

Was it open like a chair, or close?—It was close.

Do you know the difference between a coach and a chariot?—I cannot tell the difference.

You say it was not open?—I know it was not open.

How many horses were there?—I cannot tell, I think there were four or two, I cannot tell which.

Was it four, or two, or six?—Two or four, I cannot tell which.

Who was coachman?—One Dennis Cauntou.

How many brothers and sisters have you that are witnesses in this cause? Have you ever a sister that lived with one Macnabee?—I cannot tell whether it was or not.

Did your sister Eleanor Murphy live with Macnabee?—I cannot tell whether it was or no.

Do you know any body she lived with?—It was from captain Butler's at Ross that she went to lord Altham's.

Do you know the time that she went there?—Indeed, if I had known this trouble, I would know a great deal more of it.

Was it before or after you sold the linen that your sister went to the service?—She was not there the first time I sold the clouts, and she went there a little after.

Court. Did you travel the kingdom round with your linens?—Only the county of Wexford.

Court. I am surprized then, that you do not know the difference between a coach and a chariot.

Mr. Spring. Do you know the great eclipse of the sun?—I do.

Where did you live then?—I lived then at Ballyteskin. I do not know but I was in the house of Dunmaine that day, and coming home within half a mile of my own house when the eclipse came upon me.

Were not you in Dunmaine house that day?—I am not sure I was there, I was very near them I am sure in the road home.

Say upon your oath, whether you were not in the house of Dunmaine the day of that eclipse?—I cannot tell whether I was or not.

Was it before or after that eclipse that your sister went to live there?—Why it is about May the eclipse came, or the latter end of April; it was before that she went to live there; it was before.

Where did she go to live after she left lord Altham's?—I think to one Frank White.

And where from thence?—The time she left lord Altham's she went to her own father's.

Court. This witness has sworn very materially, if he has sworn true.

Serj. Marshall. The next witness I am intrusted to produce, is one Newton Ricketts, a coach-maker, and he will prove to your lordship that lady Altham was very big with child; that he after was at Dunmaine, and employed by lord Altham to make a four-wheeled chaise, and at the same time my lady employed him to make a little chair for the child.

Newton Ricketts sworn.

Serj. Marshall. Did you know Arthur late lord Altham?—*Newton Ricketts.* I did.

Did you know his lady?—I did see her, Sir, and was acquainted with her by name.

Where did you see lady Altham?—I saw her at Dunmaine.

Can you recollect at what time you saw her there?—About 32 or 31 years ago.

Which was it?—It is 32 years ago.

How long were you acquainted with her at Dunmaine?—I was acquainted with her for three years.

Recollect as near as you can, how long ago it is.—It was 33, or 34 years ago.

Do you recollect when queen Anne died?—I do not know how long ago it is.

Can you be sure how long ago it is since you knew my lady at Dunmaine?—I think it is 31 years, I cannot remember the years, or months, or weeks.

VOL. XVIII.

What trade do you profess, friend?—I profess to be wheel-wright and coach-maker.

Were you ever employed by lord Altham, and when?—Oftentimes, for two or three years, working at the house from time to time.

Did you do any particular piece of work for him?—I made a little toy-chair for a child that was there, that was called master James Annesley that time in the house.

Who bespoke that chair?—The lord Altham desired I should make it; and my lady and he both came to the coach-house where I used to work, and desired me to make it.

Where was my lady at that time?—At Dunmaine.

Was it he or she that ordered you to make the chair for the child?—My lord directed me to make it at the time my lady was at Dunmaine.

Jury. Did my lord speak to you himself? He spoke to me himself.

Court. Did he tell you whose child this was? I never ask questions when I go to gentlemen's houses; when I see masters and misses, I guess they are their own.

Serj. Marshall. Whose child did you take it to be?—The lord and lady Altham's child.

What did my lord Altham call him?—He called him Jemmy Annesley.

How was the child dressed?—Dressed as a gentleman's son, or young master should be dressed.

Did you see the child frequently?—I saw him very often at Dunmaine, and at several places besides.

How did my lady behave to the child?—I think as a mother behaves to a child.

Mr. Smith. Her behaviour is not more material than her words. Words are expressive, but behaviour doubtful.

[Cross-examination.]

Mr. Daly. How many years ago is it since this chair was bespoke?—I believe about eight-and-twenty and a half; eight-and-twenty and six-months, or nine-and-twenty, I cannot tell indeed which.

Did you see the child at that time for whom it was to be made?—I seen the child? I did, Sir.

Could he walk?—He just began to walk that time, about two years and half, or quarter old.

In whose care was he?—One Joan Laffan took care of him, I believe.

You will consider at the time this chair was bespoke from you, the child was in the care of Joan Laffan?—Yes, Joan Laffan took care of it, I think.

Pray, will you tell me another thing, can you name any servant in the house at that time?—I believe there was one Martin Nieff, and Anthony Dyer, and some other servants that are dead and gone.

Was Nieff present?—I believe he was, and Charles Magher.

Serj. Marshall. Are you sure of that?—I am sure, I think they were.

H

And Joan Laffan was the person that took care of the child?—I think she did.

Mr. Daly. Do you know one Mr. George Nixon of Newton, in the county of Wexford?—I do.

Now I ask you upon your oath, had you any discourse with him concerning the birth of this child?—Upon my oath, I do not remember it.

Had you with Mr. Henry Miller?—I do not remember I had.

What age are you?—I am four-and-fifty and odds.

What age were you at the time of making the chair?—I was twenty-four years of age.

Did you work for yourself then?—Aye, and for my father.

Where have you lived ever since?—Within four miles of Wexford.

The name of the place?—Bretherty.

Elizabeth Doyle sworn.

Serj. Tisdall. Did you know lady Altham?

E. Doyle. Yes.

Where did you see her?—At Dunmaine.

Did you observe any thing particular about her?—I observed that she was with child.

How do you know that?—By her big belly.

What time was this?—In March.

What year?—About the time of the queen's death.

Was it before or after the queen died?—After.

Have you no other reason to know my lady was with child?—Yes, she hired my mother to nurse the child.

Were you by?—Yes, I was.

Did your mother nurse the child?—No, she took a fever, and could not nurse the child.

Where was it that my lady agreed with her?—At Dunmaine.

Who nursed the child after, do you know?—I cannot tell, Sir, of my own knowledge.

Do you know Mrs. Heath?—I do not know Mrs. Heath; my lady desired one Mary to bring a glass of wine to my mother, and that is all that I know.

Was any body present but you when your mother was hired?—I remember nobody but my lord and lady.

Was my lord by?—Yes, Sir, he was.

What was your mother's name?—My mother's name was Elizabeth Richardson, and my father's William.

What was your father?—He made bricks for my lord, and for squire Loftus, and a great many gentlemen.

Where were you born?—I was born in Waterford.

Jury. How near did you live to Dunmaine?—I lived no nearer Dunmaine than Waterford.

[Cross-examination.]

Mr. Le Hunte. How old are you?—About six-and-forty.

Mr. Smith. You say, I think, that you saw

lady Altham at Dunmaine, and with child?—Yes, Sir.

Can you recollect the particular time?—In March.

What year was it?—Indeed, Sir, I cannot tell.

How many years ago is it?—About thirty years ago.

How old were you at that time?—I do not know, but I know how old I am now.

How old are you now?—Six-and-forty.

Where did you live at the time you saw my lady at Dunmaine?—In Camolin.

How far from Dunmaine is that?—I believe about twenty miles.

Upon what occasion did you come to Dunmaine?—My father was making bricks; he was digging the clay that time.

How came you to come so far to see your father?—Because my friends were in Waterford, and they were going to leave me there.

Who were present at the hiring your mother for nurse?—None present at the hiring my mother but my lord and lady, and only the woman that my lady called Mary.

Who was she?—I cannot tell, except her own maid.

Pray, then, what part of the house was this in?—In the left-hand parlour.

How came you to be in that parlour?—By reason my lady desired my mother to come in.

Was that any business of yours?—I was along with her.

What do you call the left-hand parlour?—The left-hand parlour, as you come from the big door.

When did you see the house of Dunmaine?—I have seen it oftener than once.

How long is it since you were there last?—I forget, Sir.

Pray recollect, was it in July, August, September, or October last, or not?—Why then indeed I cannot tell.

Was it last summer?—It was.

Were you carried there?—I was.

By whom?—I rode there upon a horse.

What company occasioned you to go there; who desired you to go there or sent for you?—I went there by the reason that I was desired, if I knew any thing of Mr. Annealey, and I went there to give an account to Mr. Annealey what I could tell.

Who took you there?—A man I hired took me there.

Who sent for you?—Madam Coles desired me to go along with her.

Was Madam Coles there?—She and Mr. Coles too were there.

Who was it you spoke to there concerning this affair?—I spoke to the gentlemen in the room.

What gentlemen were there?—Counsellor Fitz-Gerald, and Mr. Annealey, and Mr. M'Kercher, and Mr. Coles, and Mr. Kennedy.

How long had you been absent from Dunmaine?—I believe about twelve years or thirteen.

Did you take particular notice the last time you were there of the house?—Indeed I did not.

I ask you, whether you did not make an affidavit touching this matter in August last?—Indeed, Sir, I did not.

Did you tell Mr. Lambert, that you had great discoveries to make to lord Anglessea?—No, Sir, I did not.

Mr. Walsh. My lord, we shall produce one that lived in the neighbourhood of Dunmaine, and who often visited lord and lady Altham, when my lady was big with child, and just before her lying-in, who will give your lordship satisfaction that she was with child, and that he saw the child often after at the house.

James Sinnot sworn.

Mr. Walsh. Pray, Sir, did you know lord Altham?

James Sinnot. Yes, Sir, that lived in Dunmaine.

Did you know him when he lived there?—Yes, Sir, I did.

Were you acquainted with him?—I was acquainted with him.

How near did you live to Dunmaine?—I lived within six or seven miles.

Were you acquainted with my lady Altham?—No, I was not acquainted with my lady, but saw her once.

Where?—Standing at her own door.

Can you recollect the time you saw her?—I believe I saw her, for I rode with a gentleman there, Anthony Colclough, she came to the door to speak to Mr. Colclough.

How did Mr. Colclough address her?—The lady Altham, Sir.

When was this?—It was in February or March, I cannot exactly tell.

In what year?—This time thirty years will be soon, to the best of my remembrance.

Where was it you saw her?—I saw her at the door.

Did you take any particular notice of her?—I took notice of her that she was with child.

What reason have you for saying that?—Because she seemed big-bellied to me, that is all the knowledge I have in them sort of things.

Did you see my lord Altham after?—I saw lord Altham after at my father's house, and at his own house; he dined and supped at my father's.

Did you know the person you saw was lady Altham?—I did not know her, but as Mr. Colclough told me it was lady Altham.

Were you ever at lord Altham's after?—I was.

Did you see ever a child there?—I saw a child there.

What brought you there?—I went with a gentleman there.

Did you see lord Altham then?—I saw lord Altham, Sir.

And you saw a child there?—I saw a child, Sir.

Whose was it?—Lord Altham ordered that he should be brought up to the table to us.

Who was it that was with you?—To the gentleman who was with me, that he might see his son and heir.

Who was he?—Mr. Ivory.

How was that child dressed?—I cannot recollect.

Do you know where my lady was at this time that you saw the child?—I do not know; I did not see her that day.

How long was this after you first saw her?—The summer following, May or June, I do not know which.

Court. Were you ever examined in the Court of Exchequer?—No, Sir.

Were you at Dunmaine after this?—I was at Dunmaine with Mr. Anthony Colclough afterwards.

Did you never see my lady but once?—Never saw her but once.

Nor the child but the one time?—No.

How old was the child then?—I cannot tell.

Could it walk?—It could not walk.

How often were you at Dunmaine after?—I was there but the one time after with Anthony Colclough.

How often were you there in all?—Never but three times in lord Altham's time.

[Cross-examination.]

Mr. Bradstreet. I think you say you never saw my lady but that one time?—Never saw her before or after.

What sort of woman was she?—I did not take notice what sort of woman.

But you took notice that she appeared big?—Yes, Sir.

Had she large breasts?—I did not mind that.

Was she a tall woman?—She was neither tall nor short.

What did you follow then?—I followed farming then.

How came you to go with Anthony Colclough there?—Because I always kept him company when he thought it was proper.

Did you hear of any quarrel there was between my lord and Mr. Colclough?—I heard of no quarrel between them.

Who knocked at the door, when you and Mr. Colclough went there?—Some girl or maid was at it.

Who did Mr. Colclough ask for?—He asked for lord Altham, and they told him he was gone abroad.

Did he go into the house?—He did not go in.

Did he ask to see my lady?—He did not ask to see my lady, he was wheeling off, when she came out and stopped him.

Do you remember to see any body at any door seven-and-twenty years ago?—Indeed I do.

Who? Name them.—They were no people of note, worth remarking.

Were you ever before a jury before?—Never.

Jury. Do not you say that lord Altham went to your father's house, and dined and supped there?—He did, and stayed all night.

Was that before or after my lady was brought to-bed?—It was before.

What time of the year was it?—It was in March or April; he was there two or three nights.

Was it before that that you saw her with child?—It was.

Was she brought-to-bed then?—No, Sir.

How soon after was it?—I do not know, it may be the May following.

And it was in March or April he was at your house?—It was.

Court. Gentlemen, have you any other witnesses?

Serj. Tisdall. We have, my lord.

Court. Pray then send for them.

James Fitzpatrick sworn.

Mr. Harward. Were you acquainted with lord and lady Altham?

Fitzpatrick. I knew them particularly well, Sir.

Pray, Sir, did you know them at Dunmaine?—I did, Sir.

Did you live in that country?—Within five or six miles of them, Sir.

Were you frequently at Dunmaine?—I was pretty often there.

Did you know one Mrs. Mary Heath?—I have seen her at Dunmaine. I cannot tell whether I should know her again.

Do you think if you saw her you should know her again?—I do not think I should know her again.

Do you remember the name Mary Heath? I do remember Mary Heath very well, Sir.

Now you that were intimately acquainted with my lord and lady, as you say, did you observe any child in the family?—Why really, gentlemen, I saw the child very often after my lady parted Dunmaine, and to the best of my memory, I saw the child there one day in the forenoon while my lady was there, and Mrs. Mary Heath, I saw her; and lord Altham was pleased to be towzing and kissing her, and she told him, if he would not give over, she would call to my lady; and I saw a clean dressed woman with a child in her arms come to the place where I was, to the best of my memory, I cannot say positively.

Whose child was it?—I cannot tell, I took it to be my lord's.

What reasons had you to take it to be his?—Because my lord had introduced the child to me some time before.

Introduced him! How? What did my lord say?—I cannot tell the words, but he introduced him to me after a friendly manner.

How did my lord behave to that child?—He was very fond of him, as fond as of his eyes, and kept him like a gentleman's child.

Court. Did you see him in my lady's time?—I cannot say positively that I saw him in my

lady's time; the greatest freedom I had with my lord Altham was after my lady's departure.

Can you take upon you to say that the child you saw was my lord's child?—I took him to be lord Altham's, and my lord had that regard for me, that he would not introduce an illegitimate child to me.

When you first saw this child, did you see it before the separation?—To the best of my memory, I did once.

Can you swear positively you did?—I cannot swear positively.

Now, at the time that you saw this child to the best of your memory before the separation, did you see Mrs. Heath?—I did, Sir.

Had she the care of any body upon her at that time?—Not as I know of.

Did she take notice of any child?—I cannot tell whether she did or not.

Did you ever see this child in my lady's company?—I never did, Sir.

How did my lord treat this child, did he use him with any particular fondness?—I know my lord was very fond of him.

Mr. Harward. There can be no legal evidence, I find, but one that was actually present at his birth.

Court. You mistake the Court, Mr. Harward.

Mr. Harward. My lord, I am sure I would not willingly mistake the Court, but what I contend for is, that I have a right to ask this question; I humbly apprehend I have, for it is a point of the perjury, that there was a child taken to be my lady Altham's child at Dunmaine. And this being the case, I would ask him whether there was any child in the family as the child of the family?

Mr. Smith. My lord, this is not the point, the point is—

Court. Ask him in the very words of the indictment, if you will ask him.

Court. Was there a child of lord and lady Altham's living at Dunmaine while Mrs. Heath was there, to your knowledge, as the child of that family, while my lady was at Dunmaine?—Really, my lord, there was no doubt upon me but there was such a child.

Can you say positively you saw a child there while my lady was there?—To the best of my memory, I did see the child while my lady was there.

[Cross-examination.]

Mr. Le Hunte. Where do you live?—At Cloughleagh.

How long have you lived there?—Thence four-and-thirty years.

Were you examined on the late trial in the court of Exchequer?—No.

Did you know of that trial?—I did hear of it.

When was it you first discovered your knowledge of this transaction?—I cannot tell.

Was it before the trial? How came you to be a witness now and not then?—Because I was subpoenaed now, and was not then.

Did you ever see Mr. Mac Kercher?—I have seen him very often.

Did you see him before the trial in ejectment in the Exchequer?—I never did.

When did you first see him?—I cannot exactly tell you when I saw him.

You know you are a skilful man at the assizes, why did you not disclose this matter before?—It was sore against my will that I was brought in at all.

Do you know Mr. William Sutton?—I do.

Is he a man of honour?—He is, I believe.

Had you any, and what discourse with him about this matter?—I never had any discourse with him.

Jury. You say you never saw my lady Altham take notice of the child?—I never saw them together.

Did not you say that you were at the house before my lord and lady parted, and saw that child then?—I did, Sir.

Did you know whose child it was?—I believed it was lord Altham's.

Were you told so?—I do not know whether I was or no.

How did you know then that it was their child?—I took it for granted.

How old was the child when you saw it first?—Really, I cannot tell; about eighteen months, or thereabouts.

Pray, Sir, was it running about?—It was in the arms of a maid or woman.

Was she in the habit or dress of a servant of the family?—She was very clean.

How was the child dressed?—Oh, the child was very clean.

So you know no more of this than that you took it to be their child of your own accord?—I was not, nor did not doubt it at all.

Mr. Le Hunte. Are you sure my lady was at Dunmaine when you saw the child there?—I saw it at Dunmaine after the separation I know, my lady I believe was not there.

Was my lord fond of it at that time?—Aye, and introduced him to me.

Did he mention the mother of the child?—He did not mention the mother.

Who was butler then?—I cannot tell any of the servants, nor what servants I kept myself at that time. I saw Taylor and Sutton.

Jane Murphy sworn.

Mr. Robins. My lord, this witness was sent for by my lady Altham to be a nurse, and in the presence of my lady gave the child suck, and would have been hired to nurse the child, but her husband would not let her stay in the house, and my lady would not let the child go out.

Mr. Robins. Did you know my lady Altham?

Jane Murphy. I saw her but once in my life.

When was that?—It is about 29 or 30 years this May coming, there or thereabouts.

What was the occasion of your going to see

her?—My lord spoke to me two or three times to go-nurse this boy.

Did you see ever a child there?—I did, Sir.

How old was that child then?—About a month or three weeks, there or thereabouts.

Who was present when you saw the child?

—My lady, and the woman that brought the child into my lady's room.

Do you know who that woman was?—I do not know who she was, I knew no servant but Bryan Mac Cormack.

Where did you live then?—I lived then at the salt mills of Tyntern, by the sea-side.

How far is that from Dunmaine?—Four miles from Dunmaine, never reckoned but four.

What was it you did or said to my lady?

I told my lady that my lord sent a messenger for me to nurse the child.

And did you nurse the child?—Indeed I did not nurse him.

What was the reason you did not?—My lady would not let me have the child out, and I would not stay in the house.

Court. Did you ever see my lady before?—I never did.

Nor since?—No.

Would you know the woman, if you saw her, that brought the child into the room?—I cannot tell whether I would know her or no.

Did you ever see her since?—I never saw her since.

Jury. Who nursed the child the first three weeks?—I did not examine, nor cannot tell.

Mr. Daly. Whose cloak is that?—It is my own.

Mr. Daly. I do not believe you.

Jane Murphy. Faith, and you may, and I've worn a better before now.

Mr. Mac Manus. The next witness is Dennis Redmond. This witness will prove to your lordship that lady Altham was with child, and brought to-bed of a child; that he was the person sent for the midwife on that occasion; that he brought one Mrs. Shiel a midwife of Ross, to Dunmaine, and that my lady was delivered of a child.

Dennis Redmond sworn.

Mr. Mac Manus. Did you know the late lord and lady Altham?

Dennis Redmond. I did, I knew them both.

How came you to know them?—Because I was a servant.

Where did they live then?—At Dunmaine.

Did you frequently see my lady Altham?—I did.

Was she, or was she not with child during the time of your service?—She was, and all the servants round said that she was, she looked big.

Was there any young child in that family?—There was.

Whose was it?—It was reputed to be lord and lady Altham's.

Were you sent to Ross on any, and what occasion?—I was, for a midwife.

Who sent you?—Mrs. Heath.

Do you know her?—I ought to know her.
Look about and see if you know her.—
Upon my word, I cannot swear directly that
that is Mrs. Heath, but that was my lady's
maid.

Who sent you of that errand?—My lady's
maid did.

Did you go for the midwife?—I went for
her.

And did you bring her?—I got the midwife.

Who was she?—One Mrs. Shiela.

What did you then do?—I fetched her home
to Dunmaine.

What happened after she came to the house
of Dunmaine?—Why, after I brought her
home, that night it was a noise with them all,
every one, that my lady was brought to-bed of
a son.

Did you see the child?—I seen him after-
wards.

How soon after the midwife left the house?
—I cannot tell how soon.

Did you see him the next day?—Not the
next day.

Did you in five days, or ten days?—No, I
believe not.

Did you in a month?—I did in a month.

In whose care was it?—I cannot tell, I seen
it among the girls, among the servants as they
were.

Did you know Joan Laffan? I did.

And Mrs. Heath?—Yes.

In whose care did you see it? Name them
particularly.—I seen the child with both one
and the other several times.

Name them.—Mrs. Heath and Joan Laffan,
and with other girls that I cannot remember.

Were there any rejoicings the night you
brought the midwife?—There was the night
after.

What was the nature of that rejoicing?—
There was a fire there up in the avenue among
the trees.

[Cross-examination.]

Mr. Daly. Did you know one Mrs. Hest-
her that lived in this family?—I did, very
well.

Did not they call her my lady sometimes?
—I never heard her called so in my life.

Was not she with child while you were a
servant, upon your oath?—Upon my oath, I
cannot tell whether she was or not.

Did not you go, upon your oath, for a mid-
wife to lay her?—Upon my oath, I never
did.

Do you know one Mr. William Sutton of
Longrainge?—I do.

What was he?—He is a gentleman.

Had you ever any discourse with him con-
cerning your going for a midwife, and for
whom?—Upon my oath, I never had with Mr.
Sutton concerning going for a midwife for any
person, not that I know of, Sir.

Do you know captain Orfeur?—I do.

Had you any discourse with him?—I had
discourse with him.

Who is he?—He is colonel Palliser's son-in-
law; I was there one night after riding a horse
for him.

What servants lived at Dunmaine at this
time? Name them; who was the butler?—It
is hard for me to remember at this time.

Upon your oath, who was the butler?—One
Magher, to the best of my knowledge, and
there was one Dyer there.

Was his name Anthony?—Anthony.

Was he or you in the service first?—I was
in the service before he came there.

What other servants can you recollect; do
you know Mrs. Setwright?—If she was there
I knew her; she may be there for me, it is out
of my mind.

Who was the house-keeper?—I do not know
as for that, because there was a cook there
still.

Do you remember the name of Setwright?—
I think I remember to hear talk of her.

Who was coachman?—John Weeden.

Was his wife there?—His wife was living
at the bridge below at this time.

Did Joan Laffan live in the house at this
time that you brought the midwife?—Upon
my oath, I cannot tell now.

What do you believe?—I do not know
whether she was or not, for there were several
servants there, and a great many that I do not
know now.

Pray, did you ever see this child in the
hands or care of Joan Laffan?—I did, Sir.

Was not that after my lord and lady parted?
—It was after they parted.

Was he ever in her care before they parted?
In her care or hands?—How could I mind all
these things?

You must recollect.—Upon my word, I
cannot tell.

What service were you in?—After the
hounds and the hunters.

After them?—Aye, taking care of them, and
hunt them too, and would to this day, and ride
a horse too.

When was it my lord and lady parted?—I
cannot be exact.

When did you bring the midwife there?—I
cannot keep a memory of what year, nor I am
no scholar to keep that in my head.

Do not you remember the separation?—I
remember the time they parted, but cannot tell
what day of the week, but I think a holyday.

What time of the day was it? Was it in
the morning?—I cannot remember whether it
was or not now.

Did my lady go in a coach, or on horseback?
—In a coach or chariot.

How long did you continue in the service
after they parted?—I did not stay long there
after.

How long?—I cannot tell how long, because
my father and mother were in the town of
Dunmaine, and I went to them; upon my
word I cannot tell how long.

Where did my lady go?—To Ross.

How long did you live in the service in all?

—About three years, or full three years, or something better, to the best of my knowledge.

Had not Joan Landy a child a-nursing at her house?—She had my lord's child a-nursing.

Was not that child brought into the house of Dunmaine after my lord and lady parted?—He used to come in before and after.

But did not he come in for good and all after they parted?—He did come for good and all, and was put into the care of Joan Laffan.

How came he to be taken from Joan Landy?

—I cannot tell without he had done nursing.

How long did you live at Dunmaine before my lady came there?—I was there before either of them came.

How long were you in the service?—About three years or better.

What time did my lord and lady come down?—I cannot remember.

How long had you been a servant before my lady first came down?—I cannot tell how long, but it is three years I served in all.

How long was you in the service before she came, and how long after?—Let me never go but I cannot remember.

Did not you swear when you were examined on the former trial that you were two years in the service before my lady came to Dunmaine?—I was there; I cannot be exactly how long.

And how long of that three years were you there after they came down?—Why, I believe, to the best of my knowledge, a year or something better, I cannot be exact.

Will you tell me how soon after they came down my lady was delivered of this child?—Indeed, I cannot remember.

Was it a year, or half a year, or what time?—I cannot tell.

Were you a servant when she was delivered?—I was.

Were you there when Sarah Weedon came down?—I was there before she came into the place at all.

Did you and Mrs. Shiel discourse as you were coming to Dunmaine?—How can I remember?

Could she speak English?—She could, indeed.

Is she alive?—I cannot tell whether she is or not.

Was she an Irish woman?—I cannot tell whether she was or not.

Jury. You say, Sir, that you saw Joan Landy's child in the house of Dunmaine before the separation?—In the house I did backwards and forwards.

Did any body take notice of it?—Every one of the family, one from another used to handle and play with it.

Did you observe my lord to play with it?—I did, and was as fond of him as could be.

Now, you say that after my lady was turned away, that child was actually brought home to Dunmaine house?—He was that very time.

And you saw my lord fond of him then?—I saw him fond of him then, and after.

What became of my lady's child?—Why, I believe this was my lady's child, they all said so.

Did not you say it was Joan Landy's child that was brought to the house?—He did come in, the child she nursed.

Mr. Daly. Had not Joan Landy a child?—She had, sure enough.

Was not he got by my lord?—They said it was.

Who nursed her child?—I cannot tell, except herself nursed her child.

Jury. Mr. Daly asked him, my lord, who was the father of Joan Landy's child, and he says my lord was, and that she nursed that child.

Sol. Gen. This is a matter ought to be well understood. The Jury apprehended the child this man meant, was the bastard-child of my lord Altham by Joan Landy; I desire to know which child you meant?

Dennis Redmond. I say, there was a child that Joan Landy had by a sailor, or my lord, or somebody, but this child did not come to Dunmaine.

Jury. Had Joan Landy a child?—I cannot tell whether she had of her own body.

Was she with child at Dunmaine while you were a servant there?—She was with child in the town.

Mr. Daly. By the virtue of your oath, was she or was she not a servant in the house when my lady came down first?—By virtue of my oath, I cannot tell.

Did she live there?—She was in the town, to be sure.

Where was Joan Landy when you went for the midwife?—In her father's house.

How near was that to my lord's house?—It was just below the dog-kennel.

Jury. Was not Joan Landy a servant in the house when my lady came home?—I cannot tell whether she was or not.

Mr. Daly. Did not you swear on the trial in the Exchequer, that she was in the house when my lady came down?—She may come in and out, and I am not full sure whether she was or not.

Mr. Smith. I hope the Jury will take notice that he refuses to answer the question.

Mr. Daly. Do you remember Eleanor Murphy and Mary Doyle?—Mary Doyle I remember; there were so many they went out of my mind.

Do you remember Nelly Murphy?—I cannot tell whether I do remember Nelly Murphy or not.

Cannot you say whether you do or no?—It is impossible to remember, when there were so many of them.

Mr. Callaghan. We shall now produce Eleanor Murphy.

Mr. Smith. My lord, this witness has been here while Redmond was examined, and has heard what he said upon the table; and it was

a rule made by your lordship, that they should not examine any witness that came into court before they were called.

Mr. Nelson. My lord, I sent for her to have her ready, thinking the cross-examination of Redmond would not hold long, and she is but just come.

Eleanor Murphy sworn.

Mr. Callaghan. Did you know lord and lady Altham?—*Eleanor Murphy.* Yes.

Pray, were you ever at Dunmaine?—Yes.

Did you live there as a servant?—I did.

With whom there?—With lord and lady Akham.

Can you tell whether my lady was with child at any time, or when?—I know she was delivered of a child.

How do you know that?—Because I seen her the night she was delivered.

Give an account of all you know of that matter.—Mrs. Heath called me up, and desired me to bring up a sauce-pan of water, and have it warmed.

Court. Do you know that Mrs. Heath?—I cannot tell.

What was she?—She was my lady's woman, waiting-maid.

Well, go on.—I brought up the water in the saucepan, and set it upon the big parlour fire. Mrs. Heath called me a little while after to bring it up to the room in a brown pan, and I went to my lady's room with it, where my lady was upon her knees, and she put her finger in it to see whether it was too hot or cold; and she teamed some brandy in it to strengthen the water, as I suppose, to wash the child.

Mr. Callaghan. Where was Mrs. Heath?—She was attending my lady.

Do you know of what my lady was delivered?—It was a boy, for I saw it washed, and Mrs. Shiels put her hand in her right-hand pocket, and brought out her scissors and cut his savel-string.

Who were present at this birth?—There were a great many gentlewomen in the room that I did not know; but I knew one of them, madam Butler from Ross was there.

Were there any public rejoicings at Dunmaine on this occasion?—Yes, the second night after the child was born there was a bonfire alighted by Mr. Taylor's order and Mrs. Heath.

Do you remember the christening of this child?—I knew the day appointed for it to be christened; about a month or five weeks after there was a great gathering for it of many things.

Was it christened?—Doctor Lloyd came there I suppose to christen the child.

Who was he?—He was the minister of Ross, Sir; I knew him before and after.

Was it Mr. Lloyd that christened it?—It was he that christened the child.

What name was given to it?—Mrs. Heath

came down to the hall and told among the servants, he was called James Annesley.

Jury. That was his christian name?—Yes, James Annesley was his christian name.

Mr. Callaghan. What name was he christened by?—He was christened James Annesley.

Do you mean that he was christened James or James Annesley?—James Annesley.

Was that his christian name only, or his christian and surname?—That was the christening name and surname and all, and they said it.

Court. What was he called when he was christened?—James Annesley he was called indeed.

Was he christened James Annesley?—He was christened James Annesley.

Mr. Callaghan. Did you see the child after at Dunmaine?—Yes, I did.

How often, once or twice?—Several times, with Mrs. Heath a-dressing of him, when he would be sent for; and there never was a woman loved a child better than she did James Annesley.

Mr. Le Hunte. The jury want to know if he was christened James Annesley?—*Eleanor Murphy.* He was christened James Annesley.

Jury. How do you know that?—This was what I heard Mrs. Heath tell to all the servants in the hall.

Mr. Callaghan. Pray, how long did you continue after this christening at Dunmaine?—A good while.

How long?—I believe a quarter of a year.

Where was that child during that time?—He was sent to Joan Landy's out to nurse, she took him with her.

Do you remember the time of my lord and lady's parting?—I was not there then.

But do you remember the time?—I do not remember the time.

Was it before or after that, that Joan Landy got the nursing?—She got the nursing the day that he was christened; she came to nurse him the day before.

Where did you go when you left Dunmaine?—I went to Ross, after I left Dunmaine.

Did you see the child after?—I never saw the child after, only once that he came to Ross with my lord in the coach.

Do you understand what a christian name and what a surname is?—Yes.

What was the child's surname?—His surname is Annesley.

And what his christian name?—His christian name is James.

Was Annesley his surname or christian name when he was christened?—It was a surname, Annesley.

[Cross-examination.]

Mr. Spring. Tell me, recollect who were present when the child was born besides you?—There were several.

Name them.—Madam Butler.

Who else?—I do not know, it is so long ago, I should have a good head to remember them.

Do you remember were any of the servants by?—I remember some of the servants, Mary Doyle was by.

Was Mary Doyle in the room?—She was in the room, and Mrs. Heath.

And who else?—Why, some gentlewomen, I cannot tell who they were.

Have not you as good a memory now as a year ago?—I have not.

Is not it as good now as last year?—I do not know but it is.

Was not Mary Doyle there and madam Butler?—Yes, they were.

Do you remember any more?—I do not remember any more.

How long had Mary Doyle been in the service before the birth?—I cannot tell indeed that.

What name did she go by then?—By Mary Doyle.

She was not married then?—I never heard she was.

Which of you was in the service first?—I was first.

How long, pray?—Why, a good while; I do not remember how long.

How long were you there after the child was born?—I was there half a year almost, not half a year.

And how long was you there before?—Near hand a quarter before.

What were you in the family?—I was laundry-maid.

Were you the head laundry-maid?—No.

What was the name of the upper one?—I cannot remember her name.

Recollect.—It was a strange sort of a name, I cannot recollect it now.

How long do you say you lived in the service before the birth?—Near hand a quarter of a year.

And how long after?—About half a year.

Where were you at the time of the great eclipse?—I do not know.

Do you remember it?—I do not remember it, but I remember there was great thunder and rain.

Do not you remember the great eclipse several years ago?—I do not remember it now, but I remember thunder and rain.

How came you to remember last year what you do not remember now?—Why, what did I remember then?

Mr. Spring. The eclipse.

I ask you, upon your oath, where you were at the time of the eclipse?—I was at captain Butler's at this time of the thunder and rain.

Was there any darkness of the sun in the morning at the time of that thunder and rain?—I do not remember it.

Were you not a servant at captain Butler's at the time of the eclipse?—I was there when this thunder and rain was, the eclipse was in the evening.

By virtue of your oath, do not you remember the great eclipse of the sun?—By the virtue of my oath, I do not remember any other.

Was that thunder before or after the child

was born?—The thunder was since he was born.

Were not you in captain Butler's service then?—I was in captain Butler's house, but not in the service.

Were not you a servant at Dunmaine before lady Altham came to Dunmaine?—I was not in it when she came there, it was Mrs. Heath hired me.

Court. How long did you live at Dunmaine before my lady came?—She was there before I went there.

How long were you in the service before my lady was brought-to-bed?—Near a quarter of a year.

And how long after?—Half a year.

Do you remember the great darkness?—I do not, my lord.

But you were asked whether you remembered it when you were examined on the trial in the Exchequer, and you said you did?—Why, they only asked me then if I remembered the eclipse, and I said I remember that there was such a thing.

By virtue of your oath, did you never say that you remembered the eclipse?—I do remember that darkness.

What darkness was it?—It was a thunder and rain.

Was that while you lived at Dunmaine?—It was after I left Dunmaine.

What time of the day was it?—It was in the evening; in the afternoon.

How long did it continue?—The rain held a quarter of an hour.

Did you mention any thunder and rain when you were examined before?—I was not asked any, my lord.

Do you remember an eclipse that happened about the time of the birth?—I do not remember any but that eclipse that was in the evening, that there was thunder and rain along with it.

Mr. Spring. Were you not at Dunmaine House when my lady came down?—No, I was not.

Did you ever see her before you saw her at Dunmaine?—No, indeed, I never did.

Did she go to Dublin while you were in the service?—Not that I know of.

Could she be absent a month or two and you not know of it?—No, she was not, in my service at all, without she'd go to church.

Did not you swear formerly that you were in the house when my lady came first?—Indeed, I did not.

Where were you hired?—By Mrs. Heath.

Where?—In the parlour at Dunmaine.

And you never saw lady Altham before?—Indeed, I never did.

Did not you say, when you were examined before, that you had seen her at Ross?—Indeed I did not, without they took me up wrong.

Court. Did not you swear upon that trial, that you were in the service a good while before my lady came down?—No, upon my word I did not, my lord.

I

Mr. Spring. Did you not say, that the first time you saw my lady was at captain Butler's before you were a servant at Dunmaine?—Upon my oath, I did not, that I remember.

Now, I ask you who were the godfathers and godmother to this child?—Mr. Colclough, Mr. Cliff, and Mrs. Pigot were gossips.

What Colclough?—Of Rossgarland.

What was his Christian name?—Anthony Colclough.

Who were the other gossips?—Counsellor Cliff, and madam Pigot of Tyntern.

Whose wife was she?—Why, was not she captain Pigot's of Tyntern?

I ask you whose wife she was?—She was called madam Pigot of Tyntern.

Was not she captain Pigot's wife?—I cannot tell, but she went by that name.

By what name did you pass yourself at that time?—Eleanor Howlett, and my husband's name is Murphy.

Do you know one Bridget Howlett?—Yes.

Was she a servant to my lord Altham?—

We lived there at the same time.

Who was butler then?—Charles Magher was butler.

Did you know one Rolph that was butler?—Rolph was not there in my time.

Did you know Mrs. Weedon? Was she in the house?—I heard talk of her; she was not in the house because she was under an ill character.

Where did she live then?—She was at the bridge below.

How near was that to Dunmaine?—To the best of my knowledge near half a mile, I cannot tell how long.

Do you remember Mrs. Setwright?—I do not remember her.

Who was house-keeper?—I think, Mary Doyle, that had the name of house-keeper.

Where did you live before you came to captain Butler's?—At Frank White's, in Ross.

Where did you live after you left lord Altham's?—At no place, I was with my own people.

Did you ever live with one Macnamee?—I did indeed.

Did you live with him before or after you left lord Altham's?—That was after I left lord Altham's.

Jury. Name the gossips over again; how many were there?—Three.

Name them.—Counsellor Cliff, Anthony Colclough from Rossgarland, and Mrs. Pigot of Tyntern.

Court. This is a positive witness to the birth, if you can possibly believe, gentlemen, that she is a woman that deserves your credit.

Serj. Marshall. I hope your lordship won't make any remarks upon the witnesses till we come to the close; if we are to support the credit of our witnesses, as they appear, we shall never have done.

Court. I say, if she be a person of credit; you would not have me say, she is a person of undoubted credit.

Mary Doyle sworn.

Mr. Harding. The next witness we produce is Mary Doyle; she, my lord, is a witness to the birth.

Did you know Arthur late lord Altham?

Mary Doyle. Yes, Sir, I did.

Did you know his lady?—Yes, Sir.

How came you to know them?—Because I was their servant, Sir.

When were you in their service?—That is a good while ago, it is hard for me to remember it now.

How long do you think it is?—I believe, to the best of my knowledge, nine or ten-and-thirty years this May next.

How long do you say it is?—It is nine-and-thirty this May.

Recollect, woman, how many years is it since you lived there; is it nine-and-twenty, or thirty, or how many?—It is thirty this May, since you will have it so.

During your knowledge of lady Altham was she with child?—She was with child.

Was she delivered?—She was indeed.

Where?—In her own house at Dunmaine, Sir.

How do you know that?—I was by, Sir.

Were you present?—I was indeed.

Was any body else present?—There was.

Who?—Three or four servants.

Who were they?—One Nell Murphy, and Mrs. Heath first, and Eleanor Murphy.

Were there any gentlewomen there?—There was madam Butler, and some others I do not know.

Was the child christened?—He was.

By whom?—By one Lloyd out of Ross.

Who was he?—A mini-ster and curate.

Of what place?—Of Ross.

Who were the godfathers and godmother?—To the best of my knowledge, Mr. Colclough, Mrs. Pigot of Tyntern, and Mr. Cliff from Ross.

Were there any rejoicings upon that account?—A great deal, Sir.

When and where?—In the house.

Tell what rejoicings there were.—There were the best of liquors, and the best of eating and rejoicing every way.

Was there a bonfire?—There was.

When was that bonfire?—The night after the child was born.

Pray now, what came of that child after?—Indeed I do not know; there was a nurse there that had him, for I left the place a few days after he was christened.

What was the nurse's name?—To the best of my knowledge, her name was Landy.

How long did you stay after the christening?—I left the house a few days after.

Court. Did you see my lady delivered?—Indeed I did, I was an eye-witness to it, for I was in the room all along.

Are you sure whether Mrs. Heath was in the room or not?—Indeed she was from the first to the last.

[Cross-examination.]

Mr. Spring. You say Joan Landy was the nurse?—Yes, Sir.

Was she married or a single woman?—I heard by every body in the house that she was married.

To whom?—To one Mac Cormack.

Were they living together at that time in their own house?—I do not know whether they were or not.

Where did they live then?—They lived in the town.

At what time was this birth and christening?—It was in the month of May.

The latter end or the beginning of May?—The latter end of May.

Court. How long was it between the birth and the christening?—Between three and four weeks or thereabouts.

Was it both born and christened in May?—He was born the latter end of the month of May.

Were you there at the christening, or did you leave the service before it?—It was after the christening I left the house.

What was your service?—A chamber-maid, my lord.

Mr. Spring. How long were you in that service before this child was born?—Just three months.

How long before this were you acquainted with Joan Landy?—Never till I seen her there.

Do you know whether she had a child or not?—I heard that she had a child.

By whom?—I do not know by whom.

You said just now that Mrs. Heath, Mrs. Butler and Nelly Murphy were present at the birth?—I did, Sir.

Were there any more but them?—Indeed I do not know, for my part I do not remember them.

How long before that had you known Eleanor Murphy?—I never seen her till I saw her there.

What was her name then?—Eleanor Howlett.

Had you ever any children?—I ought to have one boy.

How old is he?—He is thirty years of age, but I had a son before that time.

Which was in the service first, you or Nelly Murphy?—She was in the house before me, and after to the best of my knowledge.

What is your son's name?—Edward Cosker.

How many husbands have you had?—I never married but one man.

How come you to go by the name of Doyle?—Mary Doyle is my own maiden name.

Where do you live now?—I live now at the fort of Duncannon.

How came you to stile yourself, in an affidavit you lately made, Mary Doyle of Ravilly?—Because I lived there.

How many years ago is it since you lived

there?—Thirty years this May since I lived there.

Were you married when you lived there?—I was five years before that a married woman.

Where did you live before you came to Ravilly?—In the county of Wexford.

Where there?—I forgot the name of the place.

Recollect where you lived before you lived at Ravilly?—At Harrolstown.

How long did you live there?—I cannot remember.

Where did you live before you lived at Harrolstown?—I lived in the county of Wicklow.

Where there?—Oh! the Lord knows where, I cannot remember.

Where did you go when you left Ravilly?—

To Low Grange in the county of Kilkenny.

Do you know one Daniel Hughes?—I do.

Did he ever live with you?—He lived in the house with me at Ravilly.

What is he to you?—He is my husband's nephew.

How long did you live at Low Grange?—I lived six years there.

How long at Ravilly?—Six years. And it was the year that I went to Ravilly that I was at Dunmaine, for my husband and I parted.

Where did your husband and you part?—We parted there.

Where?—At Harrolstown.

When were you brought to-bed of your son?—The Lord knows.

Were you in service before you went to Dunmaine?—I was, in the county of Wexford and county of Wicklow.

Where?—At one Osborne's.

How long did you live there?—I was a twelvemonth there.

Was that before or after you were married?—Before I was married.

How old do you say your son is?—I say he is thirty years old next May.

Where was he born?—I cannot remember.

Do you know Robert Cosker?—I do know him.

Court. What is the tendency of this examination?

Mr. Spring. This examination tends to prove, that she was a married woman, and lived with her husband at the time she pretends she was a servant at Dunmaine?

Who was cook at Dunmaine?—I do not know his name.

Did you know the house-keeper?—I do not remember.

Do you remember major Fitz-gerald's being at Dunmaine?—There was one Fitz-gerald that lay there one night, and I do not know whether he was a major or a captain; the servants told me he was one out of the county of Carlow.

Do you remember Sarah Weedon?—I never seen Sarah Weedon but once.

Did you know Mrs. Setwright the house-keeper?—I never knew her, I do not know what was her name.

Who was the laundress?—There was Nelly Murphy and another over her, but I do not remember her.

Who was butler?—One Magher.

Do you remember Bourk the postillion?—Indeed I do not.

How long before you left the service did Dennis Redmond leave it?—He was there before me and after me.

How long did you stay there after this birth?—I stayed after the christening two or three days.

Do you remember the great eclipse of the sun?—I do not remember it.

Mr. Morton. The next witness will be one Mary Freeman, who will prove to your lordship and the jury, that she saw my lady Altham at Dunmaine big with child, and saw the child in the care of Joan Laffan; that Mrs. Heath was particularly fond of it, and that she has seen the child with my lady in a coach frequently afterwards.

Mary Freeman sworn.

Mr. Morton. Did you know the late lady Altham?

Mary Freeman. I did, Sir.

Where did you first see her?—In Tyntern, at madam Pigot's.

At the time you knew her there, what condition did she appear to be in?—She appeared to me as a woman in her case, with child.

Did she appear big?—She did indeed, Sir.

At what time was this?—To the best of my knowledge, it was a little before Christmas in the year that king George the first came in.

Can you recollect whether before or after Christmas?—That was the time that esq. Pigot had the bonfire in Tyntern.

Was it before or after that bonfire?—Before the bonfire, for we had it at Michaelmas.

Did you ever see my lady afterwards, and where?—I seen her in Dunmaine very often.

When you saw her there, did you see any child in and about that house?—I did indeed, upon my word.

What child was it?—I seen the child with Joan Laffan tending of it, at the time madam Pigot sent a letter by me there; I seen it mighty well dressed with Joan Laffan in Dunmaine house, at the time of the letter I was sent with to be delivered to my lady Altham.

Did you deliver the letter?—I gave it to Mrs. Heath, into her own hands, and she went up stairs with it to my lady, and told me when she came down, that my lady was unwell, and could not give me an answer.

Did you see the child at that time?—I did see the child that very instant in the presence of Mrs. Heath.

Was Mrs. Heath present?—It was in her presence the minute that I delivered the letter: Joan Laffan was in the kitchen with the child in her arms.

What time of the year was this?—It was about this time of the year, I cannot tell what time.

Jury. Are you sure that Mrs. Heath was present and saw the child?—Joan Laffan had the child in her arms in the presence of Mrs. Heath, when I delivered the letter to her.

Mr. Morton. At the time you saw this child, then, or any other time, what notice did you see Mrs. Heath take of it?—Why indeed, Sir, upon my word, I know no more than that I was going to the fair of Ross, and I saw her bring out the child, and she put a bundle of clothes into my lady's coach—

But I ask you, whether at the time that you saw this child when you went with the letter, and then observed this child in Mrs. Heath's presence, you observed Mrs. Heath to take any notice of it?—She did take notice of it, particular notice, and was playing with it; indeed she was.

How old was the child then?—It was about a year and half old, to the best of my knowledge.

What sort of a child was it?—It was a pretty light-headed child.

Did Mrs. Heath take notice of it as the child of a person of consequence?—She did indeed.

As the child of whom?—As a gentleman's child.

Whose child was it considered to be?—It was considered my lady Altham's and my lord's; as I heard, it was called the young lord, young Jemmy Annesley; any other I cannot tell you.

I ask you whether at any time after this, you saw this child in company with lady Altham?—I did.

Where was the next place?—I did not see it after that time, to the best of my knowledge, till I seen him at Ross at madam Butler's.

Who did you see him with there?—He was in madam Butler's arms, for he was brought from Dunmaine that very day, and she received the child and carried it up stairs to my lady.

Who brought it to Ross?—I cannot tell.

At this time in whose company was it?—There was nobody but Mrs. Heath that came down stairs.

Now I ask you whether the child that you saw after at Ross was the same you saw at Dunmaine?—I cannot tell that, Sir, but the child was there.

Was Mrs. Heath present at Butler's?—She was indeed.

Did she at that place take any notice of the child?—I cannot tell you, Sir, it was at the head of the stairs, and I cannot tell that.

[Cross-examination.]

Mr. Edm. Malone. Do you remember the year that you saw my lady with child?—A. The year king George the first came in.

Was she big with child then?—She was.

You say it was the year king George came in?—It was the year he came in.

Was it not about Christmas you said?—And was not that the year king George came in.

I ask you, if you did not say you saw my lady big with child about Christmas?—It was about Christmas.

Where did you see her then?—At Tyntern.

Was it before or after Christmas?—It was before.

You went from Mrs. Pigot's with a letter to Dunmaine?—I did, Sir.

What time of the year was it?—In the spring.

Of what year?—I cannot tell as to that.

Was it the next spring after you saw her with child?—Indeed it was not, nor the spring after.

See if you can recollect the year?—I cannot recollect the year.

You knew counsellor Pigot?—I knew him very well.

Had any accident happened to him then?—No, Sir, it was after.

How soon after?—I do not know.

Did not he break his leg in the county of Tipperary?—I cannot tell that.

Do you remember the time he broke his leg?—I was not in the family then, but in the town.

Was Mrs. Pigot at home when he broke his leg?—I believe so.

Did she go to him?—She went to him.

Did she go from Tyntern to him?—She did.

Serj. Marshall. The next witness is one Thomas Elton, by trade a glazier; he was called to Dunmaine upon some necessary repairs of that house some time after the birth of Mr. Annesley; and he will give your lordship an account that he saw this child in the house, when he was there at work, greatly taken care of by his father and mother, and I believe by the prisoner at the bar.

Court. If you have any new witnesses to any new matter, produce them; you have produced witnesses to all the points of the indictment already.

Thomas Elton sworn.

Serj. Marshall. Pray, sir, what trade do you follow?

Thomas Elton. I am a glazier.

Do you know a place called Dunmaine?—I do, Sir.

Were you at any time and when at that house?—I served my apprenticeship in Ross to James Morris of Ross, and I was at Dunmaine house several times.

In what year?—To the best of my memory, I was bound apprentice in the year 1715.

And what time were you at Dunmaine house? I was there I believe at several times.

Name any particular time.—I was there in that same year, and in 1716 and 1717, and till the separation of my lord and lady was.

Who did you see there?—The lord and the lady was there.

Whom else did you see?—I seen Arthur lord Altham and his lady, I seen Mary Heath.

Do you know any other of that family that were there?—I have remembered to see a child there.

What child was that?—A child as I thought was the son of Arthur lord Altham.

Where was lady Altham when you saw this son?—In the house, Sir.

In what manner was this child treated?—If you please I will tell you. I am a glazier by trade, and at work in the house at several times I was.

What year was this that you saw the child?—In the year 1716, to the best of my knowledge; and upon the same, I was up in the lady's chamber at work, and a messenger came up, I did not turn my face about, nor do not know who it was, and I heard a messenger say, Young master is below: in some time after my lady called Mary Heath, and said, Go and bring up my child. With that, I seen the child coming up, and upon the same, my lady embraced it as she was sitting upon the bed.

What year was this?—I think was it 1716. And she kept it there, during the time I was at work, which was close upon an hour.

[Cross-examination.]

Mr. Recorder. Say in what time of the year 1716 this was?—I cannot tell.

Was it in spring, or summer, or winter?—I cannot tell, upon my word.

Was it after, or before Christmas?—Indeed I cannot tell, Sir.

Upon your oath, was it not in the year 1717?—Upon my oath, it was not in 1717.

Well then, what time was it in 1716?—I cannot tell, Sir.

Upon your oath, was it in 1716?—It was in 1716, but I cannot particularly guess at the time; I cannot contain that, it is so long ago.

Mr. Proby, Juror. How old was the child?—As near as I can guess, a year and half, or thereabouts.

Did you ever hold any discourse within these few days with any body upon the road?—I did not, upon my oath.

Did you see nobody in a Finglass chaise between Kilcullen bridge and this?—I believe I saw your face.

Do you remember what you told me then about your knowledge of this affair?—I do not remember.

Mr. Proby. You told me then you had a subpoena the day before, and thought it was very hard you should not know sooner what you had to swear; and swore by your Maker there, you knew nothing of the matter. You said further, you were in so great a passion you threw the subpoena and shilling into the fire.

N. B. Witness Elton produced a paper and said, Here is the subpoena.

Sol. Gen. I am now, with some satisfaction, to inform your lordships that we shall call Mr. Higginson; he is a person of some reputation. We should not call him so early, but that he is falling sick and not able to attend any longer. This gentleman will endeavour to prove that he was at Dunmaine at the time of the assizes of Wexford, and we will now produce him, though out of time, to shew where my lady was at

that time, and of her being then with child. You will observe he is now called by way of anticipation, and before his time.

Mr. Proby. My lord, I have something further to mention that this man told me, which I had forgot.

Serj. Marshall. I desire, my lord, that Mr. Proby may be sworn.

Court. You must be sworn, Sir.

Mr. Proby sworn to give evidence to the Court, and his fellow-jurors.

Mr. Proby. When he told me that it was very hard he should have such short warning, and did not know what he had to swear, I desired him by all means to make haste, for the trial would be very soon, to get to town and be instructed there. No I will, says he; and immediately he set into a gallop, and I never saw him until now since.

Serj. Marshall. What were the words he said to you?—He told me, that he was in such a passion, that he threw the subpoena and the shilling into the fire.

Mr. Solicitor. It shews he was a most unwilling witness.

Mr. Proby. His words were these, By G—d I know nothing of the matter.

Serj. Marshall. Do not you apprehend that the man meant by that, that he did not know any thing of the birth of this child?—I cannot tell what he meant.

Upon your oath, Sir, what do you think he meant?—Upon my oath, Sir, I believe from the subsequent expressions, that he knew nothing at all of the affair.

Might not such a person as you saw here clearly imagine, that his seeing a child in that house was nothing material, if he knew nothing of the birth of that child?—He told me he was summoned on the trial between the old and young lord, and swore by G—d he knew nothing of the matter.

But might not he think that he knew nothing material?

Mr. Recorder. The jury will judge of that.

Mr. Thomas Higginson sworn.

Mr. Solicitor. Mr. Higginson, pray did you know the late lord and lady Altham?

Higginson. Yes.

Do you remember to have seen either of them; and when, in the year 1714 or 1715?—I saw lord Altham very often; I had the honour to receive from the year 1710, Arthur lord Altham's rents for part of his estate.

You saw my lord Altham very often?—I saw him very often.

Do you remember to have seen either of them about the middle of April 1715?—Yes, the middle of April 1715 I called at Dunmaine.

How came you to call there?—I was receiver to Arthur lord Altham, and Arthur late earl of Anglesea.

Go on, and give an account of what you know of this family.—My lady I saw when I called at Dunmaine, my lord was not at home.

Do you know any thing of her being with child?—That time I saw her, I took her to be big with child.

Court. What time was that?—In the middle of April 1715.

Mr. Solicitor. What time in April do you say?—The middle, in Easter week 1715.

Where did you see her then?—At Dunmaine.

Inform the Court and jury what look or appearance she had of being with child.—She appeared to be big with child to me, and towards the last month of her time.

Tell us wherefore it is that you have made yourself sure it was then?—I had a pocket book in which I kept my memorandums; I was receiving rents for the earl of Anglesea, and I sent my son to receive the rents of the Nanny-water estate for lord Altham; I knew he would be at home with the money; and I called there for lord Altham to send one to Enniscorthy with me for the money.

The Witness's voice being weak, Mr. Smith, an officer of the Court, is directed to repeat what he should say.

Mr. Smith. Tell what you say, sentence by sentence, and I will repeat it.

Higginson. I called to see if lord Altham was at home to send one with me to Enniscorthy, to get some money for himself.

Did you see my lady or my lord at that time?—My lady only.

How can you be particular concerning the time of your being at Dunmaine?—Because the days that I received lord Anglesea's rents I had it entered in my pocket-book, and I gave the book to the prime serjeant Malone at the last trial.

What were the contents of that book?—Lord Anglesea's receipts.

You say lady Altham looked like a woman big with child?—She did.

What conversation had you with her then?—Very little, only that I asked for my lord, and told her what I called for; for I dared not go into the house, for if I had, lord Anglesea would have turned me out of the receipt of his rents.

Tell what passed between my lady and you.—I told her I called to get my lord to send one with me to Enniscorthy; and my lady came down and made me drink, and I drank a good deliverance to her ladyship in two glasses of white-wine.

Who did you see with my lady?—The maid was there, but I do not know her name.

Now tell us how did you dispose of yourself after you left Dunmaine?—I went to Enniscorthy, and dined with major Rogers that day there.

Where did you go from thence?—To a friend's house in Wexford early next morning, Thursday morning.

Recollect the day you were at Dunmaine?—I was there on Thursday going, and Tuesday coming back.

What day did you go from Dunmaine to Enniscorthy?—I came from Dunmaine to Enniscorthy on Tuesday.

How long did you stay at Wexford then?—Not above an hour I believe, we had but one pint of wine.

Did you see lord Altham at that assizes?—Yes, he gave me the receipt.

Did you see my lady there?—No, I did not, nor hear of her.

Do you believe, if she had been there, you would not have known it? Could she be there, and you not see her?—She might be there for me.

Pray, Sir, you say you were receiver to my lord Anglesea, did there come any account to the earl of Anglesea of the birth of a child?—Several of Ross tenants did come to lord Anglesea in July——

[Cross-examination.]

Mr. *Le Hunte*. Pray, Sir, do not you say that you were at Dunmaine on Easter-Tuesday?—I was there on Thursday and Tuesday.

Were you there on Easter-Tuesday?—I was.

What year was it?—By my books on Easter-Tuesday, in the year 1715.

Where were you the Monday before?—I believe I was at Mr. Giffard's; I was at Houghton's; I know I was in that neighbourhood on Easter-Monday.

Upon your oath, Sir, where were you on Easter-Monday?—I believe I was at Mr. Thomas Houghton's on Easter-Monday.

How near is that to Dunmaine?—I believe four or five miles.

Why are you so certain of being at Dunmaine and at Houghton's on Easter-Monday and Tuesday?—Those were the days I received money, and they were entered in my book, that is the reason of my certainty.

Do you know a place called Peppard's Castle?—I do know it.

How far from Dunmaine is Peppard's-Castle?—Which way would you have me go?

The common road. How many miles distant is it?—I believe sixteen miles.

Where were you upon Easter-Sunday?—I believe at Clomines.

How near is that to Dunmaine?—Four or five miles, I do not know well.

How far is Clomines from Peppard's-Castle?—I believe as far as Dunmaine, it cannot be less than 16 miles.

Look at that paper and see if it be your hand-writing; is that your name?—I believe it is.

When you gave receipts, did you date them on the days the tenants paid you the money?—Some I did, and some I did not.

Explain yourself.—When I would go abroad, I would leave receipts drawn according to the days the tenants promised to pay their rents, some with my wife, and some with my son, and some with Timothy Murphy that received for me.

Is that all your hand-writing?—I believe it is.

Mr. *Le Hunte*. I desire that paper may be read against himself.

Clerk of the Crown. "Received from Mr. William White now and formerly the sum of twenty-five pounds sterl. in full his last Michaelmas rent, due out of Peppard's Castle, &c. to the right honourable Arthur earl of Anglesea, received by his lops order this 18th April 1715.

25l. 0 0

THO. HIGGINSON."

Court. That is Easter-Monday that year?

Higginson. I will tell your lordship how that was. I was to pay major Rogers money for timber for my lord Anglesea, and I left my son the receipt to get the money, who was to meet me there with it.

Is the date your own hand?—Yes, I believe it is.

And did you date receipts before you received the money?—Yes, very often.

Mr. *Le Hunte*. What time did you enter this receipt in your book?—When I came home again.

When was that?—I entered it on Wednesday, when he brought me the money to Enniscorthy.

What money did he bring?—He brought me sixty odd pounds; I gave him eight receipts to call upon the people with them, and I got the money on Wednesday.

When did you enter those receipts in your book?—I believe I entered them before I went from home.

How so?—Because they promised me the payment.

Did you draw this receipt at the time that it bears date?—I gave this receipt to Tim Murphy or my son before I went away, and they told me they would be there that day with the money.

See if this be your book and hand writing?—It is.

Was this book kept by you?—It was. I lent it to Mr. Wilson.

Is that entry your hand-writing?—It is my hand-writing.

When was it entered?—It was entered when I came back.

Mr. *Mark Whyte*. Reads the title, viz.

Peppard's-Castle.	Mr. William White.	is	Debtr.	Year Month and Day	} Contra	— is —	Credr.	—
				1715	2 Bills		4 10	
				March 28	Dit. in full Michaelmas		11 17	8
				April 18		1714		

Mr. *Le Hunte*. Where was this book kept?—When John Wilson came to receive the rents of lord Anglesea after me, I lent it to him.

Court. Can you now say that it was the 18th of April, Easter-Tuesday, that you were at Dunmaine, since it appears by your book you entered receipts of that date elsewhere?—I left eight receipts for my son and Murphy, to give the people that paid the money.

How came you to enter them the 15th and 18th?—Because they were to go there them days.

Since your book shews your hand-writing at another place, the time you say you were at Dunmaine, can you, from any other circumstance, recollect that it was Tuesday the 18th of April that you were at Dunmaine?—I believe it was Tuesday the 18th by my pocket-book.

Court. See and get an almanack for the year 1715.

Does your pocket-book and this book contain the same things?—The pocket-book is of different things from this book.

Mr. *Le Hunte*. Did not you swear on the trial in the Exchequer, that you received four pounds from Mr. Houghton the day before you went to Dunmaine?—I believe so.

What day did you receive that money?—I believe it was on Monday morning.

What was the denomination that rent was paid for?—I do not know indeed, I know no

denomination now, but only Ballysop and Dunmaine.

Did not you swear that you received from Mr. Giffard of Ballysop 10*l*. on Tuesday?—Yes, I did.

Was not that the day you went to Dunmaine?—Yes, I believe I did that morning.

Did not you say, you received from Patrick Sutton 20*l*. the day before?—I received some on Friday, and Saturday, and wanted forty shillings; and they sent it after me on Monday.

Did you swear, or did you not, that you received Sutton's money on Monday?—I did not on Monday. I wanted about forty shillings, and I got that on Monday or Tuesday following.

Upon your oath, Sir, did you not swear that you received twenty pounds from colonel Sutton on Monday?—I do not know whether I did or no; I did receive twenty pounds in all; but I said then as I say now, that there was forty shillings behind, and he sent it after me on Monday.

What day did you receive the money from Mr. Giffard?—On Monday, I believe.

What did you receive the money from Mr. Sutton for?—It was for the rent of Clomines.

Look at that book now; is that your hand-writing?—The upper part is, that is my hand-writing.

And whose is the other?—That is my son's; I told counsellor Ford so before at Wexford.

Clomines	Col. Wallis	is	Debtor	Year	Month	Contra	is	Creditor
Arrears				and Day				
				1713.				
				Novemb. 30.		Mr Higginson's Account	233	14 11½
(His own writing.)				1714 June 17th.		Do.	48	00 00
				November 2d.		Do.	52	00 00
(His son's writing.)				1715 April 5th.		Mr. Giffard	30	00 00

(His own writing.) 363 14 11½

Were you present at the time it was entered?—No, he was at Ross, and Joe White the merchant gave him a bill for 30*l*., and I allowed this as cash, the tenants all received it as cash; they had a share in it, and I allowed it as cash.

Why did not you make your entries in your book at that period of time?—I had not that book with me; I had lent it to John Wilson.

Was the money paid by the tenants at the time set down in the book?—That was the bill that every one of them had a share in.

Was the 30*l*. received on the 5th of April?—The bill was.

Did not you swear you received the 30*l*. on Monday?—It was good 30*l*. to me, and so I swore I received it on Monday.

Where is your pocket-book?—I have it not now.

Did not you swear upon your former examination in the Exchequer, that you were agent to my lord Anglesea from the year 1711, to the year 1717?—No, not till the year 1717; no, if it be 1717, it is wrong printed.

Upon your oath, were not you lord Anglesea's

agent in the year 1717?—I was not discharged till 1713 or 1719 for that matter, but Mr. Wilson came in before that.

Did you continue agent for my lord Anglesea after the year 1717?—No, nor that year, but I received for him in 1716.

You received in the year 1716?—I did then in several places.

Upon your oath, did you in 1717?—I cannot charge my memory; I am sure I did in 1716.

Look at this bond, and see if it be your hand-writing?—I did see it, it is.

Mr. *Le Hunte*. My lord, this bond is to shew that he was discharged long before this time, and we desire it may be read.

Mr. *Marke Whyte* reads part of the bond, which bears date the 26th day of December 1715.

Mr. *Le Hunte*. Did you ever settle any account subsequent to the account in this book?—Yes, I did; six months after.

Mr. *Solicitor*. Would you be understood that that was the book you carried about with you?

—No, this was the book that was left at home.

What book did you take with you commonly?—I carried a little pocket-book about me.

Mr. Recorder. When you came home to that book, did you make entries different from your pocket-book?—Some I did.

How so? then you had no certain guide for keeping your accounts?—Whenever I was promised any money, I entered it down in that book the day I expected to receive it, and left receipts with my wife or son, for I was very much abroad.

How could you enter the day before you knew you would be paid?—They would keep the receipts till they got the money.

Serj. Marshall. My lord, I desire the whole conditions and all the bond may be read; Mr. White read only a part of it, and I must insist upon the whole being read, to shew that he might have received the rents for a year after the date thereof.

Mr. Bowden reads the bond as follows:

“Know all men by these presents, that I Thomas Higginson of Rahigurrin, in the county of Wexford, gent. am held and firmly bound unto the right honourable Arthur earl of Anglesea, in the sum of 1,000*l.* sterling, lawful money of Great Britain, to be paid to the said Arthur earl of Anglesea, or his certain attorney, executors or administrators, to the which payment well and truly to be made, I do bind myself, my executors and administrators, firmly by these presents, sealed with my seal, and dated this 26th day of December, Anno Dom. 1715.”

“Whereas the above-named Arthur earl of Anglesea did constitute and appoint the above-bound Thomas Higginson to be collector and receiver of his rents, arrears of rents, revenues, duties and profits of his lordship's estate in the county of Wexford for some time past. And whereas the said Arthur earl of Anglesea did on the 1st day of May last annul and make void the said power: now the condition of the above-written obligation is such, that if the said Thomas Higginson, his executors or administrators, do and shall, on or before the 1st day of May next ensuing the date of these presents, deliver up to the said Arthur earl of Anglesea, his heirs or assigns, a just and true account of all such rents, duties, arrears of rents, fines, issues, goods, chattels, profits and perquisites, as be the said Thomas Higginson hath at any

Ballydaboy, &c. Law: Nangle is Debr.

time heretofore levied or received for the use of the said earl, as his collector or receiver, and do and shall then pay, or cause to be paid unto the said Arthur earl of Anglesea, his heirs or assigns, all such sum and sums of money, as shall then appear to be and remain due to the said earl, his heirs or assigns, on balancing of such accounts; and also do and shall at any time when demanded, well and truly account for, and pay unto him the said Arthur earl of Anglesea, his heirs or assigns, any sum or sums of money, that shall or may at any time or times hereafter, within the space of one year from the date above-mentioned appear to have been received by him, the said Thomas Higginson, for the use, or on the account of the said earl, and not accounted for with him by the said Thomas Higginson, on or before the said 1st day of May next ensuing (if any such there be) that then the above obligation shall be void, or else it shall stand in full force and virtue.

THO. HIGGINSON, 1715.”

Scaled and delivered in presence of us,

DEN. BRIEN,

JOHN WILSON, junior.

Serj. Marshall. He had a right, it appears, to collect all the arrears that were due for a year, he had a year allowed him to gather them in.

Mr. Recorder. The bond says, if it shall appear within the space of one year, that he had received any sum or sums of money; but there is no power given him to receive any rents.

Mr. Le Hunte. Were not you tenant to part of Arthur lord Altham's estate?—Not at all.

Did not you hold a house from him in Ross?—I never had a house in Ross.

Who came into possession of lord Altham's estate upon his death?—I do not know, I was not employed then.

Were you receiver to lord Altham till his death?—No, till the year 1717 or 1718.

How far is Ballydaboy from Dunmaine?—I cannot tell.

How near is it to Peppard's Castle?—I believe within a mile.

Is that your hand-writing?—Yes, I saw it before.

Look at it again, was it entered the time it bears date?—I believe the Wednesday before I left home.

How came you to enter it then?—There was a fair to be on the 19th, and that was the reason.

Year	Month	Contra	is	Credr.			
	and Day						
1715.		Ditto			1	16	6
April 19th.							

The Bond is given to the Jury.

Serj. Marshall. You will observe, gentlemen, there are two clauses in the bond; the first that he shall account for all sums received; and the next that he shall account for all sums he should receive.

Court. Not at all; he was superseded.

VOL. XVIII.

Court. If you mean to produce other evidence to the same thing, I shall stop you; we have been near twelve hours in court, and cannot adjourn.

Mr. Edmond Malone. And they said, my lord, they would not take up eight hours in ten, if the trial should hold no longer.

K

Court. Let us know your next witness, and what to be examined to; say what they are.

Serj. Tisdall. The next is one John Warren, produced to the same purpose of several others.

Court. Let him stay then. Is he a man of figure? What is his addition?

Serj. Tisdall. He is a gentleman, my lord.

Court. Let me tell you, there is no safety in a multitude of witnesses.

Serj. Tisdall. A multitude of people agreeing to the same fact greatly corroborates it.

Mr. John Warren sworn.

Serj. Tisdall. Mr. Warren, were you ever at Dunmaine?

Warren. I never lived at Dunmaine, but I belonged to one Mr. Chambers, that lived at ———, and went there several times about his business; my lord's steward would buy fat sheep from him——

Were you ever at Dunmaine, Sir, while my lord and lady Altham lived there?—I was there several times whilst they lived there.

Did you ever see a child there?—Indeed I did see a child there.

What sort of a child?—They called him *Jemmy*, he was a boy.

Whose child was he?—I do not know whose child, but my lady called him her child, and came one evening and asked, How does my child do? putting out her hand to him.

Who did you see the child with?—With a servant.

Can you say whose child it was?—It is impossible for me to know whose child it was, my lord called him his son.

[Cross-examination.]

Mr. Le Hunte. How do you get your livelihood?—I have a livelihood.

Have you any trade?—I have no trade.

Upon your oath are not you a beggar?—I am not; I have something of a livelihood.

Court. Unless you can now tell us what your witness will say, I assure you we won't have the time of the Court taken up in this manner.

Mr. Archdale. For my part, my lord, if they bring a hundred such witnesses, I'll never think it worth my while to listen to them.

Mr. Daly. We'll bring but as few as we possibly can.

Mr. Recorder. We shall bring very good witnesses, and come to the point as soon as we can, when we begin our defence; but these gentlemen, I perceive, will not give us an opportunity.

Court. Unless you have something new to offer, or a man of greater figure or honour to corroborate what these witnesses have said, we shall not hear him. If you have any person of undoubted credit, in the name of God produce him.

Mr. Mac Manus. We have many more to examine, and those witnesses of undoubted credit, and I hope the Court will indulge us so far as to hear their evidence. We have examined

many, it is true, and I beg leave to say there has been a great consistency of truth in their testimony, and they have sworn very materially; and, my lord, if we falsify the traverser in any one point, we will falsify her in the whole; we have twelve men of honour to try her, and I desire we may be permitted to call Robert Kennight, he is a very material person in my brief.

Court. What is it that you produce him to?

Mr. Mac Manus. He is a material witness upon my paper; he will prove to your lordship that lady Altham (which is the first point before you upon this perjury) was big with child. My lord, they will not let me open his evidence any farther, because he is here.

Court. Bring him up.

Robert Kennight sworn.

Mr. Mac Manus. Did you know the late lord and lady Altham?

Robert Kennight. Yes, I did.

Where did you live when you knew them?

—In Garryduffe first.

Did you know them while they lived at Dunmaine?—I did, Sir.

How far from that did you live?—In the bounds of Dunmaine, they joined together.

Was my lady, or was she not with child at any time that you knew her at Dunmaine?—In my opinion she was.

Have you any reason for that opinion?—All the reason I have for it is, because I seen her big, and like a woman with child.

Did you see any child in the house of Dunmaine?—I did.

Did you know of any bonfires and rejoicings upon any, and what particular occasion?—I did, for joy about the young child that my lord and lady had.

Pray, do you know Mrs. Heath?—I never knew her, I made no acquaintance with her.

Do you remember to have seen her at Dunmaine?—I never did see her or know her at all.

I shall ask no more questions.

Court. How many bonfires were there made?—None but one.

Where was it?—At the great house in the back-side in the avenue.

Mr. Solicitor. My lord, we have examined such a prodigious number of witnesses to one point, that if my judgment had prevailed, you should have had an end of them long ago; but we shall now call our last witness for the present, and trouble your lordship no more, except in the counter-proof upon the reply we should have occasion to produce fresh proof. This witness is a witness that was examined upon the last trial in ejectment in the Exchequer, her name is Joan Laffan.

Court. Why did not you call her first?

Mr. Solicitor. We look upon her to be a very material one, and hope she will satisfy your lordship and the jury of this whole affair.

Court. I was wondering what was become of her all this time.

Joan Laffan sworn.

Serj. Tisdall. Mrs. Laffan, did you know my lord and lady Altham?

Joan Laffan. Yes, Sir.

Were you ever a servant there?—Yes, Sir.

What was your service?—I was chamber-maid when I came there first.

What time did you come there first?—The year after the death of the queen: I was at colonel Deane's at her death, and came the year after to lord Altham's.

Pray, how long did you continue in that employment of chamber-maid?—About a year and a half, and then I was employed to nurse master Jemmy Annesley.

How old was he then?—Near upon a year and half, or thereabouts.

Pray now, whose child was he?—My lord and lady Altham's.

By whom were you employed to nurse him?—By my lord and lady Altham.

Pray, what time did you go into my lord's service?—To the best of my knowledge, it is the harvest; I lived at colonel Deane's till after king George the first came in better than half a year, then I left it, and was a little while with my friends, and then went to lord and lady Altham's.

Pray, can you tell in what month you went there?—I cannot recollect the month, but, to the best of my knowledge, about harvest.

In what year was it?—I cannot exactly tell what year.

But you say it was the year after the king came in?—The year after, or thereabouts.

How long after you lived as a chamber-maid was this child put into your care by my lady?—Near upon a year and a half after, or thereabouts.

Who was it put the child into your care?—Lady Altham.

Pray, did Mrs. Heath know that you took care of it?—She did, Sir.

Where was the child before he was put into your care?—The child was at nurse before; when he came from the wet-nurse, he was put into my care.

Pray now, how old was the child when you were hired?—I believe the child was three or four months old when I was hired, there or thereabouts.

How old do you say he was?—About three months, or better, I cannot exactly tell that.

How old was the child when put into your care?—Near upon a year and a half.

How long after you were hired was he put into your care?—About what time of the year?

—About a year and half after.

Were you a year and half chamber-maid before you had the care of him?—Yes, I believe I was near upon it.

How long did you attend this child before my lady went away?—Half a year.

How long did you attend the child before my lord and lady parted?—About two years old the child was when they parted; so that I at-

tended him half a year before my lady went away.

Before this child was put into your care, where was it?—At the wet-nurse.

You say, that before this child was put into your care, it was put unto the wet-nurse?—Yes.

Was it ever brought up by her to Dunmaine house?—Yes, it was; sometimes my lady would go on fine days and fetch it in the coach with her, and the nurse would bring it other times.

Was Mrs. Heath in the service then?—She was indeed.

Pray how did my lady behave to it?—My lady was very fond of it.

Who used to dress the child?—Mrs. Heath dressed it; its day clothes were kept in the house, and the child was dressed by her and my lady; and the night clothes were kept with the nurse.

How did Mrs. Heath treat this child? Was she employed in any sort about it?—Sometimes to dress him, and take him in her arms that way, very fond. I know that when there were jellies made, or jellies left, it was given to the nurse, and put into her whey and broths to drink.

Were you at Dunmaine at the time of the separation?—I was there.

Where was this child then?—In the house.

How did my lady behave to the child at parting?—She desired very hard to take the child with her, and my lord would not let her have him.

Pray, was there any thing happened particular to the child at the time of the parting?—My lady desired very hard to have the child; she sent down for Mr. Taylor to come up and hand her down stairs; so, when he came up, I hope, says she, you had not a hand in this wicked plot contrived for me. He said, No, he had not. Says she, If you are so good as to prevail on my lord to let me have the child, I do not care if I never set my foot in Dunmaine again.

What happened upon that?—I know that she said so, for I stood at the stair-head when Mr. Taylor handed her down stairs.

[Cross-examination.]

Mr. Spring. Where were you hired into the service of lord and lady Altham?—My lady hired me.

Where?—In her own house.

Are you sure my lady hired you?—She did indeed, she did not know me, and she sent to a gentlewoman to get a character of me, and she said she would give her word for 1,000*l.* for me.

Who was that gentlewoman?—It was Mrs. Synnot, she sent her footman to her.

You say my lady was at Dunmaine at that time?—She was.

Upon your oath, did she continue the whole month of August at home?—I cannot tell whether she did or not,

Was she, or was she not at home the month of August?—I cannot tell whether she was at home or not.

Did she lye a week abroad at any time in August?—I cannot recollect.

Was she a fortnight abroad in August?—I cannot tell.

Was she the whole month of August abroad?—I cannot discharge my memory.

Was she the whole month of September?—I cannot discharge my memory when she was at home or abroad.

Was she the month of October?—I cannot tell.

Was she in November?—I cannot tell.

Or December?—I cannot tell.

Was she the month of January?—I thought I did not come here to scold.

Was she absent for three months together?—I cannot tell, but she did go away for three months.

You say that my lady used to go in a coach to visit this child?—She did.

Did not you say that the child was brought every day to the house by the nurse?—Sometimes the nurse came up with him, and sometimes my lady went to the nurse's to see him.

Did not this continue every day during the whole time that the child was at nurse?—Sometimes, I do not say every day; but sometimes my lady would go there, and sometimes the nurse would bring him to the house.

To what place did you go after you left that service?—I went to Cheek-Point.

Do you know Mr. William Bolton?—I do.

Is he an honest man?—I believe he is.

Do you know Maynard Walker?—Yes.

Is he an honest man?—He has a very indifferent character, and all the family; I know they helped to ruin me.

Do you know William Elms?—I do.

What character has he?—I see nothing by the man.

What character did you give him when you were examined in the Exchequer?—What character did he give me?

Did not you swear then that he was an honest man?—I do not say to the contrary now, do I?

Did not you then say, that you could make him blacker than he could you?—I do not know but I did.

You say, you saw the child in the coach with my lady when she was going away?—I did, and she kissed the child in the carriage, and the child was taken away from her.

What time of the day was that?—It was after dinner-time, between that and evening; towards the evening.

Repeat that again?—It was towards the evening.

Who used to visit at Dunmaine when you lived there?—I cannot tell the company exactly.

Did Mrs. Giffard visit my lady?—She did sometimes.

Did my lady visit her?—My lady visited her sometimes, I cannot tell exactly how often.

Did you know Mr. Palliser at that house?—I did.

How long did he use to stay there at a time?—I cannot tell how long.

Did he see the child?—He did see it.

Did he know whose child it was?—He knew the child was my lord and lady's.

Had he ever the child in his arms?—I cannot swear he had the child in his arms.

Court. Do you know Edmond Howlett?—I do.

Did my lady go away in a coach or chariot?—To the best of my knowledge it was a four-wheeled chair.

Was any body with her?—Yes, Mrs. Heath.

Was there any body else with her?—No body else that I know of.

Was the child in the chair?—I seen the child was taken to her, and she kissed the child when it was taken from her.

Did she desire to have the child brought to her?—She desired the child to be handed to her, and then she kissed it.

How many horses were there to the chair?—To the best of my knowledge there were two.

Was the chaise open before or at the top?—Upon my word I cannot give my word for that.

Was it an open chair, or a chariot?—I cannot give my word for it, what carriage it was.

Was it before or after dinner my lady went away?—It was after dinner, Sir.

Mr. Spring. Were you ever in the house the child was nursed in?—I was.

Was the wall a mud or stone wall?—Stone and mud, mortar wall, stone and mortar mixed, stone in the lower part.

Do you know Sarah Weedon?—I did.

What did you tell Mr. Bolton concerning my lady's having or not having a child?—I never told him any thing, for he never talked to me of the subject at all.

Mr. Solicitor. My lord, I told you she should be the last witness upon the direct examination; we reserve a power to reply to any new points, if necessary.

Court. You shall, to any new facts.

[Here the evidence of the prosecutor was closed.]

Court. How many witnesses have you, gentlemen of counsel for the traverser? Have you any objection on either side to the jury having some refreshment?

Counsel. We have no objection.

Jury. My lord, we chuse to go on, and will not have any refreshment at all; but desire Mr. Recorder will consider how long we have been in the box, and that he will shorten the trial as much as is consistent with the benefit of his client.

Mr. Recorder. My lord, it is with the utmost concern that I am to lay any thing before the jury at so late an hour, but as this is a matter of great consequence, I am sure they

will bear me with patience, and I shall make it as short as possible in ease of the jury.

My lord, there are two points that now are in question; for though there are four or five assignments of perjury, yet they all end in two; one is, that lady Altham was with child while the traverser, Mrs. Heath, lived with her; and the other, that she was brought to-bed of a son.

My lord, it appears from the evidence of the prosecutor, that my lady Altham came first into this kingdom in the month of October 1713, and the fact is so, and that she never was in this kingdom before. This will be material when I come to speak to the evidence, and remark upon the particulars of it. It appears from the evidence, that my lady came to the house of Mr. Briscoe in this town; there she staid till some time in December, that my lord Altham came to town and was reconciled to her, and though they have endeavoured to prove that they left Briscoe's, and went into lodgings before they went down to Dunmaine, we shall prove that my lord Altham remained at captain Briscoe's with my lady, and never went to Mrs. Vice's, the place they pretend he removed to, till he went to Dunmaine in the county of Wexford. We shall prove that they remained there, and went from the house of Briscoe to Dunmaine. My lord, we shall prove, though they swear that they stayed but three or four days at Briscoe's after my lord came, for so Alice Betts and the other witnesses have sworn, that they stayed at Briscoe's during their continuance in Dublin; and that my lady, when she lodged at Mr. Briscoe's, hired Mrs. Setwright, the house-keeper, though those persons could not remember her name. We shall prove that Mary Waters was hired for the chamber-maid, and Betty Doyle for laundry-maid, and that my lady sent these servants down from Briscoe's to Dunmaine before her, two days before my lord and lady set out; and these people will prove that two days before they set out, my lord and lady lodged at Briscoe's, and that these servants set out from thence to Dunmaine. We shall prove when they came to Dunmaine what servants were there, for it will be material to the jury to know who they were, because we shall not give evidence of roving, straggling people. We shall prove by a concurrent testimony of all the servants of the family, that my lady never was with child at Dunmaine, or any where else in Ireland. We shall prove, that in the months of September, October and November 1714, when it is sworn she was in this town sick, and visited by a physician, that she was then in the county of Wexford. We shall prove that one Mrs. Giffard, a near neighbour and acquaintance of lady Altham's, had twins, and that my lady was at the groaning, and so far from being with child, that she lamented her not having the prospect of a child; and we shall prove that my lady, at the time that these witnesses for the prosecutor swear that she was at Dunmaine, and near lying-in, and lay

the time in April or May 1715, we shall prove by a cloud of witnesses, that she went to the spring assizes of Wexford that year, was at the assizes, and at the trial of one Masterson and Walsh for enlisting Pretender's men. We shall prove by several witnesses of undoubted credit, and by the person where she lodged, that she was there all the time of the assizes, and was there the 18th day of April, and at the trial of these people, when Higginson swore that she was at home and big with child; and it will appear to your lordship, that she was so far from being with child, that she did not return to her own house till the 22nd of April. We shall then prove, that after that she came to Dublin; that she came here in May following, which, if what they swear be true, could not be; for they say she lay-in then, and that it was above three weeks before she got out of her chamber. We shall prove that she was in Dublin the king's birth-day, when the fireworks were made on that occasion, which was on the 28th of May. My lord, one would imagine that when we shall have given you the concurrent testimony of all the servants of the family, and other undoubted witnesses touching these facts, we should have little occasion for further proof; but we shall go to facts that will overturn their witnesses, and shew that all this is a made, contrived affair. My lord, they pretend that this child was christened, and that Mrs. Pigot and counsellor Cliff and Mr. Colclough were godfathers and godmother; they swear that they were all present at this christening. These are circumstances we shall shew to be false; and if we can prove that Mrs. Pigot was not in the county of Wexford from November in the year 1714, till after the separation in the year 1716, all this contrivance must fall to the ground. My lord, we shall prove it incontestably; we shall prove that Mrs. Pigot came to Dublin from the county of Wexford in November 1714, that she was in Dublin in the year 1715, that her husband broke his leg, and happened to lye ill in the county of Tipperary, and that she went to him and continued there, and never returned to the county of Wexford from November 1714, till some time in the year 1717, which was after the separation; and we shall prove what will fix this, that the great eclipse was the 22nd of April 1715. Now, they lay that this christening was in May or June that year; for they say lady Altham was brought to-bed in May, so that Mrs. Pigot must have been in the county of Wexford, if at all at the christening, in May or June. Now, my lord, we'll prove that at the time of the eclipse, Mrs. Pigot was with her husband, and was actually in the county of Tipperary the 22nd of April 1715, and continued there many months after. When we have proved this, we shall prove that Mr. Cliff was not in the county of Wexford in May or June 1715, the time of his being sworn to be godfather to this child; we shall prove he was in Dublin during the term, and continued sick here after, till the

middle of June. We shall prove, that at the time of Mr. Colclough's being said to be godfather, there was a particular quarrel between him and my lord Altham; besides that, Mr. Colclough was a papist at that time, and died one; and then you'll judge whether they would have chosen a papist godfather to a child born to inherit so great an estate and such honours. When we have proved this, we apprehend that this concurrent testimony of all the servants of the family of my lady's having never been with child, and the proof of her being at Wexford at the assizes, and after in Dublin, and other circumstances, will convince any reasonable man that this is all a fiction. I could open many other circumstances, but rather chuse to spare the time, and let the jury hear the witnesses.

Mr. Smith. My lord, the first witness we produce is Mrs. Vice; you have heard of one Vice in Essex-street, to whose house lady Altham was supposed to go to lodge the first time she was in Dublin, after my lord and she were reconciled at Mr. Briscoe's: we have the daughter of that lady, and she will give your lordship a true account of that transaction, and the true periods of time concerning their lodging there.

The Examination of the Traverser's witnesses began at a quarter before nine o'clock at night.

Mrs. Letitia Vice sworn.

Mr. Daly. Mrs. Vice, I'd ask you a question, madam. Pray, do you remember when the late lady Altham came first into this kingdom?

Mrs. Vice. I do remember her. Not when she landed; but I remember her being in the kingdom.

The first time that you remember her being in the kingdom, where did she lodge?—I heard she lodged at capt. Briscoe's.

Serj. Tisdall. I am to inform you, you are not to tell what you heard.

Mr. Daly. Pray, madam, where did you first see her?—I first saw her in my mother's house in Essex-street.

Pray, can you recollect the first time that she came to lodge at your mother's?—Indeed, sir, I can't.

Is it from the country she came, or from England?—From the country I believe.

Pray, madam, what time was it?—Indeed, sir, I can't tell.

Do you remember any thing of her living at Briscoe's?—Yes, I heard she lived there.

Do you remember the time, madam, when she lodged there?—I only heard she lodged there; I never was to see her there.

Do you know Mrs. Cole?—No, Sir.

Do you remember whether my lady came from the country to your mother's?—I believe from the country.

What reason have you to believe so?—I have reason to believe so.

Why? did you observe what people came

with her?—I did not, Sir, I was then very young.

Do you remember the fire-works that were at the birth-day of king George the first; and were my lord and lady at your mother's house then?—I remember them being at my mother's house one birth-day of king George the first.

How often were they at your mother's?—They were there twice, and I believe once was before the birth-day; they were there at the death of the queen.

Was that the first time of their being there?—I cannot tell whether that was the first time.

Were they ever there lodging but twice?—But twice, to the best of my knowledge.

Was your father living then?—My father was dead.

Will you please, madam, to give a particular account of the times they were there?—I can't give a particular account, but that they were there when the queen died, and one birth-day of king George the first.

What day of the week was that birth-day?—It was on a Saturday.

Why do you remember it to be on a Saturday?—I remember the Restoration was on Sunday, and my lady had a mind to have a bonfire made before the door, and my mother was not willing there should be one, and there was some dispute on that; and that makes me remember the day of the week.

Do you recollect, madam, whether there were any fireworks that birth-day?—I believe there was, Sir.

Did you see any body at those fireworks looking at them?—We were pretty near the Custom-house, and I believe I might see some of them there; but was not with my lady to see them.

But you say the first time my lord and lady lodged at your mother's, they came from the country?—To the best of my knowledge they did.

Pray, madam, when first my lady came from England, did they come to visit at your house or not?—My lady dined with my lord there; but I don't believe she came to lodge till after she came from the country.

Mr. Morton. There was a direction of your lordship's, that the witnesses should be kept together till called for; but I am to inform your lordship here are two of the witnesses walking about the court.

Mr. Annesley. I beg, my lord, I may explain this matter to your lordship; I've been with them for these three hours, and Mr. Hervey did not leave the place till it was said he was sent for by the Court.

Mr. Daly. My lord, the witness says, she remembers, that when it was said that my lady came from England, that my lord and she came to dine with her mother.

Where did they lodge at that time?—I heard they lodged at capt. Briscoe's.

Did they lodge at your house then?—Not when they came to dine there.

Did my lady ever lodge there before?—No.

You remember those fireworks that were at the time they lodged at your mother's house; how long did they continue in town after?—I can't tell.

Well, madam, the last time, which is the second time that they came to your mother's, how long did they continue there?—I can't be exact to the time: they were there a good while, but I can't tell how long, Sir.

What time of the year was it?—I can't recollect the time of the year.

What time of the year were they there the second time?—They were there the eight and nine and-twentieth of May; but how long before that I can't tell.

What reason have you to be exact as to those days?—Why, the first being the birth-day, Sir, and the fire-works being at that time, and my lady's desire of having a bonfire on Sunday night, which was the Restoration.

How long did they continue in town after?—I can't be exact how long they continued in town.

Do you remember any thing of twelfth-night?—I do remember my lady was there one twelfth-night, but what year I cannot tell; and I remember there was a twelfth-cake.

[Cross-examination.]

Serj. Marshall. You say, you are sure that lady Altham was at your house at the death of the late queen Anne?—I am, Sir.

Pray, do you remember the 20th of October following that?—No, Sir, I don't.

Do you remember any thing remarkable that happened that day?—I don't.

Serj. Marshall. I tell you then, that was the coronation of king George the 1st.

I ask you now, were there not the fire-works on that day in Dublin?—I don't know indeed.

Do you remember any thing particular of the 20th of October?—I do not, Sir.

Can you take upon you to say, that lord and lady Altham were not in Dublin in October 1714?—I can't take upon me to say whether they were or not.

Can you, that they were not in November 1714?—I can't, Sir.

You mentioned a twelfth-day; now I ask you, can you say they were not here on the twelfth-day in 1714?—I can't say that; but my lady was one twelfth-day at my mother's.

Can you say it was not that year?—I can't say whether it was or not.

Pray, can you say, since the only reason you give was, that there were fireworks, that it was not the fireworks on the 20th of October 1714?—I say it was not that day that I remark; it was the 28th of May, Saturday, and the Sunday was the Restoration.

Can you say that that was not the 28th of May 1716?—Indeed I can't take it upon me to fix the year; but believe that it was the year 1715, and my reason for it was, that it was Saturday.

I ask you, madam, can you say that it was not May 1716?—I do not believe it was May 1716; I say it was on a Saturday, whatever

was the year it was in; whether it was the year 1715, or 1716, it was on a Saturday, and that was the year.

Court. Saturday was the day in 1715 by the almanack.

Serj. Marshall. Do you know one Catharine Mac Cormack?—I do, she was my mother's servant.

Was she a servant in the family at the time lady Altham lodged there?—She was.

Do you remember that there was any disturbance or quarrel between lord and lady Altham, while at your house?—I do not remember any particulars of that sort at all; I was too young to make observations of that kind.

Mr. Harward. You must have been very young indeed at that time, madam!—Not so young, perhaps, as you may imagine, Sir.

Serj. Marshall. Pray, give me leave to ask you how old you were then?—I am now three-and-forty, Sir.

Did you never hear of my lord's sending for Mrs. Lucas the midwife?—I never did.

Was she a noted midwife at that time?—I believe so, Sir.

She lived near you, madam?—She did so.

Was my lady at any time confined at your house?—I do not know.

Did doctor Jemmat ever visit her?—I do not know but he might.

And you do not know but my lady was here in October, November, December and January 1714?—I do not know.

What clothes did my lord and lady wear when they came to your house first?—Indeed, Sir, I cannot tell. You could not tell, I suppose, what clothes I have on now at such a distance of time.

What clothes did they wear generally?—I do not know; I know my lady was in town in the queen's mourning. I have seen her too in colours, in a yellow and silver silk, a blue and a white damask.

What was your reason for fixing the birth-day to Saturday?—My reason was, because my lady would have a bonfire on Sunday, and my mother was not willing there should be one, and there was a dispute about it.

What was the objection your mother had to the making it?—It was, that as she was a widow, she thought such a thing as a bonfire was not agreeable to her, and that was the reason.

What day did the king's birth-day happen on in the year 1720?—I do not know; but my lady could not be at our house in the year 1720, because my mother had left the house.

Court. The witness said that the birth-day that lady Altham was at her mother's house was on a Saturday, and whatever year that happened on, that was the year. And that was the year 1715, by the almanack.

Serj. Marshall. You mentioned a twelfth-cake, I think?—Yes, Sir.

Was that the first or second time lord and lady Altham were at your mother's?—I cannot be particular whether first or second.

Pray, madam, how long is it since you first recollected that this birth-day was on a Saturday?—Since I was asked whether my lady was in town on a birth-day.

How long is it since you looked into an almanack about this?—I never looked into an almanack till after I had told that it was on a Saturday, and the Restoration on Sunday, but never till then.

Were not you in town when the last trial was in the Exchequer?—I was, Sir.

Were not you then applied to?—I was applied to.

And did you come?—I did not come.

How so?—Because I could not recollect any particular passages at that time.

Serj. *Marshall*. Why then it was not till after the trial that you were set right.

Mr. *Daly*. Who applied to you to appear at the Exchequer?—There came a gentleman from captain Annesley to know if I knew any thing of this affair. I sent word I did not, and if there had not been a particular question asked me about the fireworks, I should not have recollected.

Serj. *Marshall*. Who asked that particular question about the fireworks?—I cannot tell who it was.

From whom were you asked that question?—It was from Mr. Annesley's family. Mr. Mac Kercher and Annesley before that came to me to know what I knew of my lady's lodging at my mother's; and I told them I knew nothing particular about it.

Who asked you the particular question about the fire-works?—It was captain Annesley's and lord Anglesea's friends.

Was this at the time of the trial?—I do not know when the trial was.

I tell you then, it began the 11th of November 1743, and lasted for twelve days; did they ask that question during that time?—They only applied to me in general, to know if I knew any thing of the time of my lady Altham's lodging at my mother's, and I told them I could not recollect.

Did they at that time put this particular question about the fire-works?—They did not.

Did they any time before the trial was over?—No, they did not. Mr. Mac Kercher came to me when he came over first, to enquire about my lady's lodging at my mother's. I told him I recollected nothing particular about it, and had nothing to say that could serve him.

When was it that that question was put to you?—I cannot remember the day.

Recollect when that question was put to you, was it before the trial at Wexford?—It was.

Who was the person that put the question to you?—I forget by whom, I was sent to by lord Anglesea's friends; I do not know whether Mr. Colles did or not, but he was with me.

Mary Setwright sworn.

Mr. *Richard Malone*. Were you at any

time, and when, acquainted with lord and lady Altham?—*Mary Setwright*. I was, Sir.

When were you first acquainted with them?—When I was hired to them.

When were you first acquainted?—Four days before I was hired.

When were you hired?—About five or six days before Christmas-day.

In what year?—The year I cannot tell well.

Where did lady Altham lodge then?—At captain Briscoe's in Bride-street.

Do you know how long she had been in Ireland, before you were hired?—Not long.

You have said that you were hired at captain Briscoe's?—Yes, Sir.

Mr. *Le Hunte*. How soon did you go from Dublin after you were hired?—In four days.

Mr. *Malone*. Pray, after you were hired did you leave town, and when?—Four days after.

Where did you go?—To Dunmaine, to my lord's country-house.

What time did you get there?—The day before Christmas-eve.

Were there any other persons that went with you?—Two servants, the chamber-maid and laundry-maid.

Who was the chamber-maid?—The chamber-maid was Mary Waters.

And who was the other woman?—*Elisabeth Doyle*.

You say that you got to Dunmaine before Christmas?—A day before Christmas-eve.

Pray, madam, did my lord and lady go there at any time after, and when?—They came there the very next night, Sir.

Now, I would ask you, where did they lodge when you left town?—At captain Briscoe's.

In what station were you hired?—House-keeper.

How long did you live with my lady?—A year and a quarter, or thereabouts.

What time did you leave her?—In February.

What year?—Indeed I do not know the year; but the eclipse was the year following.

Do you remember, during the time you lived there, to have seen Mrs. Briscoe or her daughter there?—I did, Sir.

Can you recollect how soon after my lord and lady went to Dunmaine, it was that they were there?—It was very soon, but I cannot tell how long.

Now, I ask you whether my lady miscarried, or kept her room for any, and what time?—Never to my knowledge.

Did you ever hear it?—No, indeed.

Could she have miscarried at Dunmaine during the time Mrs. Briscoe and her daughter were there, or kept her room, without your knowing of it?

Serj. *Marshall*. I must stop Mr. Malone a little, because it is a direct leading question.

Court. Was my lady sick, or confined for any time while they were in the house?—No, not to my knowledge, my lord.

Mr. Malone. You say that you were house-keeper?—Yes.

What things were under your care, as house-keeper?—I kept the sugars, the spices, and bread, and all those things, every thing but only liquor.

Were you at any time, while Mrs. Briscoe and her daughter were there, called to for any thing under your care for any person that was sick?—No, not that I know of.

Court. Did you see my lady every day at that time?—Every day in the week, my lord, to know her commands.

Was it possible that she could miscarry, and you not know of it?

Serj. Marshall. That, my lord, must depend upon the credit of witnesses, for a gentlewoman of good credit has sworn she did.

Jury. Do you believe that my lady was with child at that time?—I believe not.

Mr. Malone. Did Mrs. Briscoe and her daughter remain at Dunmaine for any and what time after my lord and lady got there?—Yes.

How long?—I cannot exactly tell how long they stayed there.

How long might it be?—I cannot say particularly.

Pray, do you recollect what time they left Dunmaine, what time of the year?—It was in summer.

Was it the summer after my lord and lady went to Dunmaine?—Yes, it was.

I ask you now, whether my lord and lady came from Dunmaine to Dublin at that time, or any time, and when?—They went to Dublin in my time.

Was it in the same year?—Yes, Sir.

How soon after Mrs. Briscoe came to Dublin?—Indeed I cannot tell.

Was it in the summer season of the year?—Yes, it was.

What time was it that my lord and lady returned to Dunmaine next?—I cannot exactly tell you what month it was, but it was in the summer-time.

Do you know who was butler in your time?—Thomas Rolph.

Had you any and what directions in order to prepare any and what thing for Christmas that year? What was it?—Minced pies, and those things that were proper for Christmas-time.

Did you make any thing particular?—I made a collar of brawn.

By whose directions did you make that?—By my lord and lady's directions.

When was it that they returned to Dunmaine?—It was in the summer, it was a great while before Christmas.

Did you at any time and when see them in this town?—I did after I left them.

When did you leave them?—I left them in February.

Upon what occasion did you see them in this town, and where, and I would know whether you were called to them for any and what purpose?—They sent the running footman for

VOL. XVIII.

me, for to prepare an entertainment they made for company.

Where did they lodge then?—They lodged at Mrs. Vice's in Dirty-lane.

What was it they sent to you for?—They sent to me to serve the entertainment, to manage it, and see it properly done.

Do you remember at what time it was?—It was Christmas the twelfth-day.

Court. You lived a year and quarter and then left them, and saw them in Dublin after; how soon after was it?—It was about two years after I left them that I saw them in Dublin; it was upon a twelfth-day.

Mr. Malone. As you were there that night, do you recollect any of the persons in company?—Mr. Colclough was one of the company.

What Colclough?—Mr. Caesar Colclough.

I think you said that Rolph was butler at the time you were in the country?—He was.

When my lord and lady returned to Dunmaine, was there any and what thing brought for the butler?—There was mourning brought down.

[Cross-examination.]

Mr. Walsh. Pray now recollect what was the particular time you came to live with lord and lady Altham.—In December.

What year?—I cannot tell you the year.

You must recollect the year?—It was the year before the great eclipse, whatever year that was.

When did you leave her service?—In February.

When?—In February before the great eclipse.

Court. When was it that you came to lady Altham?—In December, the year before the eclipse.

How long did you live with her?—A year and two months, to the February next but one following.

Was the great eclipse after you left her?—The eclipse was the April after I left her.

Jury. Had you the keeping of any china?—I had not.

Do you remember any body that had?—My lady's woman kept what cups there were.

Do you remember any particular saucers?—I do not indeed.

Mr. Walsh. Recollect now, and tell when you came to live with lord and lady Altham?—I came two or three days before Christmas.

In what year?—I cannot tell you more than it was the year before the eclipse.

How long was the eclipse after the time that you came to live with them?—It was the April after I left them.

And when did you leave them?—In February.

How long did you go to the country before them, after you were hired?—I went four days before them.

Did you ever see Mr. Briscoe and his wife and daughter at Dunmaine?—Yes, I did.

L

Did they all go there together?—She and her daughter came first.

When did he come?—I cannot exactly tell the time he came.

Was it in summer or winter?—I think in summer.

What time in the summer?—I cannot remember.

Was it in harvest?—I cannot remember the exact time.

How long did he stay there?—Mrs. Briscoe stayed a good while, but I do not know how long he stayed.

Are you sure it was in summer when he came?—I cannot tell exactly when it was.

When was it that Mrs. Briscoe and her daughter came?—Just after the time that my lady came.

When did my lady go down?—In December.

And when did they go?—As near as I can remember, in a fortnight or some such thing.

How long did they stay?—As good as two months, I forget if longer.

Do you know did my lady miscarry at Dunmaine?—She never miscarried to my knowledge.

As you were house-keeper, what did you keep the keys of?—I kept the keys of the sugar and spices, and several other things.

Were you yourself ever sick at Dunmaine?—I never was sick myself there.

Did you ever miscarry there?—I never did.

Were you ever brought-to-bed there?—I had a child there.

When?—The June after I went down.

Were Mrs. Briscoe and her daughter there when you lay-in?—They were.

Might not my lady have miscarried when you were laid up with your child?—I never heard any thing of it.

Pray, did you see her every day?—Every day, but when I lay-in.

You said you saw her every day, and therefore she could not miscarry unknown to you?

—I was but a fortnight in all lying-in.

Is it usual for women to go out in that time?—I did.

Where were you brought to bed?—At the dairy house.

How far distant was that from Dunmaine house?—About a field from the house.

Was my lady confined to her chamber at any time while you lived with her?—She was not that I know of.

Might she not unknown to you?—I should have heard of it, if she had.

Can you say, upon your oath, she did not miscarry?—She did not to my knowledge.

Could she not unknown to you?—I cannot say she did to my knowledge.

Could not she unknown to you, when you were out of the house?—I believe not, my lady came to see me when I was lying-in.

Who kept the keys when you were lying-in?—Mrs. Heath.

Did you come to town when my lady came

to town, after she was at Dunmaine?—I did not come to town till I left them.

When did my lady come to town, after you went down?—I cannot exactly tell how long after.

When was it that she came to town? Re- collect yourself.—I cannot tell the particular time.

Did she come the February following?—It was in the summer following.

What time in the summer?—I protest, I forget what month it was.

Was it in July?—No, it was not.

Was it in August?—To the best of my knowledge, it was August.

How long did she stay before she returned?—Two months, or thereabouts.

Did she go to Dublin after she returned?—She returned in two months.

Did you live with her when she returned, again?—I did.

In what time did she return?—In about two months she returned.

How long did you live with her after?—Not long.

How long?—I left her in the February following.

Now recollect and tell the particular time, that she returned to Dunmaine.—I cannot tell the month; she stayed about two months away.

Was she in Dunmaine when you left her?—She was.

When was that?—The February after she returned.

How came she to discharge you?—Something that my lord said that I took ill made me leave it.

What reason have you to remember that my lady returned in two months?—It was summer-time when she went and when she came back.

Now I ask you a plain question, was not lady Altham in this town in November and December 1714?—Indeed I do not know.

But you must answer that question; was she in this town the months of November and December, before you left her?—She was in Dublin in the summer.

Was she, or was she not, here in November and December?—I cannot recollect.

Can you say that when she went to town in summer that she returned in two months to Dunmaine?—I cannot be positive she did.

Can you be positive she was in Dunmaine in November and December before the February that you left her? Come, woman, recollect.—I believe they were, I cannot remember.

Court. Was my lady Altham at Dunmaine the November and December before you left her?—Yes, she was, my lord.

Mr. Walsh. Do you know Mr. Nesbit, a clergyman?—No.

Do not you know Mr. Nesbit of St. Catharine's parish?—I have seen him.

Had you any discourse with him lately about this matter?—Not lately.

Had you ever any?—I had some.

What was that discourse? Had you any in relation to Mr. Annesley's being my lady's son or not?—He asked me if I knew of her having a child, and I told him that I never did, nor never heard she had.

Did not you tell Mr. Nesbit, that if Mrs. Heath swore that my lady never had a child, she was a damn'd bitch?—No, I never did.

Court. Is that your indictment that my lady never had a child? Your indictment is, that she never had a child while Mrs. Heath lived with her.

Jury. I think you said you made some preparations for Christmas at Dunmaine?—I made brawn in it.

When did you make it?—The Christmas I went down.

When was it my lord and lady came to Dunmaine?—They came the very day before Christmas-day.

And how then could you make the brawn against Christmas?—I made it that year, but not the day after I went down.

Was it the Christmas you went there that you made it?—It was that Christmas.

Who gave you orders for making it?—My lord did.

Where was he when he gave you those directions?—He was at home at Dunmaine.

Was my lady there then?—She was.

Mr. Walsh. Do you remember any saucers with smutty figures on them?—I did not.

Did you ever hear that any of them were broke by lord Altham?—I never did; I never did hear of any such at all.

Rev. Mr. William Hervey sworn.

Mr. Edward Malone. He is an ancient man, my lord, and cannot stay any longer, which makes us produce him now, though out of time, and we are now going to shew that my lady Altham was at the assizes of Wexford in April 1715; we examine him out of time, because he is falling sick.

Serj. Tisdall. My lord, I must complain to your lordship of his being in court this some time, and not having been kept with the other witnesses.

Mr. Malone. Call Mr. Thomas Bourk to shew when the Wexford assizes were. I believe the gentlemen will admit it for shortness sake, that they were on the 16th of April 1715.

Court. Do you admit that, gentlemen?

Serj. Tisdall. I protest I do not know what to say to it.

Mr. Thomas Bourk sworn.

Mr. Malone. What have you got in your hand?—A record; a copy of an estreat.

Where did you get it? from what office?—From Mr. Morryson's office.

Clerk of the Crown reads the Record, as follows; viz.

Com Wexford; ss. Extract fin et Americia-

ment Imposuit et Recogn floriffact et Attinotur &c ad General Assiz et General Goal Deliberacon tent apud Wexford in Com Wexford præd. Die Sabbati decimo sexto die Aprilis Anno Regni Domini nr. Georg Dei Gra Magn Britan Franc et Hibernia Reg Fidei Defenc &c primo Cor Honobl Joham Forster Ar Capital Justic dict Domini Regis Cur. su de Coi Banc su regni su Hibernia et Thom Coote Ar secund Justic dict Domini Regis Cur su de Capital plit su in Hibernia Justic et Comiss ejusdem Domini Regis ad General Assiz et general Goal Deliberacon nec non ad omn et singul Prodicon Murd Homicid Incend Illicit Assemblaon Felon Rober Extorecon Oppressaon Cna Contempt Offens Malefact et Caus quæcunq; in Com Wexford præd perpetrat sive perpetrand audiend et terminand assign Virtut Commission dict Domini Regis sub magn Sigill su Regni Hibernie geren dat apud Dublin decimo sexto die Februar Anno Regni su primo.

Mr. Spring. We produce a clergyman of the county of Wexford, a man of as good character as any in it, to shew that my lady Altham was at that assizes.

Serj. Tisdall. I desire, Sir, you will please to give an account, whether you were not in court the whole time that the other witnesses were examined, or were not informed of what passed here.

Mr. Hervey. I was called about an hour and half ago, and told that the court wanted me; when I found they did not, I went into the court of Chancery, and stayed there till I found the first witness coming; afterwards I stood by the clock, and I believe you will think it is impossible to hear there any thing that passed here; and not one word was I informed of what was said.

Mr. Malone. Do you remember the time the Pretender's men were tried at the assizes of Wexford?

Mr. Hervey. I remember when Mr. Walsh and Masterson were tried for enlisting men for foreign service.

Were you at that assizes?—I was there and heard the trial.

Pray, Sir, can you fix the year when they were tried?—They were tried in Lent assizes 1715.

Was it spring assizes?—It was Lent assizes; but I believe it happened in Easter that year.

Were you in court at the trial of Walsh and Masterson?—I was in court.

Who were the judges?—My lord chief justice Forster, my particular patron and friend; his brother was my tutor when I was in the college.

Who was the other judge?—I do not remember any other judge, but I know he was there.

Were you in court at the trial?—I was.

Then I ask you, Sir, whether or no you saw my lord Altham at that time in town?—I did;

I saw him at his lodgings and at the court-house, and had discourse with him in both places, and never saw him before or since.

In what clothes was he dressed then?—To the best of my remembrance, he was in black.

Were there any ladies in court at that assizes?—There were several ladies in court.

Were they of any fashion or rank in the country there?—I saw a lady of very good appearance, though homely features, and I asked who she was, and I was told—

Serj. *Marshall*. You are not to say any thing you were told, you must declare nothing but what you know yourself.

Mr. *Hervey*. They said it was lady Altham.

Mr. *Malone*. Did you know that lady you saw to be lady Altham?—I am morally assured it was her.

Did you ever see her after?—I never saw her afterwards.

You saw other ladies there as well as this lady?—I did.

Did you know them?—I took notice of none but Mrs. Giffard, for she was my relation by marriage; and I had another reason why I took notice of her, which was, that I have often heard her blamed—

Was Mrs. Giffard in company with that strange lady?—She was.

Do you remember any quarrel upon the account of beating a man at the assizes?—Yes, I remember it very well, and have reason to remember it.

Serj. *Tisdall*. My lord, I do not see to what this examination can tend.

Mr. *Malone*. It is in order to fix the time particularly.

Court. Go on, Sir.

Mr. *Hervey*. I took a king's evidence to Wexford, one Sinclair, he had gone to France with several others, and when he came home, he was afraid I would represent him to the justice of peace and have him prosecuted; to avoid which, he said he would come in and make a discovery if I would get him pardoned. I said I would; and after I had him, I mounted him before my portmanteau and took him to Wexford. While he was there some servants of my lord Altham fell upon him and beat him for being an informer, and while they were beating him I caught them, and they had almost murdered him. I took them to colonel Ram's lodgings, and we went to my lord Altham to his lodgings, and shewed him the bloody condition that this fellow was in.

How did you know where my lord lodged?—I was informed that my lord and lady lodged at Mr. Sweeney's.

Go on, Sir.—We went there to shew my lord Altham the treatment his servants had given this man, and my lord said he was ashamed of their behaviour, that they should be punished for it, and said they should come into court.

And did they come into court?—There came but two into court, the rest made their escape.

Were they punished for this assault?—My

lord chief justice Forster was very angry, but fined them only 5*l*.

Mr. *Recorder*. My lord, thus he ascertains that lord Altham lodged at Mr. Sweeney's.

Mr. *Malone*. You say that you saw Mrs. Giffard in the court-house, and that she is your relation?—Yes, her brother and I took two sisters in marriage.

Did she sit next to my lady Altham that day?—I do not know whether she was next to her, but she was very near her.

Now I ask you, whether that lady had any signs of pregnancy or not upon her?—I took particular notice of her; she was, to the best of my remembrance, dressed in black, was a full-chested woman, and had a fine, slender waist.

Did she appear to you as a woman with child?—She might be very young with child, for aught I know; but there was no visible appearance of her being with child.

Mr. *Harward*. This evidence is founded upon a supposition that the lady he saw at Wexford was the lady Altham; he says he was only told it was she, and cannot say it was of his own knowledge.

Mr. *Hervey*. I am pretty certain the lady I saw was lady Altham. I am told, Sir, that you are counsellor Harward, am not I to believe you are? I am told that gentleman is counsellor Daly, I am morally assured of it, and I believe it.

[Cross-examination.]

Serj. *Marshall*. Pray, Sir, did you see that lady go into the court-house, that you were so particular in your observations about?

Mr. *Hervey*. I cannot say I did; but I saw her in court.

Do you know Mr. Caesar Colclough?—Yes, I do very well.

Did not he sit by that lady a great part of the time?—I cannot charge my memory; as I told you before, I took no notice of any but Mrs. Giffard.

I ask you, Sir, whether Mr. Colclough was there or not?—He might be there; and I cannot say whether he was or not.

Who were the persons tried?—Jack Walsh, and Mr. Mastersson.

They were tried that day?—They were, Sir. Are you sure they were tried at that assizes?—They were tried at that assizes.

You are positive they were tried at that assizes?—I heard them both tried, and I believe at that assizes; Walsh was tried first.

Are you positive that they were both tried?—Indeed I have no reason to doubt but they were; they were there, and appeared there at the bar both of them.

Were they convicted or acquitted?—Acquitted: Mr. Walsh made a very good defence.

Whereabouts were you in the court?—I was very near the judge.

Did you or did you not see Mr. Colclough there?—I cannot say I saw Mr. Colclough.

Did you see colonel Loftus there?—I cannot say I saw colonel Loftus.

Do you recollect any gentleman of the country that you saw there?—Why, do you believe that I was not there?

It is no matter what I believe, but can you name any one gentleman that was there?—Lawrence Esmond of Ballynastraw was there.

And you remember that Mrs. Giffard was there very positively?—I do, Sir.

Now, I ask you, was not Mr. Masterson tried the summer assizes?—Indeed I do not know, I know he was in the dock then.

Did not you say you were sure he was tried that assizes?—I do not know whether he was tried then or no, but he was in the dock.

Did you see this lady any where else but in the court-house?—I saw her no where else but there, neither before nor since.

Did she sit or stand during the time you saw her?—I saw her both sitting and standing.

Whereabouts?—Almost opposite the sheriff's box.

Did you talk to Mrs. Giffard at that time?—I did not speak to either of them.

Did you speak to her at that assizes?—I do not remember I did; but if you please I'll give the reason why I took notice of her more than another.

Give your reason.—She was a near neighbour of lord Altham, and was the most conversant there of any others of the neighbourhood; and my lady not bearing the fairest character in the world, I heard Mrs. Giffard blamed for having such an intimacy there; and therefore when I was told this lady, that made a very good figure by her dress, was my lady Altham, I took notice of Mrs. Giffard being in her company; and whether Mrs. Giffard knew it or not I cannot tell, but I have heard her censured for being in it. And if they had lived within three miles of me, as they did of her, I would not have had converse with either of them.

Was not there one Doyle, a clergyman, tried at that assizes?—I cannot tell whether he was tried or not, I saw him in the dock; he was one I knew in the college.

How came you to be seated so near the judge?—I was near the judge for two reasons; for the sake of the justices of the peace and grand jury.

Do you know Mr. Henry Bolton?—Yes, I do.

Was he at that assizes?—He might, but I do not remember.

Mr. Mac Manus. I hope at this late hour they will produce witnesses to the point.

Mr. Solicitor. I desire, my lord, to make one observation; which is, that Mr. Hervey's testimony will account for every thing that has been said concerning the bad reputation of this family.

Mr. Le Hunte. My lord, we shall now produce one Edmond Bourk, he was postillion to my lord Altham before my lady came to Dunmaine. He will prove that he rode pos-

tillion when the chariot came to carry my lord and lady into the country, and that they went from captain Briscoe's, and not from Mrs. Vice's; he will prove that Mrs. Setwright, Elizabeth Doyle and Mary Waters were servants in the family, and that he continued in the service till the year 1716; that he drove my lady in a chariot in 1715 to the spring assizes of Wexford; that Mrs. Giffard went in the chariot with her; that Mrs. Heath rode, and that he was one of the servants mentioned in this affray, and made his escape from the assizes; and he will also prove that my lady was at a hurling-match at a place called Rathimny Bogg, between major Sutton and my lord, at the time of this pretended pregnancy.

Edmond Bourk sworn.

Mr. Le Hunte. Did you know Arthur late lord Altham?—*Edmond Bourk.* I did, Sir.

When did you first know him?—At his first coming to Ross.

Did you ever live in his service?—I did.

When did you go to live with him?—I cannot exactly tell the year, but I lived almost six years and two months with him.

Where did my lord live then?—At Dunmaine.

Did you live there before my lady came over?—I did.

How long after you lived there did she come to live with him?—I cannot tell how long.

What was your service?—I was a postillion, and came up for my lady to Dublin.

Where did my lord and lady go from Dublin?—They went from Dublin to Dunmaine.

From what place in Dublin did they go to Dunmaine?—From captain Briscoe's in Bride-street.

Are you certain that they went from captain Briscoe's?—By the virtue of my oath, they did; we took them up there.

Did you know Mrs. Mary Heath?—I did, Sir.

What was she?—She waited on my lady Altham as her gentlewoman then.

When did my lord and lady get to Dunmaine?—We got to Dunmaine in December, it was about Christmas-Eve.

Who went along with you besides my lord and lady?—I cannot tell you; but the chariot broke by Johnstown, and a great many were in company, but I cannot tell who they were.

Did Mrs. Setwright go with you?—Mrs. Setwright was sent down two days before, and two maids with her, Betty Doyle and Mary Waters.

Do you remember any body visiting at Dunmaine for any time?—There was Mrs. Briscoe there.

Was any one along with her?—Her daughter was.

How long might they have staid there?—I cannot tell, but I was sent with Miss Briscoe to the lower part of the county of Wexford.

Do you know one Mr. Boyde?—I did.

Where did he live?—He lived at *Blenchard*. Did not you go to his house?—We did call there, and staid there a night or two, to the best of my knowledge.

Do you know a place called *Rathinny Bogg*?—I do; I was born near it.

Did you know major *Sutton*?—I knew him very well.

Did you know of any diversion or sport at *Rathinny-Bogg*?—I remember a great hurling there.

What was the occasion of it?—I was told it was between major *Sutton* and my lord *Altham*.

Do you remember any person that was at that hurling?—My lady *Altham* was there, Sir.

Were you at the assizes of *Wexford* at any time after this hurling?—I do not know whether it was after or before.

When was that assizes?—Easter assizes in the year 1715.

Did you go from the house of *Dunmaine* to the assizes?—I did, Sir.

Did any body go along with you?—My lady went in the chariot and one *Mrs. Giffard*.

Who rode postillion?—I did.

Who was coachman?—*John Weedon*.

Do you know of any quarrel that happened at the assizes, and on what occasion?—I do very well, I have a reason to know it, Sir.

Tell your reasons.—Some gentlemen of the county of *Wexford* were impeached with this thing of enlisting and harbouring men for the Pretender at that time, and above all, there was the parish priest that is living yet, one *Father Michael Downes*, and he was our parish-priest; and this *Downes* being impeached, my lord's servants, four or five of us, went to see the priest, and his prosecutors were with him at the house of one *Hatchell's* that kept the *Swan*; we fell out with the prosecutors, because that we thought to make it up with them not to prosecute the priest, my lord; and upon that, when they would not make it up, a quarrel happened between us, and please your lordship, and to be sure we paid the poor people very sorely; but next morning we were taken prisoners by *Mr. Hervey*, colonel *Ram*, and *Mr. Symes*, and kept in confinement from morning till about eight o'clock at night—

Was my lord *Altham* at the assizes?—My lord *Altham* was there. A little time after I came home he discharged me, because I made my escape; but two were put on their trial.

Who were they?—They were *Ned Mac-Cormack* and *Bryan Neale*, the running-footman, and the groom.

Where did you go after my lord discharged you his service?—I believe to *Kilkenny*, and lived with alderman *Barnes* there some little time.

Do you know *Mr. Lambert*?—I do very well.

Did you ever live in his service?—I lived with him after I left *Kilkenny*.

How long did you live in *Kilkenny*?—I believe I did not live in *Kilkenny* above two or three months.

Do you remember any quarrel between my lord and lady *Altham* in your time?—I do not remember any quarrel.

Did they continue to live together as long as you knew them?—They did, they were separated after.

Where did you live then?—I believe with *Aaron Lambert*.

Where did he live then?—He kept a house in *Ross* then.

How far is *Ross* from *Dunmaine*?—Four small miles from *Dunmaine*.

Did you see my lady after the separation?—I did.

Where?—In *Ross*.

Do you recollect the house that my lord and lady lodged in at *Wexford* at the assizes?—I set her down at one *Mr. Sweeney's*.

Pray, whilst *Mrs. Briscoe* was in the house at *Dunmaine*, did you hear of any miscarriage that my lady had?—I never did of any miscarriage, or of her being with child until within these three years.

Did she appear to you to be a woman with child?—She never did.

Do you know *Joan Landy*?—I do.

Do you know of her nursing a child?—I do.

Was that after my lady came to *Dunmaine*?—She was big with child at the time my lady came.

Where did she live at that time?—In my lord's house.

Was she brought to-bed there?—No; she went to her father's house to lye-in.

How far was that from the house of *Dunmaine*?—As near as I can guess, an English mile.

Did you ever see a child nursed by *Joan Landy* in the house while my lady was there?—I never did, by virtue of my oath.

Did you ever see a child of lord *Altham's* with *Joan Laffan*?—I never did, nor nobody else.

Mr. Mac Manus. My lord, he swears that nobody else saw that she took care of the child, as well as him.

Mr. Le Hunte. Did you ever see any child of lord and lady *Altham's* in the care of *Joan Laffan*?—Never did, Sir.

Did you ever see a child that was *Joan Landy's* child with *Joan Landy*?—Yes, I did, Sir.

Did you live with my lady at any time after the separation?—I did.

How long after?—As near as I can guess, almost two years after they parted I waited on her in the town of *Ross*.

Did you see any child there with her that was reputed her child?—I never did.

Did you ever see any other child with her there?—Yes, I used to bring in children myself to her; she was very fond of them.

What lodging were you at there?—At one *Mrs. Wright's*.

[Cross-examination.]

Serj. Tudall. How long did you live with

my lord Altham?—To the best of my knowledge, about six years with my lord and lady.

Did they live together during the whole time you lived with them?—They did not, Sir.

When were you first hired into the service?—I cannot tell.

When did you leave my lord?—I left him in the year 1715.

What time of that year?—I cannot tell.

How soon was it after they came from Wexford?—I cannot tell how soon.

Was it a fortnight, three months, or a year, or how long?—No; it could not be a year, or a quarter of a year.

What was the occasion of your leaving the service?—The occasion was that I made my escape from Wexford, and my lord promised he would not keep them that escaped.

Recollect how long you were at Dunmaine before you were discharged.—I might have been at home a fortnight or three weeks.

How long before you left my lord, did he and my lady come to live together?—My lady came in December 1715, to the best of my knowledge.

Where were you then?—In Dunmaine, and they met in Dublin.

How soon after did you come for her?—I was not long in town.

How soon after they met, did you come for her to town?—I cannot tell how long.

Were you in town with my lord that winter before they met?—I was not.

Did you live with them again after you left them in the year 1715?—I did.

What time?—I cannot tell.

Were they separated before you came to live with them?—They were; my lady was at Ross at that time.

When you returned to live with my lord, was there any child in the house?—Never a child that I know of.

How long did you live with him after you returned?—I cannot tell how long.

Did you live a second time with them before the separation?—To the best of my knowledge, I did.

Did you return to the service before my lord separated from my lady?—I am not sure whether I did or no.

Were you in the house at the separation?—I was not.

Where were you at that time?—To the best of my knowledge, in Ross with Mr. Aaron Lambert.

Were you in his service then?—I was.

How long did you live with him?—I cannot tell; but my lady was some time in Ross before I came to live with her.

Did you return to my lord's service after you were discharged that time after the assizes?—Indeed I cannot tell.

Cannot you tell whether you lived with him after at Dunmaine?—I am not positive; I cannot tell you, Sir, whether I ever lived with my lord again at Dunmaine.

You say, you were turned away after the assizes?—I was.

Upon your oath did you return to live with my lord again?—Upon my salvation, I cannot tell whether I returned again to him.

Recollect how often you have lived with him?—I remember I lived with him once, because he owed me some wages.

What wages?—I believe two years wages.

When were those wages due to you?—They were due after the assizes.

Can you answer or not, whether you returned again to the service?—I cannot answer whether I did or no.

Do you know Mr. Amias Bush?—I do.

Had you any conversation with him?—Not, as I can remember, Sir.

Or with any other person, that my lord had a child by his lady?—By the virtue of my oath, I never did declare it to mankind.

Did you ever declare that you would go and swear for lord Anglesea, and be made a man of?—By the virtue of that oath I have taken, I never did.

Did any body offer you any money for swearing in this cause?—Yes, Mr. Mac Kercher did.

What did he offer you?—He offered me 300*l.* for swearing.

When the witness said this, there was a loud huzzza in the court.

Who was the agent that offered you 300*l.*?—Have patience, and I will tell you the man, one Paul Keating, he offered me 300*l.* in private between me and himself, if I would join his young lord, as he called him.

When was this offer made you?—About this time two year.

Why did not you appear and declare this on the former trial?—I kept off from the last trial, and from this till I was compelled by law.

Were you ever in company with Mr. Mac Kercher?—I was in the room with Mr. Mac Kercher, and he sent for me, and Mr. Bob Snow carried me up stairs to an upper room.

What is it you can say of Mr. Snow?—Nothing of him, but that I was in Mr. Snow's room along with Mac Kercher.

When was this?—About this time two year, to the best of my knowledge.

What was the conversation that passed between Mr. Mac Kercher and you?—Why then I will tell you that, gentlemen, I came in the evening to Mr. Snow's; Mr. Snow was feed as an attorney against me in a cause between a man and me—

Give an account what passed in conversation in the presence of Mr. Snow.—Mac Kercher and Snow went up from the company, they were to sup there.

Where?—At Mr. Snow's that night; and he told my landlord, Mr. Flood, that Mr. Snow was to be there that evening; and Snow told me that Mac Kercher, and Annesley, and Livingstone were to sup there that night; and he told me if I would come there at eight o'clock,

that I could see Mac Kercher. Upon that I did, and we went up stairs, Mr. Snow, and Mac Kercher and me, and he asked me if I knew this young James Annesley, esq. Where is he? says I. I hope, my friend, you will do nothing against his interest, says Mac Kercher. Indeed I will not, nor appear at all, says I, if I can help it; so there is all I can remember.

Did there pass any other conversation between you that night?—There might, but not to any purpose.

When do you say the 300*l.* was offered to you?—About this time two year.

And who made you the offer of it?—Paul Keating, and carried me to one captain Forrester's.

When this offer was made, was any body present?—No, he carried me aside to a little garden at captain Forrester's door, and he said that when the cause was over I would get the raising of my family.

What did he offer you this money for?—He offered it for to join his young master James Annesley, because he thought that I knew a great deal by living with lady Altham, only to give my promise to testify for James Annesley.

What did he tell you, you were to swear?—The words were in general.

Clerk of the Crown reads the estreat for the assault on the prosecutors at Wexford, as follows, to shew that Edmund Mac Cormack and Bryan Neale were taken into custody, and fined for the said assault, viz.

“*fin. Impost. ad pæd. General Assiz. sup. seperal Person in Custod. Vice Com. Wexford.*

“*Edmond Mac Cormack indict. ad pæd. Assiz. pr. quodm Assault. et Cul. pro fin. in sum - - - 0 0 6*

“*Bryan Neale indict. ad pæd. Assiz. pr. cons. pro fin in sum - - - 0 0 6*

Mr. Smith. My lord, the next witness is Mrs. Sweeny. Your lordship observes that the last witness gave an account of my lady Altham's going from Dunmaine to Wexford assizes, and that she was drove to captain Sweeny's at Wexford. He, my lord, is dead: this Mrs. Sweeny is his widow; her husband took the house in March 1714, and she has lived there ever since; she will give account that lord and lady Altham, Mrs. Giffard and other persons came and lodged in the house, and that my lady did not appear to be with child.

Mrs. Sarah Sweeny sworn.

Mr. Le Hunte. Where do you live, madam?

Mrs. Sweeny. I live at Wexford.

What is your christian name?—Sarah.

How long have you lived there?—These four or five-and-thirty years.

Pray, do you know Mr. John Masterson?—I do.

Did you know Mr. Walsh?—I did.

Do you remember that they were charged with any crime at Wexford?—I do.

When?—In the year 1715.

Did you know the late lord or lady Altham?

—I did; I knew them both, but my lord much better than my lady.

Was it usual for you to set lodgings?—It was.

Can you recollect whether they lodged at any time and when in your house?—They lodged with me in the year 1715, in April.

Do you know upon what occasion, or what was a-doing in Wexford at that time?—The assizes was at that time.

Pray, madam, can you recollect how long they lodged with you, and when they came, whether before or after the assizes?—They came just at the assizes, and they staid no longer than the assizes held, four nights or five, I cannot tell which.

Can you tell whether any gentlewoman came with lady Altham to the assizes?—Yes, there did come Mrs. Giffard, and Mrs. Mary Roe, and there came Mrs. Heath.

Was Mrs. Heath a servant to any of the ladies, or whom?—She was her ladyship's woman.

Where did she lodge?—At my house, Sir.

Can you be certain that it was in the spring assizes 1715, that they were there?—I am very sure of it.

Pray, can you give any reason for that certainty?—I can give several reasons, if there was an occasion.

Please to inform the Court and the jury what your reasons are.—It was in the year 1714 that I came to that house I now live in. I came to it in July, just before the queen died; and in 1714 Mr. Sweeny was ill of a fever, and was just recovered out of it as her ladyship came to my house; he was recovered the March before she came.

When she was there did you frequently see her?—I did see her very often, Sir.

Where did she generally diet in Wexford?—She dined and supped at my house.

Did she dine and sup at your table?—I dined with her at the table, and with my lord, when he dined there.

Had she any signs of breeding, or being with child?—I did not perceive any, neither do I believe she was with child.

Could she have been with child then and you not know it?—If she had been with child I should have heard it.

[Cross-examination.]

Mr. Fitzgerald. You say, I think, that my lady came to lodge at your house in April 1715?—Yes.

What particular reason have you for fixing it in April?—I tell you; in July before the queen died I came to the house, and the April following she came to lodge there.

Where did you live before?—At Kenny's-Hall, a little out of Wexford.

How long did you live there?—From the latter end of the year 1713, till we left it.

What particular time did you leave that hall?—In July 1714, just before the queen died.

Was that house, where you received lord and lady Altham, repaired when you took it?—We repaired it before we came there.

After you took the lease, what time did you take to repair it?—Not very long; I cannot tell how long.

Did the repairs take up three months?—I believe it might take up three months; but I was sick at that time, and do not know how long it was.

What time was it you took the lease?—We took the lease in the year 1714.

What time of that year?—In the beginning of 1714. I have the lease if you have a mind to see it.

Do you know a man called Nicholas Duffe?—I do.

What is he?—He was master of a vessel for my husband.

Did he live with you then?—He did not live with us then.

Was not he master of the ship at that time?—He quitted that employment before I was married to Mr. Sweeny. He went master before for him.

Did he live in your house in April 1715?—No, he did not.

Did he live with you when you took the house and you were sick?—He was at sea in 1714, when I was ill of the fever, and he came home at that time in the year 1714, and was not employed after, for my husband parted with the ship.

You say he was not in April 1715, in your house?—Not to live with me.

Was not he then master of your husband's ship?—He was not in that employ, we were building a ship then.

Was not he in the town of Wexford in the year 1715?—I do not know but he might.

Do you know captain Maxwell?—I do very well.

Do you know his wife?—I do; I am very well acquainted with her.

Did they not visit you in April 1715?—I cannot tell in what year, I do not know but she might be there, and they lived in the house where I lived in before.

Do you know one David Conolly?—I do not know any such body as Conolly, I know one David Connell.

Was he a servant of your's at that time?—He was not a servant, but in and out with me.

How long did he live with you?—Really I cannot tell.

What did you think of that man, what is his character?—Why really, I never thought it worth my while to enquire; he did my business well enough.

Did you and Mrs. Maxwell visit frequently?—Yes, we did, and I was godmother to one of her children.

What is Mrs. Roe's name now?—Mrs. Crumpton.

Did you declare to any person of your acquaintance in Wexford that you were not sure when lady Altham was at your house?—I do

VOL. XVIII.

not know whether I did or no; to be sure at the beginning I could not recollect it, but after, when I considered about it, I found it out.

Did she never lodge with you but once?—Never but once.

Was she never there at the water-drinking season?—She never was.

And that time she lodged with you was at the assizes?—It was at that time.

Mr. Smith. This lady has mentioned that her sister, who is now Mrs. Crumpton, came to Wexford at that time in company with lady Altham; she was then called Roe, my lord; we shall now produce her to the same point.

Court. Do not you think you have proved it already without producing her?

Mr. Daly. I would produce Mrs. Giffard and no more to that fact, I own it.

Court. Call Mrs. Giffard.

Mr. Smith. This Mrs. Giffard not only was at Wexford with my lady at the assizes, but was a particular intimate of the family, and she will prove to your lordship, that she not only accompanied my lady to the assizes, but that she returned from Wexford to Dunmaine with her, and saw my lady almost every day while she staid there, and never saw or heard of a child; and your lordship must recollect that one of the witnesses did mention, that she was censured for her great intimacy in that family; and that Joan Laffan said, she and my lady were very great.

Mrs. Anne Giffard sworn.

Mr. Le Hunte. Mrs. Giffard, are you a married woman or a widow?

Mrs. Giffard. A widow.

The widow of whom?—Of Ravenscroft Giffard.

What is your christian name?—Anne.

Where did your husband live?—At Ballysop, in the county of Wexford.

Do you know a place called Dunmaine?—I do.

How far is Ballysop from Dunmaine?—Not two miles, a mile and half or thereabouts.

How long have you lived at Ballysop?—We went to live there forty years ago, and continued to live there till now, only seven years that I lived at Ross.

Do you remember the late lord and lady Altham?—I do remember them very well.

Where did they live when you knew them?—They lived sometimes in Dublin, and sometimes at Dunmaine.

Do you remember when my lady first came to live at Dunmaine?—I do.

When was it?—In the year 1713, two or three days before Christmas-day, as I think; I am not positive to the day.

Were you intimately acquainted with her?—I was indeed.

Did you ever see her with child whilst you knew her?—Upon my oath, I never knew it, nor never heard it.

Did you ever know of her having a child at Dunmaine?—I never did indeed, Sir.

M

Do you remember to have travelled with her at any time to any and what place?—I did to Wexford in a chariot.

From whence?—From Dunmaine.

Did you go with my lady in the chariot?—I did, and my lord rode.

What time of the year, and what year was it?—I believe it was in the spring.

Of what year?—The time when Mr. Masterson and Walsh were tried.

Where did you lodge in Wexford?—At Mrs. Sweeney's.

Who lodged with you there?—My lord and lady Altham.

You mentioned something of Walsh and Masterson, what is the reason that you remember any thing of them?—Because my lady Altham and I were in court to hear their trials.

What do you call court?—At the session-house.

What is the use of that house?—The house where the judges are.

Were you and she in that house at this time of the assizes?—We were indeed.

How long did you stay in Wexford that time?—We stayed four days.

Did my lady and you travel together from Wexford?—I came home with her in the chariot, and lay there that night.

Do you remember any woman-servant to have travelled with you?—Mrs. Heath; she rode.

Were any other persons with you?—My husband went.

And who else?—A sister of mine went.

What was her name?—Mary Roe.

Is that her name at present?—Her name now is Crumpton.

Where did you go to from Wexford?—Back to Dunmaine.

Where did you lie that night?—I lay there.

How long were you acquainted with lady Altham after your return to Dunmaine?—Whilst she stayed at Dunmaine.

Do you remember any remarkable eclipse of the sun?—I do, the eclipse was just after we came from Wexford; the Friday after we came home, I was at a burying that day and know it.

What I ask you now is, whether during your acquaintance with lady Altham you perceived her to be with child, or knew her to be with child?—I did not, nor never heard her talk of it.

How often did you visit?—Frequently, sometimes twice, sometimes once a week, or a fortnight, or so.

Did you go to the same parish church?—Sometimes; she very often came to White-church.

Can you recollect after her coming to Dunmaine, that she went to Dublin?—I remember she went once or twice to Dublin.

Have you been in the room with her when she dressed or undressed herself?—Yes, I have pretty often.

Did you ever observe any symptoms of pregnancy?—Upon my oath, I never did.

I ask you, madam, whether my lady was big-bellied at the assizes?—Indeed she was not.

Do you know one Anne Bennet that was formerly your servant?—I never had a servant of that name in my life.

Do you know any person of the name of Bennet that lived with you?—I do not know any one of the name of Bennet that lived with me.

Is there any one of the name of Anne that lived with you, that is now married to the name of Bennet?—They say so; I heard so to-day, but I know nothing of it.

Did you ever tell any servant of yours of the name of Anne, that my lady had been with child, or had a child?—I never did, I could not say it.

[Cross-examination.]

Mr. Harward. If I do not mistake, you were examined at the trial in the Exchequer?—I believe I was; to be sure I was.

Did not you then swear to all the company that went with you to Wexford?—And so I do now.

Were you not asked at that trial, to give an account of all that went with you to that assizes?—Well, I was.

Did you give that account?—I did, of every one that I remembered.

What I ask you now is, did you give an account that this Mrs. Roe went along with you?—No, I did not.

Then you did not give an account that she went?—No, Sir, I did not.

In what manner was it that she went?—She rode.

Did she ride single or double?—She rode single.

How did Mrs. Heath ride?—Single too.

Pray, madam, lord Altham rode, I suppose, too?—Yes.

And how did my lady and you go?—It was a chariot-and-six that we went in.

By virtue of your oath, were not you in mourning for a brother of yours at that time?—I was not; I was in mourning, but not for him; he was dead a great while before that.

Was it not to hear this trial that you and lady Altham went to Wexford?—I do not remember whether it was that or no we went for; but we went there to hear it when we were in Wexford.

So that it was curiosity that carried my lady and you into the court-house to hear these trials?—We went to see Wexford; to be sure it was our curiosity that carried us into court when we were there.

Was not that the only motive that induced you to go there?—It was not that that induced us to go.

What induced you to go?—We went for our pleasure.

Were you ever in a court-house before for your pleasure?—Indeed I was in that same very often before when I was a girl; but what signifies that?

Upon the trial in the Exchequer did you not say, that you could not tell whether it was before or after the queen's death that this trial was?—Well, I do not know whether I said it or no.

Did you not upon that trial say so?—Indeed I cannot tell whether I said it or no.

Recollect whether you did not upon that trial say, you did not know whether their trial was before or after the queen's death?—Why, Sir, if I went after the queen's death, you know that I could have said nothing else; what do you mean by saying that upon that trial I said I could not tell whether before or after?

Did not you say upon that trial that you did not know whether it was before or after the queen's death?—I do not believe I said any such thing at all.

Did you or did you not say upon that trial that it was before or after?—Upon my word, I cannot tell that I said any such thing.

If you cannot tell whether you said that it was before or after the queen's death that you went to Wexford, how can you say now that it is either one or the other?—I do not remember.

Would you be understood to say that you do not know whether it was before or after the queen's death that you went to Wexford?

Court. Is not that fully said already?

Mr. Harward. I do not apprehend it so, my lord.

Which was it, by virtue of your oath, was it in the queen's time, or after her death, that you went with lady Altham to the assizes?—I could not tell you now; I do not know, Sir.

Now, madam, I ask you this, how came it that you could not tell that this Mrs. Roe went with you?—I might have remembered it indeed, but I did not at that time.

Had you at this time any extraordinary intimacy or business with Mrs. Sweeny?—She is my sister.

Oh! I did not know that, madam. Pray, were you in mourning then?—I believe I was.

For whom?—I cannot tell whether for any body; I wore black sometimes.

Were you in mourning for any body at that time?—I wore black, but I cannot tell whether I was in mourning for any body.

Was my lady in mourning?—She was.

As to this trial that you went to see, give us some account of what passed there?—I remember nothing of the trial, but that I saw the gentlemen in the Dock.

Did you stay, madam, till they were acquitted or not?—Indeed I cannot tell.

Who sat by you in court?—Lady Altham.

Did not Mr. Colclough sit by her?—He did.

Did not he hand her in and out of court?—I believe he did.

Are you sure he did?—To the best of my knowledge, he did.

Did not you swear on the trial in the Exchequer, that you could not tell whether he did or not?—I say, to the best of my knowledge, he did.

Who went into the court-house with lady Altham?—He and I and lord Altham went with her.

Did not you swear that you could not tell whether he did or not?—I cannot recollect whether I did or not.

Did you know any of my lord's family?—I knew Ralph the butler, and Anthony Dyer, my lord's gentleman.

Did you know Bourke?—Yes, I did.

Did you know John Weedon?—I did, and Mrs. Setwright too, I was often there and knew them.

What was Bourke?—The postillion.

Was Doyle the clergyman tried at the same time?—He stood on the side-bar, and was not tried that time.

Did you know the judges?—I knew one Forster, I believe.

Did lord and lady Altham go to Dublin after this?—They went to Dublin soon after Wexford assizes.

Did not they go twice after?—I cannot tell indeed, I remember once they did.

Did not you swear on the trial in the Exchequer that you could not tell whether it was before or after my lord returned from Dublin that you were at Wexford assizes?—I never did.

Madam, do you know one Mrs. Bushe?—Not I, indeed I do not.

Did you ever declare, to your remembrance, that you did not know but this assizes was in the year 1716?—I cannot remember whether I did or no.

Did you, or did you not?—Not that I know of, indeed I did not: I am sure not to Mrs. Bushe.

Sarah Weedon sworn.

Mr. Smith. Before she comes it will only be proper to observe to your lordship, that she has been mentioned by some of the witnesses as being the coachman's wife at the time of the birth; and, my lord, Mrs. Sarah Weedon was the coachman's wife, and she will give your lordship an account of her knowledge of the family at Dunmaine during the period of time to which the birth is sworn to; and I believe, when she is produced and has given her evidence, that you will think she is not a material witness for the prosecutors, as she was upon a former occasion sworn to be.

Mr. Morgan. Do you know a place called Dunmaine?—*Sarah Weedon.* Yes, Sir, I do.

Did you know lady Altham?—Yes, Sir.

And lord Altham?—Yes, Sir.

Where were you when my lady came first to Dunmaine?—I was at Dunmaine.

How long did you continue there after she came?—I believe very nigh three years, to the best of my knowledge.

Did you know one Mrs. Briscoe?—I did, Sir.

Did you know her daughter?—I did.

Did you see them at Dunmaine?—I did, Sir.

Pray now answer, where were you at the time that they were there?—I was in the house, Sir.

Did you know of any accident that happened to lady Akham during the time they were there?—I did not know of any accident that happened to her.

Any miscarriage?—Upon my word, I never knew nothing of it.

What condition in point of health was my lady in during the time that they were there?—To the best of my knowledge, she ailed nothing at all.

Did you ever hear of any and what accidents happening upon account of tussors during the time they were there?—I protest I remember no such thing.

No china broke?—I do not remember any such thing, Sir.

I ask now, whether you know of any of that family to be delivered of a child during the time you were at Dunmaine?—I do.

Who was that?—One Hesther, that my lord called Pouty.

I ask you whether this Hesther was delivered of this child before or after my lady came to Dunmaine?—Before, Sir.

Do you know of any other person delivered after she came?—Not in the house, Sir.

Do you know of any out of the house?—Mrs. Setwright was, and myself, out of the house.

Court. Was lady Altham with child while you were at Dunmaine?—She was not, my lord.

Did you see her with child at any time whatever?—Upon my word, I did not. My lord, what I say is truth, and nothing but the truth.

Mr. Morgan. You say that this Hesther was delivered of a child, can you recollect the midwife?—If I should tell you the truth, they sent for one Mrs. —, I forget her name, — Mrs. Shiel in Ross; but to tell you the truth, before Mrs. Shiel came, I delivered her.

Who was sent for Mrs. Shiel?—Really I cannot tell; there was a fellow in the house, but I cannot tell his name now.

Now recollect and say, whether any other persons were brought to-bed at Dunmaine during your time?—There was Juggy Landy.

Now I ask you, did you see this child of her's?—I did.

Did you know it?—I did, Sir.

Did you see it at any other place?—I did, Sir.

With whom?—A great while afterwards, when we were in the county of Carlow, the child was brought there.

To what place?—To Carrickduffe.

Whom was it with there?—It was in the house.

With whom do you mean?—With lord Altham.

Was that the very child?—I say, Sir, it was the same I saw with Jean Landy at Dunmaine.

Did you ever see any child at Dunmaine considered as my lord Akham's child by his lady?—Never in my life; I would not say it for all the estate that ever lord Anglasta had, if it was false.

Where do you live now?—I live in Gennaught.

With whom there?—With colonel Blakeney.

At what place does he live?—At a place called Abbert.

Have you any children?—I have, Sir.

What are they?—Sons.

Court. What is it you propose by this evidence?

Mr. Morgan. What I propose by this evidence is this, that we shall shew a very unfair attempt made upon this woman on the part of the prosecutors.

Court. Mr. Mac Karcher has made an affidavit, which I wish, for his sake, he had not.

Mr. Morgan. He says, my lord, in his affidavit, he served this woman with a subpoena; I hope I may ask her that question.

Court. Go on, Sir.

Mr. Morgan. Were you served with a subpoena by him, and when?—I cannot tell the day of the month, it came one day, and I went to appear in Dublin the next day.

How far is colonel Blakeney's house from Dublin?—It is threescore and three miles off.

[Cross-examination.]

Mr. Callaghan. Did you live as a servant in the house of Dunmaine?—I did, Sir.

In what station were you there?—I was house-keeper before my lady came there.

Were you so after?—I was not; Mrs. Setwright was.

In what capacity, did you serve in the house after she went there?—I was in the house after she went there.

But I ask, did you serve in the house after?—I did after, because I did every thing that was to do.

How long did you continue to live in the house?—I lived in the house till I took a house of my own.

When was that?—I cannot tell exactly the time, but it was just at the end of the autumn, and I was as frequently in the house then, as I was before.

I ask you how soon after my lady went to Dunmaine was it that you left the house?—I cannot tell exactly the time, Sir.

Was it a month?—Oh! a great deal more than one, or two, or three.

Was it before or after Mrs. Briscoe and her daughter went there?—I was in the house when they came there.

I ask you only, whether you were a servant living in the house at the time they went there?—I was.

Upon your oath, did not you keep an ale-house at the bridge then?—No, not till after they went there.

Did you keep an alehouse there before Mrs.

Briscoe and her daughter left Dunmaine?—No, I did not, to the best of my knowledge.

What time did they go to Dunmaine?—I cannot tell the year, nor month, nor any thing of that, it is too long ago for my memory.

How long did they stay there?—I cannot tell that again.

How long after they left it, was it that Mrs. Setwright was brought-to-bed?—I cannot tell; she was with child coming to the house; but I cannot tell the time she was brought-to-bed.

Was it a month, or six weeks, or two months after they left Dunmaine, that she was brought-to-bed?—Mrs. Briscoe's daughter was a gossip to the child, to the best of my knowledge, and they were there at the same time.

Were you out of the house at the time Mrs. Setwright was brought-to-bed?—I think I was not out of the house then.

Were you or were you not?—I cannot tell that exactly.

But you are sure you were a servant when Mrs. Briscoe went away?—No, I did not say that: I say, to the best of my knowledge I was in the house.

You remember Mrs. Heather's being brought-to-bed?—I do, very well.

Was that before or after my lady went to Dunmaine?—It was before my lady went there.

You mentioned the midwife's name?—Shield it was.

Could that midwife be sent for for any purpose to lady Altham?—She could not, because lady Altham never had a child; she never had a child.

Was not it before lady Altham went to Dunmaine that Heather was brought-to-bed?—Yes, do not I tell you so?

I think you say you were at Carrickdaffe?—I was, Sir.

Were not you there upon a day, that was celebrated as a birth day of lord Altham's son?—There never was such a thing in this world.

Can you take upon you to say there was not?—I am as positive of it as of any thing in the world.

Had you any conversation with any body in relation to lady Altham's having had a child?—No, never since I was born.

Upon your oath, did you never say that my lady had a child?—Never, in the course of my life.

Mr. Recorder. Now we shall judge whether Mr. Mac Kercher's information be true or not.

Court. He was certainly misinformed.

Eleanor Thomas, alias Fisher, sworn.

Mr. Le Hunte. The evidence she will give is this—

Court. Do not open it now she is here.

Mr. Le Hunte. What is your name?

Eleanor Thomas. Eleanor Thomas.

Is that the name you go by now?—Eleanor Fisher is; my maiden name was Thomas.

Did you know one Mary Waters?—I did.

Did you know the late lady Altham?—I did, Sir.

Did you ever live in her service?—I did.

When did you go there?—I cannot tell you the year, but I was the second servant she hired after she came to Dunmaine.

What was the nature of your service?—I was house-maid.

How long did you live with my lady?—I lived a twelvemonth with her.

Where did you go when you left the service?—I went to one Mr. Bunbury's of Ballyeskin.

Did you ever hear of one Mrs. Briscoe and her daughter's being at Dunmaine?—I was in the house at the same time.

What house?—My lord's in Dunmaine.

Whilst you were house-maid, do you remember to have seen them there?—I did.

Did you continue there till they left it?—I did indeed.

Do you know of lady Altham's having a miscarriage at Dunmaine?—Indeed I never did.

Did you know Mrs. Pigot?—Indeed I did.

Of what place?—Of Tyntern.

Did you ever live in her service?—I lived eight years maid and wife with her.

When did you go to live with her?—I went to her after I left Dunmaine.

I thought you said you went to Mrs. Bunbury's?—I was only a year at Bunbury's.

How long did you live with Mrs. Pigot?—I was eight years maid and wife with her.

Did you live any where in her service but at Tyntern?—No where but at Tyntern.

Can you recollect the time she was living there when you was hired?—I was a twelvemonth her servant at Tyntern before she came from Dublin.

When did she come from Dublin to Tyntern?—I went to her at Lammas, and the Lady-day twelve month following she came to Tyntern.

What year was it?—Indeed, Sir, I cannot tell.

Where did she live for that year?—In Dublin, Sir.

Who hired you then?—Her steward, James Byrne, hired me.

Was there any separation between lord and lady Altham, to your knowledge?—I remember they parted; I was at Tyntern at the same time.

Was Mrs. Pigot there at that time?—I think she was; I cannot tell positively.

Whilst you were at Dunmaine and Mrs. Briscoe there, did you hear that lady Altham miscarried of a child?

Mr. Walsh. That is a leading question; do not answer it, woman.

Court. Did you ever see lady Altham with child?—I never saw her with child, nor never heard of her having a child.

[Cross-examination.]

Mr. Mac Manus. You say, you lived at Dunmaine?—I do, Sir.

What year?—Indeed, Sir, I cannot tell you the year.

Upon your oath, what year did you go to live there?—I can tell you the time of year, but not the year.

Can you tell the year you left Dunmaine?—I served her ladyship a year.

Was it in the year 1716 or 1717 that you left her service?—I cannot tell, if you would shoot for me that.

Court. Where were you hired?—In Dunmaine house.

Who hired you?—My lady hired me herself.

During the time that you were there, did you see any child there?—I never did.

Did you see lady Altham frequently?—I did, I was the next servant to Mrs. Heath, and often saw her.

Mr. Mac Manus. Did you see the furniture of that house?—I did.

Did you see any sawcers with odd figures on them?—I never saw the sawcers.

Did you never see those bawdy sawcers in the house?—I never did.

Do not you believe they were there?—I do not know; I never did see them.

Did you never hear of a miscarriage occasioned by the breaking of the sawcers?—I never saw or heard of a miscarriage.

Did you never hear it among the servants?—I never did, upon my word.

Upon your oath, did you never hear it?—Upon my oath, and upon my life, I never did.

Could there not be a miscarriage and you not know it?—There could not, Sir; for my lady could not miscarry unknown to me.

Could she do any office of nature unknown to you?—I do not know what you mean.

Mr. Bradstreet. The next witness will shew your lordship where Mr. Cliffe, who is said to be godfather to this child, was from the fifth of May till the middle of June 1715. His son will appear here to prove that; and will shew some rules of the Court, where he made motions during that time.

Mr. Walsh. I believe many a rule is entered in a lawyer's name that he knew nothing of.

Mr. Bradstreet. First, we will produce his son, to shew where he was in the year 1715. We will shew that first.

Court. If this be as you have opened it, it will be the most material thing that has happened yet: and I believe there will be little in the thing after, for it cuts off two or three of the most material witnesses on the other side.

The night being pretty far advanced, Mr. Cliffe had retired to his lodgings, and the next witness called was Mrs. Halpen; but she being also out of the way, Mr. Tench was called.

John Tench, esq. sworn.

Mr. Spring. Pray, Sir, inform the Court and the jury, whether you had any knowledge of Mrs. Pigot of Tynern?

Mr. Tench. I had, Sir.

You did know her?—I knew her, Sir.

Was any friend of yours concerned for her in her affairs?—My father received her rents for above 30 years.

Who was concerned in the management of her affairs, and receipt of her rents in the year 1715?—My father was.

Can you give the Court and the jury an account where Mrs. Pigot was in the month of November 1714, and from thence down to the latter end of the year 1716?—From my own knowledge I do not know where she was; but from letters I can tell you.

Have you any reason to enable you to form a judgment where Mr. Tench was in—

Court. Where was Mrs. Pigot in November 1714?—Of my own knowledge I cannot tell where she was.

Mr. Spring. Are your father's accounts, and papers, and letters, come to your hands?—I have them, Sir.

Have you any accounts relating to Mrs. Pigot's affairs in the years 1714, 1715 or 1716, in his hand-writing?—I have in the year 1715.

Court. It is proper to ask him if he has such; but what then? That won't prove where Mrs. Pigot was.

Mr. Spring. My lord, my next question is, Whether he has any letters of Mrs. Pigot to his father?

Court. That will not do. If she was produced here as a witness, you might produce her letters to confront her. We are not now upon the proof of similitude of hands.

Mr. Spring. Were you at Tynern in the year 1714?—I cannot tell where I was in 1714.

Were you there in the year 1715?—I was there in 1715.

Where were you in May 1715?—Indeed, Sir, I cannot tell.

James Walsh sworn.

Mr. Edmund Malone. We produce this witness, my lord, to shew that Mrs. Pigot was in another country, at another place attending her husband, who broke his leg, at the time they pretend she was godmother to this child.

Mr. Edmund Malone. Are you a married man?

James Walsh. Yes, Sir.

In what family did your wife live when you married her?—In the family of Mrs. Pigot.

What Mrs. Pigot, Sir?—Mrs. Pigot of Tynern.

Did you know counsellor Pigot?—I did, Sir, very well.

I ask you, then, if you recollect at any time when any, and what accident or hurt happened to him?—I do, Sir.

Tell it.—Mrs. Pigot went to Dublin in 1714, about November or December, I am not sure in what month, and some time after Christmas Mr. Pigot went to London, and he came back again—

Was it in January 1714-15, that he went to London?—I believe thereabout.

Well, go on.—He came back I believe about

March, or thereabouts, and he went to his estate in the county of Limerick, and happened to break his leg or thigh in the year 1715.

What time in the year 1715?—April I believe, or March, or thereabouts.

At what place did he break his leg?—They tell me, Sir, at Glengoose; I was not with him there.

How do you know he broke his leg?—I know, because Mrs. Pigot went from Dublin to him.

What time did she go to him?—She went about April 1715.

Where was she to go to?—Either to the county of Tipperary or county of Kilkenny, I cannot tell which.

How soon after he went to the county of Limerick did she leave Dublin?—I cannot tell exactly how soon she left Dublin, but she stayed there till she brought Mr. Pigot home.

To what place?—To her house upon Arran's Quay.

What time was that?—I cannot exactly tell the time; I believe it was in the year 1715.

How long might she have stayed away with him?—I cannot tell exactly; I believe it was more than a month; I believe it was two months, I do not exactly know.

When they came to Dublin, how long did they continue in Dublin without going into the country again?—They stayed in Dublin till she buried Mr. Pigot in 1717.

Are you positive that she remained all that time in Dublin, without going any where to the county of Wexford?—Yes, Sir, I can say that safely; and that she went home in the year 1717, and sent me back to Dublin to make a monument for Mr. Pigot at the outside of St. Paul's Church.

How long after their return to Dublin was it that he died?—He died in the year 1717.

Court. Are you sure that Mrs. Pigot was not at Tyntern in the year 1715?—She was not, upon my oath.

Nor in the county of Wexford?—Indeed she was not, my lord.

How many years did you live with her in all?—I cannot tell how many years, but I lived with her from his death to her death.

And you are sure she was not in the county of Wexford from the time she came to Dublin, till she buried him?—I am sure she was not.

[Cross-examination.]

Mr. Harward. Pray, Sir, where were you in Christmas 1714?—In Dublin, Sir.

Where did you live in Dublin?—On Arran's Quay.

Were you a house-keeper there?—I generally kept Mr. Pigot's house when they were in the country, but that year I did not.

Did you keep his house in Christmas 1714?—I did not, Sir.

Where were you then?—On Arran's Quay.

Where were you in the beginning of March 1714?—I was in Dublin then.

Where in Dublin?—In lodgings of my own.

Where were you May-day 1715?—In Dublin, Sir.

Are you sure you were?—I was indeed; Sir.

Where in Midsummer 1715?—In Dublin.

Now, I ask you upon your oath, was Mr. Pigot or Mrs. Pigot in their house at Dublin in the beginning of March 1714?—No, they did not come to Dublin till November 1714.

Where was Mrs. Pigot in March 1714?—In the county of Wexford.

Court. Do you mean March 1713-14, or March 1714-15?—In March 1714-15 she was in Dublin.

Where was she in March 1713-14?—I cannot tell, my lord, I believe in the county of Wexford.

Mr. Harward. Where was Mr. Pigot the 1st of May 1715?—I cannot tell you whether in Dublin, or that he was sick where he got his hurt.

Can you say, upon your oath, where he was the 1st of May 1715?—Indeed I am not sure whether he was in Dublin, or whether he was where he broke his limb.

Now, friend, where was Mrs. Pigot when the great eclipse was?—I believe she was with her husband where he broke his leg.

Were you in the county of Tipperary at the time of the great eclipse?—I was not.

Where was she at that time?—I suppose she was with Mr. Pigot.

Don't be supposing with me; you know you ought to tell nothing but what you know; do you know where she was at the eclipse?—She was, and I take it upon my oath, she was where Mr. Pigot broke his thigh.

Where was that?—In the county, I believe, of Tipperary.

How do you know that she was not in the county of Wexford?—Because I know she was not.

Were not you in summer 1715 in Dublin?—I was, part of the summer 1715.

How do you know that she was where her husband lay ill at the time of the eclipse?—I know it very well; she was with Mr. Pigot where he broke his leg.

Did you see her with him?—No, I did not.

Why will you swear then she was with him?—Why, because I am sure of it.

How are you sure of it?—She told me she was going to him, I knew that she went there, and we all knew that she went there.

Have you any other reasons for being so positive?—There are letters from under her hand, giving an account that she was there?

What letters?—To her agent captain Tench.

Pray now then, is not that the reason that you know she was there?—It is only one reason.

Tell another reason.—Why, I am sure she was there, because I know she went there, and all that were along with her told me so.

Do you know of your own knowledge where she was?—No.

Court. Did you see Mr. Pigot when he came to Dublin?—I did.

In what condition did he then appear to you?—He appeared as if he had a leg broke, and was very bad.

Court, to the Jury. The witness says, he saw Mrs. Pigot go down to her husband, and saw them return together.

Mr. Recorder. Where he swears that she went to her husband at a certain time, that she said she was going to her husband, and that he saw her come back with him, with his broken leg, it is as full evidence as is necessary.

Mary Walsh sworn.

Mr. Lec. What is your husband's name?

Mary Walsh. James Walsh.

Did you know Mrs. Pigot?—I did.

Did you know her in the year 1715?—Yes, I did.

Where was she then?—In Dublin then.

Court. Where did she go from Dublin?—She went to where Mr. Pigot broke his thigh.

Where was that?—Beyond Kilkenny, going up to Munster.

Were you with her?—I was not.

How do you know she went there?—Because she was sent for when he broke his thigh.

Mr. Lec. When did Mrs. Pigot come to town after that?—I cannot tell when she came up.

Who came with her?—Mrs. Wallace and others, I cannot tell who.

Did you ever see Mr. Pigot after?—Sure I was with him when he was buried.

Do you remember when he came to Dublin after he had broke his leg?—Why, I believe he came when she came.

Who came to town with counsellor Pigot?—I cannot tell you, Sir; I cannot remember that.

John Cliffe, esq. sworn.

Mr. Bradstreet. My lord, this is the evidence that I have already opened.—What is become of your father?—*Cliffe.* Dead.

What profession was he of?—A lawyer at the bar.

Do you remember where your father was in May and June 1715?—I cannot take upon me to say where he was; he was in this kingdom, but whether in country or town I cannot take upon me to say from my own memory.

Where were you at that time?—I believe I was at the college.

Pray, recollect and consider now, where your father was in those months?—I cannot take upon me to say, from my memory, where he was in May 1715.

Where do you say you yourself were at that time?—I was in the college at that time.

Did your father attend the terms regularly at that time, or not?—I believe he did; but I cannot take upon me to say that I remember his keeping terms regularly; I believe he did.

Mr. Bradstreet. It appears to your lordship that Mr. Cliffe was a lawyer at the bar; now, we are to falsify the testimony of some wit-

nesses produced on the other side, who swear he was godfather to this child, and therefore I hope we shall be at liberty to shew some rules of the Court, to prove that Mr. Cliffe was here in May and June in the year 1715.

Serj. Tisdall. I desire to know first, whether you have other questions to ask the witness.

Mr. Bradstreet. My lord, I remember when the testimony of a person was defeated, by shewing that the name of a lawyer was to a certain bill. He said, that the lawyer was dead before that time, the record was produced, and his name was at the record in the cause of Reynolds and Sandys. We produce this witness to shew that these witnesses, who swore his father was godfather to my lord Altham's child, swear false; cannot we, in addition to his testimony, shew the rules of the several courts that his father made motions in at that time?

Mr. Mac Manus. My lord, I only got up to answer Mr. Bradstreet. I do apprehend, that a bill in Chancery is not evidence, and the reason is, because any man may file a bill in the name of another; and therefore unless you can shew some proceedings have been had upon it, you cannot produce it as evidence. The same rule will hold in a chancery motion in court, which may be made by one person and have another's name to it.

Mr. Daly. It is never done on the equity side, it is always moved in court publicly.

Court. I think it must appear, who the counsel is that makes the motion.

Mr. Mac Manus. The attorney is the person to whom you must give notice, and is answerable for all the proceedings; the lawyer's name may be, and often is mistaken by the officer of the Court, it not being material what lawyer moves.

Court. The question is, Whether attested copies of the acts of a court of record may not be produced, proved and given in evidence to falsify a witness, to shew that a person sworn at a certain time to be in one place, was then at another?

Mr. Daly. The indenture of a fine is read against a man every day.

Mr. Solicitor. By act of parliament.

Mr. Daly. It is not made evidence by act of parliament.

Court. Put the case distinctly.

Mr. Bradstreet. I say, my lord, I put it thus: after the evidence of this gentleman, his father appearing to be a lawyer at the bar, and after the evidence that has been given on the other side of his being godfather to a child at Dunmaine at such a time, I offer these rules of his on motion, to shew that he was not at Dunmaine at that time, but in these courts, and I instanced the case of Reynolds and Sandys for a precedent.

Mr. Robins. Are they litigated motions?

Mr. Bradstreet. They are litigated, and hearings and open pleadings.

Mr. Thomas Bourk sworn.

Mr. Bradstreet. What is that in your hand?

Thomas Bourk. Rules in the court of Exchequer in Easter term 1715.

Are they all out of that court?—They are, Sir.

Are they true copies?—They are.

Serj. Tisdall. I believe it is an established rule in evidence, that the greatest certainty must be had, that the nature of the thing to be proved will admit of. This is evidence of no sort of certainty, because it depends upon a person not on his oath, and because he incurs no penalty by falsifying the name of the lawyer. He is not upon his oath not to put the name of the lawyer to the record, and it is no more than a falsifying evidence; and besides, records can only be produced as evidence between the parties to them.

Mr. Mac Manus. I apprehend it no sort of evidence at all.

Mr. Bradstreet. What I apprehend is this, that this is evidence which is contradictory to the evidence that they have produced to this point. Here are motions that have been litigated, that have not passed of course; but I say, they have been litigated, so that it is to be presumed, that he was litigating these matters; and if so, it is impossible he could be at Dunmaine at that time. And as such, I hope, is good proof, and especially since he is dead.

Court. I think it may be read to contradict a witness; and I know that the officer is so far from being permitted to do this thing of falsifying a name, that he is under a great penalty for it.

Mr. Bradstreet. The register is answerable, though committed by the deputy.

Court. I think it may be read in contradiction to the witnesses.

Mr. Mac Manus. Your lordship is going to establish a rule that may be of dangerous consequence.

Court. I am not going to settle a rule, but I only tell you what I think is and ought to be allowed as evidence. The Journals of both Houses of Parliament have been produced in evidence.

Mr. Walsh. I beg leave to consider this—

Court. Read the notes and orders.

Mr. Whyte reads: This is the 5th of May, 1715.

“*POWELL v. GOODWIN* Ex. of Goodwin.

“*Mr. Cliffe* pro Q. prays interest for the 246*l.* which the defendant's testator received since they were paid the mortgage money.

“*Mr. Baly.* I do not oppose plaintiff's having a decree for the money, but they move for interest, and I am surprized at their demanding of interest.

“*Cur.* Take a decree for the money reported, and interest for the money reported from the time the report was confirmed, and take an injunction forthwith to be put in possession, and take a decree for the rent that fell due the 25th of March last.”

Court. He must be personally in court at that motion.

VOL. XVIII.

Mr. Whyte. The next is the 6th of May, 1715.

“*BERMINGHAM et al. v. LORD SHELburne.*

“*Mr. Cliffe* pro Q. moves on the last notes for putting off the giving of the judgment of the Court on affidavit.”

The next is the 9th of May, 1715.

“*LAWLESS v. SHEE.*

“*Mr. Cliffe* pro Q. moves on last order for putting off the hearing a week.”

The next is the 11th of May, 1715.

“*BERMINGHAM et al. v. LORD SHELburne.*

“*Mr. Cliffe* prays a day to speak to this matter.”

The next is the 13th of May, 1715.

“*ARCHER v. ROGERS.*

“*Mr. Cliffe* pro D. moves for time to answer personal interrogatories as to several books, in regard the books are very large, and produces an affidavit of this matter.”

The next is the 13th of May, 1715.

“*WATSON v. BUTLER.*

“*Mr. Cliffe* pro D. moves for to dissolve the injunction.”

The next is the 14th of May, 1715.

“*WHITE et ux. v. GALE et al.*

“*Mr. Cliffe* pro Q. moves on the notes upon the hearing.”

The next is the 31st of May, 1715.

“*THOMAS WHITE v. DAVID DUNBARR.*

“*Mr. Cliffe* opens the defendant's answer.”

The next is the 1st of June, 1715.

“*ARCHER v. ROGERS.*

“*Mr. Cliffe* pro D. the plaintiff never demanded any custom for timber these 14 years.”

The next is the 18th June, 1715.

“*BERMINGHAM v. LORD SHELburne.*

“*Mr. Cliffe* pro Q. moves on the order for liberty to read the bill and answer in the cause of Stewart against the lord Shelburne.”

The next is the 23d of June, 1715.

“*KING v. GORE et al.*

“*Mr. Cliffe* pro D. moves on affidavit for a commission to examine.”

The next is the 25th of June, 1715.

“*BERMINGHAM et al. v. LORD SHELburne.*

“*Mr. Cliffe* pro Q. Stewart et al. have a decree against lord Shelburne, Evans et al. and they have a decree for the 29,503*l.* and also for the 21,032 acres, and on the hearing of this cause the bill of Stewart and others and the lord Shelburne's answer was offered to be read, but the Court has not yet read that bill and answer; prays that bill and answer may be read, before the bill is dismissed.”

Mr. Bradstreet. How many of your name were at the bar in the year 1715?

N

Mr. *Cliffe*. I know of no person of that name but my father.

Did you ever attend the courts?---I did not, Sir.

Did you know Mr. Anthony Colclough, Sir?---Yes.

Of what religion was he?---He was reputed a papist.

Is he alive or dead?---I have heard that he is dead.

Did not he die a papist?---He was reputed a papist during his life.

[Cross-examination.]

Mr. *Mac Manus*. Did you attend the terms in the year 1715 or 1716?---I did not attend in 1715 or 1716.

Was your father the only person of the name that professed the law?---There might be another, but I never heard of any.

Mr. *Walsh*. It has not been taken notice of in what terms these motions have been made. Here is a chasm of about a fortnight between the first and last motion, and there is so between the two terms. The first rule is on the 5th of May, the last the 25th of June, so that it must be in two terms that they were made.

Court. So it was.

Mr. *Walsh*. Well, then there was a short vacation, when he might have been in the country, and stood godfather to the child.

Court. But you will consider, one of the witnesses said the christening was four or five weeks, and another three or four weeks after the birth.

Mrs. *Penelope Halpen* sworn.

Mr. *Lee*. What was your maiden name?---Mrs. *Halpen*. Hunt, Sir.

Whose daughter are you?---Daughter to John Hunt of Glangools, near Killenaule, in the county of Tipperary.

Where did he live in the year 1714, 1715, and 1716?---He lived there, Sir.

Do you remember the eclipse of the sun?---I do.

Where were you at that time?---I was at my father's house then.

Were you acquainted with counsellor Pigot and his wife?---I was.

What was the occasion of your being acquainted with them?---He broke his thigh near my father's house, and came and lay there till he was cured.

When was that?---In the year that the eclipse happened.

Was Mrs. Pigot there?---She was there at the time of the eclipse.

How long did she stay after the eclipse?---I cannot tell indeed.

How long was she there before?---I cannot tell indeed.

Was she a fortnight, or a month, or how long?---I cannot tell how many days.

Who came there first, he or she?---He came first.

How long was he there before she came?---He was a few days before she came.

Who came with her?---Mrs. Wallace.

In what state of health was he?---He was in his bed with that broken leg.

How long did he keep his bed?---I cannot tell how long he kept it; whether a month or six weeks I cannot tell.

Court. How long did his wife stay with him?---I believe more than a month.

Mr. *Lee*. Were they visited by any body while they stayed there?---By several.

Can you recollect any one that visited them?---Mr. Caesar Colclough was there; whether to pay him a visit or not I cannot tell, but I saw him there.

Did they leave your father's house together?---They did, to the best of my memory and knowledge.

Where did they go to from your father's house?---I cannot tell indeed.

Court. Did they come to your father's before or after the great eclipse?---Before.

Was Mrs. Pigot there before the great eclipse?---She was indeed.

[Cross-examination.]

Serj. *Tisdall*. Can you be positive of the time that she came to your father's house?---I cannot tell what time.

Can you say whether she was there at the time of this eclipse?---Yes.

Are you sure she was?---I am sure she was.

Was any person with her at that time?---Mrs. Wallace and she were there.

Have you any particular reason for being so certain?---Yes, Sir, I was in the garden when the eclipse happened, and I called Mrs. Wallace out, to the garden, to look at the eclipse with me.

When was the eclipse?---I cannot tell, Sir.

How long after the eclipse did Mrs. Pigot stay?---I cannot tell indeed.

How long did she come before it?---Nor how long before she came.

Mr. *Le Hunte*. My lord, we now produce Mr. Sutton, who will shew your lordship that Dennis Redmond in the year 1718 told him, that he carried a midwife to Dunmaine to deliver one there, who was called my lady.

William Sutton, esq. sworn.

Mr. *Le Hunte*. Pray, Sir, do you know Dennis Redmond?---*Sutton*. I do, Sir.

When did you first know him?---I believe in the year 1717.

Was he ever in the service of you or your mother?---He lived in the house with us in the year 1717.

Had you ever a sister at that time?---I had.

Had she any occasion for a midwife?---She had, Sir.

Was any body sent for a midwife?---Dennis Redmond was sent.

Will you give an account of what you remember of the bringing her by him to your sister?---I believe it was in February 1717 that I sent him to Ross for Mrs. Shiel; he went out pretty early in the morning, so as I expected

him home before dinner, but he did not return till an hour or two in the night, which made me imagine he had occasion to go further for her; and when he came home, I went to the stable to look what condition the horse was in. When I came into the stable, I found him taking care of the horse, and asked him how he came to stay so late; he told me he could not get her to come away sooner; and upon examining the horse, I took up the saddle and pillion, and found him very warm and wet; upon which, I asked him how that came? He said, he could not tell, unless that unhappy woman had pissed upon the pillion, for that she was fond of drink, and had served him so once before.

Upon what occasion did he tell you he had been sent for her before?—He told me he had brought her once from Ross to Dunmaine for a young gentewoman, as he called her, that was kept by my lord Altham.

Go on, Sir.—He named the young gentewoman's name, but I will not take upon me to swear her name; I do not remember now what he called her.

Who was it he said he brought the midwife for?—He said, he brought her for a young gentewoman kept by my lord Altham.

Did he ever tell you that he fetched one for my lady Altham?—He never did.

What is the character of Redmond, is he to be credited upon his oath?—Why, of late years he is not reckoned a man of veracity in our country.

Is he to be believed upon his oath?—I should take but very little notice of his oath now.

[Cross-examination.]

Mr. *M. Manus*. Why now?—From his general bad character in the country.

How long has he had that general bad character?—He has not had a good one these several years.

Do you know him to have perjured himself?—I did not know him to have perjured himself in a court of justice.

Mr. *Edmond Malone*. We now produce Nicholas Croake, and he will shew that my lady Altham stayed in Dunmaine in the months of October and November 1714, that she went to Dublin in May following, and stayed in Dublin all the year 1715.

Nicholas Croake sworn.

Mr. *Edmond Malone*. When did you first become acquainted with lord and lady Altham?

Nicholas Croake. The first time that I knew lord Altham was in the year 1711.

And when with my lady?—In the year 1713.

Where did you live in the year 1713?—At Ballycarrigmore.

How near is that to Dunmaine?—I believe very near two small miles the high road, but to go a short road it is much nearer.

You say in the year 1713 you first knew my lady, where was it you first saw her?—In

1713, that was the first time that I saw her at Dunmaine, some time after she came there, in December 1713.

Do you know Rathimny Bogg in that country?—Very well.

Do you know any thing particular that happened there?—I do, very well.

Give an account of what you know.—In the year 1714, his lordship and major John Sutton made a hurling-match, to be hurled at the Green of Rathimny.

What time of the year was that hurling-match?—It was hurled in September 1714, or the beginning of October 1714; I cannot tell whether in October or the latter end of September.

Pray, Sir, how long after that, and when did you see lady Altham at Dunmaine?—I saw her that day at the Hurling Green in her chariot.

Was my lord there?—He was on horse-back.

Pray, Sir, were you at any time and when at Wexford in the year 1715?—I was there at the assizes in 1715, which happened upon Easter week.

I ask you, Sir, whether there were any and what persons of consequence there that you took notice of?—Lord and lady Altham were there.

Between the time of the hurling-match and the time of the assizes, did you visit them at Dunmaine?—I was very often at Dunmaine in the year 1714, when they lived there.

Were you ever there in November 1714?—I was often there between the hurling-match and Christmas 1714.

Were you there in November that year?—I cannot tell that.

Did you see my lord and lady often between the hurling-match and the assizes?—I did, Sir.

When you saw my lady at the assizes, did you observe her to be with child?—I never did, by the virtue of my oath, nor never heard she was till this affair.

After the assizes, can you recollect any misfortune that happened in your family?—When I was at Wexford assizes, my father, being ill for several months before, died; when I came home the 20th of April 1715, he was dead, before I came home, and was buried that Friday, that the great eclipse happened, the 23rd of April.

Do you remember any rejoicings at Dunmaine, about the time of the eclipse, and on what occasion?—I cannot tell you on what occasion, but on the 23d of April, being St. George's day, that my lord made a merriment, it was on a Saturday, the day after my father's burying.

Did my lord Altham celebrate any day, and what day in the year with dancing and merriment?—That day he did, the 23d of April 1715, and the 23d of April 1714 before.

Did you see lady Altham at the time you were there?—I saw her there, indeed.

Was she present at the diversion?—She was.

In what condition did she appear, as to being with child then?—By the virtue of my oath, I never saw her appear as to say she was any way big, or with child.

How soon after did they go from Dunmaine to Dublin?—They went in May 1715 to Dublin.

Did you see them at any time after, and when?—I saw them in August 1715.

Was that the August after the assizes?—It was in August 1715 that I saw them in Dublin.

Did you see them at any time that year besides, and how soon after?—I did see them in October 1715, and in February 1715 I seen them here; and in April 1716, the latter end of that month I came to town to my lord, and stayed till he went into the country in May 1716.

Where was my lady then?—I saw her at her lodging.

Where?—At Mrs. Vice's in Essex-street.

Can you say when my lord returned to Dunmaine?—He went from Dublin to Dunmaine in May 1716.

[Cross-examination.]

Mr. Mac Manus. You say, you knew my lord and lady Altham at Dunmaine?—I did, Sir.

Pray, how often did you see them there?—I cannot tell, but very often.

I think you said, that my lady was not with child when you saw her?—I did say so, and I never heard it till this affair.

Might not she have been with child and you not know it?—I should have heard it in the house where I was so conversant.

Might not she have been with child and you not know it?—I never knew her to be with child.

What sort of a woman was lady Altham?—She was a clever proper woman.

Was she tall?—She was tall.

May not a tall woman be with child and you not observe it, if she was young with child?—If she was, I never saw it nor heard it.

Did you ever hear that she miscarried?—I never did.

You say you were at the assizes of Wexford?—I was.

Were you there in Easter assizes 1716?—In Easter assizes 1715, I was there.

Were you there in Easter assizes 1716, or any other assizes?—I cannot tell but I might be at other assizes, I do not remember which now.

How came you to know you were there in 1715?—I gave you a reason before, that my father was ill when I went to the assizes, and I found him dead when I came home.

Was Mr. Colclough at that assizes?—I believe he may be there.

Would not you have seen him, if he had been there?—There may be several there, that I did not see.

Name any person you did see there.—I saw lady Altham there.

How came you to take more particular notice of her being there than of Mr. Colclough's?—Because I was much better acquainted with them than him; and I had very great reason for it.

Did you see her go into court?—I did not.

Was she in it to your knowledge?—She was, as I was told.

Were you in the court during the assizes?

—I was in it sometimes, and I cannot tell well whether I was or not, but I believe I was.

What coloured clothes had she on at Wexford then?—I cannot tell.

Where was it you saw her at that assizes?—At her lodging at captain Sweeney's, at Wexford.

Where did he live?—In the street as you go down towards the gaol.

How came you to see her there?—Because I came to his lordship about some business.

Did you see her whenever you went to see my lord at any other time?—Perhaps I might, and perhaps not.

Where was my lord at Wexford when you saw him?—I saw him at captain Sweeney's house.

And where did you see my lady?—She was coming out of the room when I saw her.

What sort of clothes did she wear then?—I cannot tell what sort of clothes, it is so long since.

Jury. Pray, Sir, when did you hear of your father's death?—Not until I came home, in the night.

How long were you at home after he was buried?—I came home before he was buried, he died on Wednesday, and I came home that night, and he was buried on Friday the 23d of April.

How far do you live from Dunmaine?—About two miles, or thereabouts.

Were you at Dunmaine the 23d of April?—I was there the 23d of April, the day after my father was buried.

Mr. Mac Manus. How many days did you stay at the assizes?—Two days, Sir.

Were you there the first day of the assizes?

The Witness is directed to go off the table.

The Examination of the Witnesses for the Traverser ended at three o'clock in the morning.

Mr. Solicitor. I mentioned to your lordship some time ago, that if these gentlemen offered any thing new, we would reserve a liberty of replying, and encountering some testimony that we expected on the other side. It relates to the transaction at Wexford, on which they lay great weight; in answer to which, for the satisfaction of the jury, we shall beg leave to have two or three witnesses produced.

Court. Well, be it so. Whom do you call?

Serj. Tisdall. We shall now call Mr. John Masterson, the very man that was tried at that assizes.

Mr. *Malone*, Mr. *Daly*, &c. Not one of the witnesses said that he was tried, but that Walsh was.

Mr. *Robins*. This is to shew whether lady Altham was there or not.

Mr. *John Masterson* sworn.

Serj. *Tisdall*. Were you at the assizes of Wexford in spring 1715?

John *Masterson*. I was, Sir.

Pray, Sir, were you arraigned there?—I was.

Can you say whether there was any lady at the court-house the day you were arraigned?—There were some gentlewomen there, but I know of no lady.

Did you take notice of any of them?—There were two aunts of mine, and a sister of mine, and two cousin Germans.

Who were they? Name them.—My aunt Swords, my aunt Talbot, my sister Colclough, and my aunt Talbot's two daughters.

Court. Did you know lady Altham then?—I did.

Did you see her in the court-house that day?—I take it upon me, to the best of my knowledge, to say, that I did not see her.

Do you know Mrs. Anne Giffard?—I did know her formerly, but have not seen her since the last time I seen her at Wexford.

Did you see her in court?—To the best of my knowledge, she was not there.

Was she in Wexford at that assizes?—If she was, she was not in court.

How do you know?—Because I did not see her.

And might not she be there for all that?—She might be in disguise, may be.

Would you know her now if you saw her?—I do not believe I would, for I live very remote from that part of the country, and have not seen her a long time.

Might not she be there and you not see her?—Not, except she kept behind backs.

Serj. *Tisdall*. Did you know lady Altham before that assizes?—I have seen her before at Ross at captain Butler's, my wife's father-in-law's.

Were you acquainted with her face?—I was.

Did you, or did you not see her in the court at the assizes?—I did not see her to the best of my knowledge.

Mr. *Daly*. Was lord Altham there?—He was.

Serj. *Tisdall*. Was Caesar Colclough there?—He was.

Whereabouts was he in the court-house?—I do not remember whereabouts he was.

Court. This is improper; it is not regular, Mr. Serjeant. It is evidence to the same fact, your evidence now must be only to discredit the witnesses.

Serj. *Tisdall*. My lord, it is a new fact arisen upon their testimony.

Did you see lady Altham there at any other assizes?—I did.

At what other assizes?—I cannot tell which

assizes, but it was after that, and I have seen Mrs. Giffard with her, and it was not the assizes I was tried.

Are you sure it was not the assizes 1715?—It was not.

Were you tried at that assizes?—I was arraigned, and tried then, and acquitted with honour.

Was Mr. Walsh tried at the same time?—He was not tried by the same jury, nor the same day.

Pray, were you both at the same time in court?—We were, Sir.

Mr. *Recorder*. I ask you, Sir, were you under so little concern, as that you reckoned all the ladies in the court?

Court. You establish him as a witness properly produced, if you cross-examine him.

John *Masterson*. There were more women that I do not remember.

Serj. *Tisdall*. We beg leave to produce Mr. Colclough.

Jury to Mr. *Masterson*. What was the day you were tried on?—I believe it was on Wednesday I was tried, to the best of my memory, and I believe it was the 20th of April.

On what day was Mr. Walsh tried?—Mr. Walsh was tried the day before me.

Did the Court sit the day after you were tried?—I did not mind that, for I was drinking with my friends and minding other business, and did not mind that; I believe the judges discharged the country.

Were you in court when Walsh was tried?—I was.

Mr. *Mac Manus*. Mr. Colclough has met with a very great misfortune by the death of a valuable son, but for the sake of public justice he will appear here.

Caesar Colclough, esq. sworn.

Serj. *Tisdall*. Were you at the spring assizes of Wexford in the year 1715?

Caesar Colclough. I was, Sir.

Did you see lady Altham or Mrs. Giffard there?—I did not that I know of.

Were you in the court-house when the Pretender's men were tried?—I was.

Pray, Sir, were lady Altham and Mrs. Giffard there?—To the best of my knowledge, they were not.

Did you sit by them at those trials?—I did not, Sir.

Pray, Sir, did you hand either of them into court?—I handed neither of them into court, by the virtue of my oath.

Did you attend the whole trial?—I did, and was there before and after.

You were acquainted with Mr. Pigot, I presume?—What Pigot?

Counsellor Pigot, that was married to Mrs. Pigot of Tyntern.—Yes, he was married to my relation.

Can you say where he was in spring 1715?—To the best of my knowledge, he was then in England.

Do you remember his breaking his leg?—

I do, Sir; I remember he broke it at Glangoole in the county of Tipperary.

Pray, Sir, what year was that?—In the year 1716, to the best of my knowledge.

Did you go to the county of Tipperary to see him?—I was in town here when he broke his leg, and my cousin Pigot wrote to me, she had a jointure upon that estate, and wrote to me that I should come—

Mr. *Duly*. I must object to this evidence Mr. Colclough is going into; those letters, Sir, that you received from Mrs. Pigot are not evidence.

Serj. *Tisdall*. Do you know Dennis Redmond?—I do.

Pray, Sir, what character does he bear; is he a man to be credited upon oath?—Upon my word, I believe he is to be credited upon his oath; if you will ask me for my reasons, I will give them to you.

What is his general character?—He has as good a character as any man of his abilities that I know of in the world; I have known him these twenty years.

Pray, Sir, do you know when counsellor Pigot died?—I believe in the year 1719, or thereabouts; he was buried in St. Paul's church, the time of his death is on his tomb there; I believe it was 1718 or 1719, or thereabouts, I am not certain.

Court. Do you know whether Mrs. Pigot went to her husband when he broke his leg?—She did; and stayed with him till he came to Dublin.

Do you remember what year it was?—It was in the year 1716, as near as I can recollect.

[Cross-examination.]

Mr. *Recorder*. Can you swear that lady Altham was not at the assizes in the year 1715?—I can, as positively as I can swear any thing in the world.

Can you, that she was not at the assizes?—I can, that she was not in the court.

Can you swear that she was not in the town?—I cannot take upon me to swear that she was not in the town.

Can you swear that Mr. Pigot did not break his leg in the year 1715?—I can, to the best of my memory.

But can you positively swear that he did not break his leg in the year 1715?—I can swear that it was not in the spring 1715, because I was at the Wexford assizes, and my cousin wrote to me to come to her.

Where was she?—She was at Glangoole.

At whose house there?—At one Hunt's, it was a thatched house.

Do you remember Penelope Hunt, a daughter there?—I cannot tell, I might see women there, but did not take such notice as to remember them.

Do not you believe that Mr. Hunt's family knew when Mr. Pigot broke his leg? Was not it broke near them?—Upon my word, Sir, I do not believe they knew better than I; because

I was directed by my cousin to come down, and I did; and I found her there, and surgeons setting his leg, and I am sure it was the year 1716.

Where was Mrs. Pigot in the year 1715?—She was in the winter 1714, I am positive that she was at Tyntern, and she seldom left it till towards May, or thereabouts.

Do you know James Walsh?—He did not live with her then.

Did not he live with her in the year 1715?—No, Sir, nor his wife neither.

Where did they live?—They lived in town, or somewhere else, but not in our family.

Was not he an attendant of the family at that time?—No, Sir, I believe he was then a door-keeper to the play-house.

Upon your oath, do you know that of your own knowledge?—I do know it so far, as I had it from his own mouth, upon my oath, that he was a door-keeper at the play-house.

How long before that was he in their service?—He had not been in the service before.

Was not he in the service at all?—He was afterwards, but he was not in the service at the time Mr. Pigot broke his leg at all.

Jury. Was lord Altham at the assizes of Wexford in 1715?—I do not recollect any thing about him at all; I was told he was, but he was a man taken very little notice of.

Do you know whether he was in court or not at the trial?—I do not know whether he was in the court or not.

Mr. *Recorder*. Do you remember where you were at the time of the eclipse?—I was in the county of Wexford; I was hunting on the mountain of Forth at the very instant of the eclipse.

Did you, or did you not see lord Altham at Wexford assizes?—I did not see him there, to the best of my knowledge.

Recollect, and say upon your oath, whether you did or no?—I do not recollect, I cannot say I did not see him or that I did, upon my oath.

Serj. *Tisdall*. We shall trouble your lordship but with two witnesses more, and them but to two short points. The first relates to Edmond Bourke; we produce Mr. Bush to give an account of that man, and a character of him too.

Arthur Bush, esq. sworn.

Mr. *Solicitor*. Do you know Edmond Bourke? Mr. *Bush*. I do, him of Collombkill.

Do you remember that he was a postillion to any body?—I do not.

What is he now?—He is a kind of a farmer now.

Had you any discourse with him about the affairs of the Anglesea family?—I had a discourse with him.

Give an account what that discourse was.—A little after the time that Mr. Annesley and lord Anglesea were at Ross, examining witnesses, this Bourke came to my house about some business of a justice of peace, and after I

had done what he came about, I asked him whether he was at Ross, and what was doing there? He told me there was a great deal of company, and he said he gave some evidence there. I then asked him on which side he was a witness; he told me, on the earl's side. What was it, says I, that you had to say? He swore that he was servant to lord Altham, when he lived at Dunmaine, and that there was a kitchen maid there that my lord had got with child, that she was under the cook in the kitchen, and that all the family disliked her, because she took a great deal upon her for lying with my lord. That one day there was a hare in the kitchen to be dressed for dinner, and the cook took the skin of the hare off and threw it at her, and hit her upon the back, and said, Damn you, for a whore, if I can do nothing else, I will mark your bastard. Some time after, he said, she was brought-to-bed of a son, and they were all desirous to see if it had that mark, and they run to see it, and it had the mark of the hare's skin upon the back of it. I told him, this is a very material thing, and I thought you were a cunninger fellow than to be pinned down to swear such a thing as that. Oh! says he, if they do not like that, I can say that my son was that day drowned, and that I was a madman and did not know what I was doing. He swore further, that there was a quarrel between my lord and lady Altham on account of Tom Palliser; and upon that, he said, they parted, and my lord lived at a place called Dunmaine, and she in Ross, and he went with a compliment from my lord to my lady, with a How-do-you-do, and said, that he saw my lord very fond of the child; and, says he, I spoke to my lord about it, and said, How can you be so very fond of that bastard? Why, says he, I got him, and I will take care of him, I will get him to be a captain of horse.

What character has this Bourke?—He is of a very bad character.

Is he to be believed upon his oath?—I will not believe him; nor no one that ever heard talk of him would believe him.

How long have you known him?—I have known him these 26 years, and I have known him under a bad character during that time.

[Cross-examination.]

Mr. Recorder. Had you any discourse with this man about a child of lady Altham's?—No indeed, he told me that she never had a child.

Mr. Just. Blennerhasset. Gentlemen of the Jury; The traverser, Mary Heath, is indicted for perjury, committed by her on her examination in the Court of Exchequer, in a cause wherein Campbell Craig, lessee of James Annesley, was plaintiff, and the earl of Anglesea, defendant. The several assignments of perjury in the indictment are as follow:

First, it is laid in the indictment, that she swore on that trial that lady Altham never had a child, while she, the traverser, lived with her.

Secondly, That lady Altham never had a child at Dunmaine in the county of Wexford.

The third is, That there never was a child as a child of lord Altham's and Mary his lady christened or living at Dunmaine house, while she, the traverser, was there.

The fourth, That she never saw a child in the hands or care of Joan Laffan while she was at Dunmaine.

And the fifth is this, That lady Altham did not miscarry of a child at Dunmaine.

The indictment, gentlemen, averreth the contrary of all these facts, sworn by the traverser, to be true, and that she has been guilty of malicious, wilful and corrupt perjury. There have been many witnesses produced by the prosecutor in support of this indictment, and many in support of the traverser; and it has been admitted that there was a verdict in that cause tried in the Exchequer, and that verdict was given on the side of the party, who was to gain by having the traverser's testimony discredited: And it is also admitted, that those several facts above-mentioned were sworn by the traverser on that trial in ejectment. It is likewise admitted by both sides, that the traverser lived with lady Altham from the month of October 1713, the time of her first coming into this kingdom, till the year 1729, when lady Altham died. All these are admitted, to shorten the time.

The first witness examined by the prosecutor was Mrs. Henrietta Cole, whose testimony related to the miscarriage of lady Altham.

She swears, that lady Altham came over in 1713. That lord and lady Altham lived at Dunmaine. That they, and Mrs. Cole, and her mother, were at dinner at Dunmaine. That there were saucers of indecent images brought to table, which were broke by my lord, whereby my lady Altham received a fright, and that Mrs. Heath came and alarmed her mother that night with the indisposition of lady Altham; and that Mrs. Cole was in bed with her mother, when Mrs. Heath desired her mother to make haste, and rise, for that lady Altham was extremely ill. And the witness said, she believed, that lady Altham miscarried, for that she saw the abortion in lady Altham's closet; she first said, that the abortion was shewed to her by her mother, and did not remember any particular conversation about a miscarriage, with lady Altham; that lady Altham was confined to her chamber a fortnight, and that she mentioned this affair to Mr. Monk's family.

This is the substance of her direct testimony. But she is not quite so consistent when cross-examined.

You observe, gentlemen, that Mrs. Cole says, that lord and lady Altham went from her father, to lodge at another lodging, and that from thence they went to Dunmaine. In this point, the witnesses for the traverser stand in contradiction to her; for they swear, that lord and lady Altham went directly from

' Mrs. Cole's father's house to Dunmaine. Mrs. Setwright, who was hired to be the house-keeper, is particular in her testimony herein, that lord and lady Altham went from Mrs. Briscoe's, and not from Vice's to Dunmaine. Mrs. Cole said, that Setwright was brought to bed in Dunmaine. Setwright and she agree in this part of the evidence.

' Mrs. Cole said, she was examined in the Court of Exchequer, and there declared, that she and her mother went down to Dunmaine, from Dublin, in March or April, in the spring immediately following lady Altham's coming over to this kingdom. But now she corrects herself, and says, she then mistook the time, for that it was in February she and her mother went to Dunmaine. She says, the accident of china saucers happened two months after going to Dunmaine, and that four gentlemen and her mother and she dined with lord and lady Altham that day, and were present at that accident: She does not mention who they are, but conceals their names. In her testimony, she describes the room. She tells you, gentlemen, that lord Altham emptied the saucers very carefully from the sweetmeats, and threw them down, one by one. She swears, that lord Altham knew his lady was with child. She says, that she believes that she swore, that she was about 13 years old, at the time of the former trial; but now she says she was born in the year 1691, so that she must be then about 23 years old, and differs now 10 years from the account she gave of her age on her former examination. She tells you now, that one might observe the large eyes and head of the abortion. She admits to have said, on the former trial, that her mother told her it was an abortion; but now she says, that her mother and she went into the closet together. She said on the former trial, that lady Altham sat next to her at table, but now she says that lord Altham sat next to her; and excuses herself from these mistakes, that they all arose from the confusion she was in at the time of her examination.

' She now will not be positive that lady Altham went to Vice's before she went to Dunmaine, but is positive she went to other lodgings. Says, she does not remember the housemaid at Dunmaine, nor Bourke the postillion. She tells you, she paid a visit to Mr. Boyle's. She was asked if she knew Anthony Dyer, one of the servants; she said she did not. She was asked if she was at Dunmaine on St. George's-day; she said she believed she was. She was asked if she remembered any smock race to be at Dunmaine that day; she said she did not remember of any smock-race. She denies she ever had any discourse with Mr. Mark White, that she could swear for lord Anglesea, if her lease was renewed. She said she did not know of any fire or candle, being in the room when Mrs. Heath came to alarm her mother of lady Altham's being ill; but the manner

of her knowing Mrs. Heath was, by her voice.

' The next witness in behalf of the prosecutor was Dr. Jemmatt. He swore that he was physician to lord Altham several years. He swears, that lord Altham came to his lodging to acquaint him of the indisposition of his lady, and that he went along with my lord to see her, and found her very warm, and prescribed for her; but that afterwards he discovered by her all the symptoms of pregnancy, and that she told him she was gone three months with child. She said she was regular till about two months past, and thereupon he ordered her mild medicines: He further said, he believed, that lady Altham was with child, and that her complexion was altered, as pregnant women are. He was asked on the cross-examination, whether there was any infallible rule to know a real from a false conception. He said, the Colleges of Physicians of Dublin, or London, or the Royal Society in London, could not as yet determine that point.

' Hellen Moncriefe was the next evidence. She swore, that Doctor Walker recommended her as a nurse to lady Altham. That she met him in Stafford-street the beginning of November or December 1714. That she was three times at my lady's lodgings, that she appeared as big with child as any woman that had been gone six or seven months, that she laid her hands on her belly near her petticoat; though she was not quite so critical as the doctor was in his profession, yet she seemed to know more of lady Altham's pregnancy than the physician knew. When she was cross-examined, she said, she did not observe any child to move in her belly.

' Mrs. Bush was next examined. She said, she was acquainted with lady Altham, and saw her at New Ross in February 1714, and that she seemed then to be with child; and that she was in mourning for queen Anne. That she was introduced to her there, and in a day or two paid her a visit. She says that she saw her after the latter end of June, to the best of her recollection, without her big belly. There was nothing certain in her testimony, and nothing material arose from her cross-examination; therefore, gentlemen, I will not trouble you therewith.

' Alice Betts swore, that she wished lady Altham joy, and in November 1714, and after, had some conversation with Mrs. Heath; and that she used to joke with her about lady Altham's being with child. She said, that lady Altham appeared with child, and that it was easy to be seen that she was with child; that it was before or after Christmas.

' Mary Sutton swore, that she dined at Dunmaine, and toasted the boy in the box.

' As to Evan Thomas, and Martha Tenant, their testimony was not very material. You have it, gentlemen, in your notes.

' Anstace Toole said, she fitted a gown on lady Altham, and that Mrs. Heath was pre-

sent. That she saw the child at Ross, and made a gown for the child, and said that she never had any conversation with lady Altham about the child.

‘Anne Bennett said, she believed in her heart, lady Altham was with child, and that lady Altham looked very round.

‘Edward Howlett was the next witness, who was examined after Bennett. You have seen, gentlemen, the mean figure and appearance he made. He swore he sold clouts to Mrs. Heath, for lady Altham’s lying-in. That on the day of separation of lord and lady Altham, her ladyship kissed the child in the coach at parting. He said that this happened about ten or eleven o’clock in the morning. But here, gentlemen, I must take notice, that all the other witnesses say it was in the afternoon lady Altham went from Dunmaine, the day of the separation; and herein contradict Howlett.

‘It is of no purpose to mention all the cross-examinations, therefore I shall not repeat them to you.

‘Newton Rickets said, that he made a small chair for a child, but did not swear, that lord and lady Altham called him their child, but that they behaved to him as such. I shall likewise not trouble you with his cross-examination.

‘Elizabeth Doyle swore, that her mother fell ill of a fever, which prevented her nursing the child. On her cross-examination she said that Madam Cole desired her to go to Dunmaine last summer to give an account of what she could say, and that she was not at Dunmaine for twelve years before.

‘James Sinnot swears, that he saw lord and lady Altham at his father’s house, and observed that lady Altham was with child, and that the child was afterwards at Dunmaine, and that lord Altham had ordered the child to be brought to table to be shewn to the witness and Mr. Ivory as his son and heir. This piece of evidence is somewhat extraordinary, that lord Altham should call his son and heir to be shewn to him, and that he never saw the child but once.

‘James Fitzpatrick says, that he saw a child in the arms of a clean, orderly woman, and that he took it to be lord Altham’s legitimate child; and the only reason he gave for it was, that he believed lord Altham had that regard for him that he would not introduce his illegitimate child to him, and that to the best of his memory, he saw the child once before the separation. But I must observe to you, gentlemen, that no witness of figure has been produced to satisfy you that lady Altham miscarried, or was brought to bed.

‘You have given great attention, gentlemen, to the evidences of both parties, and you have them on your memory, therefore in regard it is so late, at this time I shall not trouble you farther with a repetition of them.’

Gentlemen, I see you are all greatly fatigued; I do not wonder at it, for I think we

VOL. XVIII.

have sat here without refreshment for near twenty-two hours. You have heard the evidence on both sides, and seen the witnesses, so that it will be unnecessary to take up more of your time. I shall only observe to you, that the crime the traverser stands charged with is a crime of a high nature; the consequence of a conviction is no less than to make her perpetually infamous, never to be believed after in a court of justice; and therefore it is that men of honour will see, that evidence is clear and demonstrative, before they will lay such an imputation by their verdict on any body: You will for this reason, weigh the testimony on both sides, and compare the credit of the witnesses; and if, on the whole, you shall believe that the balance goes on behalf of the crown, you will then find the traverser guilty; if, on the other hand, the testimony in favour of the traverser outweighs the crown evidence, or is equal with respect to credit, even in that case juries rather incline to mercy than otherwise; so that, gentlemen, you will go together, and I will wait for you till you please to return with your verdict.

L. C. J. *Marlay*. Gentlemen, my brother has summed up and observed upon the evidence, so far as he has gone, as clearly and distinctly as possible.

There have been twenty-five examined on behalf of the prosecutor, besides three new ones produced on the reply, and no less than fifteen on the part of the traverser. To repeat every thing they have said would be endless, and almost impossible, considering the time already taken up in this extraordinary trial.

I shall only observe to you, that in a criminal case of this nature, the testimony to convict any person of so great and infamous an offence, ought to be so full, clear and consistent, that there can be no room to doubt the truth of what it is offered to prove.

Whether what you have heard on behalf of the prosecutor be such of itself, considered without regard to what has been given in evidence for the traverser, you are the proper judges.

Though there are many witnesses for the crown, there are few material ones; and it has been observed to you already, that the bare declarations of my lord or lady Altham are not evidence in this case.

The first witness produced, Mrs. Cole, is a material witness; my brother has fully repeated her testimony; I shall not add to his observations; she swears to the miscarriage, and there is no other witness brought to support her testimony, though two contradict her.

The 11th, Edmond Howlett, a pedlar, is in some measure a material witness; he swears that the child was owned by lady Altham before Mrs. Heath, and a ribband bought for it by my lady, and put on the child by the traverser, and diaper bought for it for clouts, before it was born, by the traverser. You have

O

seen and heard him, and are the best judges how far he is to be credited.

James Fitzpatrick, the 15th, swears, though not so fully, to the same purpose, the public owning of the child; and to this purpose are those who are produced to prove the enquiry for a nurse, and the child's being carried about by my lord and lady Altham.

Eleanor Murphy, the 18th, and Mary Doyle, the 19th witness, are both material, and swear positively, that they were present at the birth of the child; and Dennis Redmond, the 17th produced, swears almost as fully to the same purpose, though he does not swear himself an eye witness of the birth.

Joan Laffan, the last produced by the prosecutor, is a very positive and material witness, if you credit her; she dry-nursed the child in the house with my lord, and she says, with my lady too, where the traverser saw him every day. As to all the others, they are only evidences as to their belief and opinion, merely conjectural.

Doctor Jemmat, the person of most skill, told you, that neither he, nor the College of Physicians here, nor that in London, assisted by the Royal Society, can distinguish between a false conception and a real pregnancy.

I said the other witnesses were only to their belief and opinion; I must except Thomas Higginson, who would have been a material evidence, if his memory did not fail him.

Now, gentlemen, if you believe Eleanor Murphy, Mary Doyle, Dennis Redmond, and Joan Laffan, you have sufficient evidence to convict the traverser, Mrs. Heath; but if you should not think them persons of credit, you have not sufficient positive evidence on which you can ground such a verdict.

Three of these witnesses, Murphy, Doyle, and Redmond, swear to my lady Altham's being delivered of a son, and swear it very positively.

But if they swear truly, this child was born at Dunmaine, and very near Easter, in the latter end of April, or beginning of May 1715; and christened at Dunmaine by Mr. Lloyd, a clergyman of the Church of England, three, or four, or five weeks after its birth, and had for godfathers and godmother, Mr. Cliffe, Mr. Anthony Colclough, and Mrs. Pigot of Tyntern, who were all present.

If there was no child of my lady Altham's born at the place and time they positively swear to, nor christened there, they are, I mean all these three witnesses, directly perjured.

Now, if my lady Altham was at Wexford assizes at that time, she could not be delivered

of a child at Dunmaine. If Mr. Cliffe and Mrs. Pigot were, one in Dublin, and the other in the county of Tipperary, from the latter end of April till six weeks after Easter, they could not possibly stand in person as godfathers to a child of my lady Altham's, christened at Dunmaine in three, or four, or five weeks after it was born.

Observe, gentlemen, that it appears by the almanack, that Easter day, in the year 1715, fell on the 17th of April; the great eclipse of the sun happened on the 23d of April; King George the first's birth day, the 28th of May, was on a Saturday. On that birth-day my lady Altham was in Dublin. The spring assizes of Wexford began on Easter-eve that year. My lady Altham is sworn to have been there.

Now, as to my lady Altham's being or not being at the spring assizes of Wexford in 1715, if the matter should stand doubtful; because, though three witnesses of credit have sworn she was, yet Mr. Masterson and Mr. Caesar Colclough swear they did not see her there; yet it is impossible that Mrs. Pigot and Mr. Cliffe could be at a christening at Dunmaine, when they were at many miles distance at the time that christening was, if there were ever any such thing.

Mr. Cliffe is proved by the records of the Court of Exchequer to have been in Dublin.

And Mrs. Pigot, by a witness, (who, if she swears the truth, cannot be mistaken) to have been at Mr. Hunt's in the county of Tipperary.

I must observe to you, that Mr. Arthur Bush, the third and last witness produced by the prosecutors on their reply, swears only to discredit Edmond Bourke the postillion, a witness on behalf of the traverser.

If you believe the traverser's witnesses, particularly Mrs. Giffard, Mary Setwright, and Sarah Weedon, my lady never was brought-to-bed at Dunmaine; and consequently Joan Laffan, who swears that she had this child put into her hands by my lord and lady Altham, and that she dry-nursed it at Dunmaine, and all the rest of the positive witnesses for the prosecutor, are not in the least to be credited.

You, gentlemen, are judges of the fact; it is your business to weigh the testimony on both sides, and, as you find one or other deserve credit, to find the prisoner Guilty, or acquit her.

At half-an-hour after four o'clock the Jury left the box, and after twenty minutes stay, returned with their Verdict for the traverser, Not Guilty.

505. The Trial* of the Right Hon. RICHARD Earl of ANGLESEA, FRANCIS ANNESLEY, esq. and JOHN JANS, gent. for an Assault on the Hon. James Annesley, Daniel Mac Kercher, and Hugh Kennedy, esqrs. and William Goostry, gent. before the Hon. Richard Mounteney, esq. second Baron of his Majesty's Court of Exchequer, and St. George Caulfield, esq. his Majesty's Attorney-General, Justices of Assize for the Leinster Circuit, on Friday, August 3d, at Athy, in the County of Kildare in Ireland: 18 GEORGE II. A. D. 1744.

THE Court being set at eleven o'clock, the Jury were called over, and answered to their names; of whom the following twelve were sworn, to try the issue joined between the parties.

John Digby, esq.	Mr. John Berry.
Henry Dickson, esq.	Mr. Samuel Mills.
John Bagot, esq.	Mr. Edward Harman.
Mr. Thomas Sherlock.	Mr. James Tyrrell.
Mr. George Bradford.	Mr. Thomas Tyrrell.
Mr. William Leban.	Mr. Edward Ward.

Angus Byrne, one of the persons indicted for the assault, is called into court, and appears.

Clerk of the Crown. You stand indicted, for assaulting William Goostry, gent. on the 16th of September last, do you submit or traverse?

Angus Byrne. I do submit.

Clerk. You likewise stand indicted for assaulting Hugh Kennedy, esq. do you submit or traverse?—Angus Byrne. I submit.

Clerk. You likewise stand indicted for assaulting Daniel M'Kercher, esq. do you submit or traverse?—Angus Byrne. Submit.

Clerk. You likewise stand indicted for assaulting James Annesley, esq. do you submit or traverse?—Angus Byrne. Submit.

Court. The gentlemen of the jury must have pen, ink, and paper.

Clerk of the Crown reads the Indictment, which is as follows:

'County of Kildare. The jurors for our lord the king, upon their oath say and present, that Francis Annesley of Ballysax, in the county of Kildare, esq. the right honourable Richard earl of Anglesea, Joseph Lawson, late of the city of Dublin, in the county of the city of Dublin, yeoman, John Jans, late of the same, in the said county of the said city, gent. Anguish, otherwise called Angus Byrne, late of the same, in the said county of the said city, yeoman, and Michael Laoy, late of the same in the said county of the said city, yeoman; on the 16th day of September, in the 16th year of

'the reign of our lord George the second by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth, with force and arms, that is to say, with swords, sticks, and so forth, at the Curraugh in the said county of Kildare, in and upon one William Goostry, a true and faithful subject of our said lord the king, in the peace of God, and of our said lord the king, then and there being, did make an assault, and him then and there did beat, wound, and ill treat, so that his life was greatly despaired of, and other wrongs to him then and there did, contrary to the peace of our said lord the king, his crown and dignity.'

The like for assaulting the honourable James Annesley, esq.

The like for assaulting Daniel M'Kercher, esq.

The like for assaulting Hugh Kennedy, esq.

Mr. Disney. May it please your lordship, the right honourable Richard earl of Anglesea, Francis Annesley, esq. and Mr. John Jans, do stand indicted on the 16th of September, 17th of Geo. 2, for an assault by them made, at the Curraugh of Kildare, in and upon the honourable James Annesley, which indictment sets forth, that on him then and there, they did make an assault, and likewise on Daniel M'Kercher, esq. Hugh Kennedy, esq. and Mr. William Goostry. I hope we shall be able to give such evidence, as will clearly prove the allegations of the indictments, and that your lordship will direct the jury to find for the prosecutors.

Mr. Harward. May it please your lordship, and you gentlemen of the jury, I am of counsel this day for the prosecutors, Mr. Annesley, Mr. M'Kercher, Mr. Goostry, and Mr. Kennedy, and the nature of this case and prosecution will appear to your lordship and to the jury, as I apprehend, in this light; for I shall state it from what I presume to be true, and will appear to be so from the examinations that are given in against the traversers by those gentlemen. And though this, my lord, upon the face of the record, appears to be but an ordinary and common assault, yet, if these ex-

* See the two last Cases in vol. 17, and the preceding Case.

minations are true, it will appear, that, had not the hand of Providence, very signally interposed in preservation of their lives, instead of a common and sudden affray, it would have been a crime of another nature, it would have been a crime of the deepest dye, for which the traversers must have stood a trial for their lives. I do not mean, my lord, when I say it would be a crime of another nature, by that to bring it home as such to all the traversers; no, I believe there may be one of them who had not such a wicked intention; but as to others, it will appear to be a concerted, premeditated assault, not to be satisfied by bloodshed and battery, but to pursue the prosecutor, Mr. Annesley, to death. If these examinations are true, this is but one of the many attempts that lord Anglesea—

Mr. Spring. My lord, I must submit it to your lordship's judgment, how proper this gentleman is at this time in this very elaborate and affecting harangue. The offence for which the traversers are indicted is an assault, which arose from an ordinary and common quarrel at a public meeting; but this gentleman tells your lordship that there was an intention in the traversers, or some of them, to commit what they are not now charged with, something of another nature, which he makes a crime of the deepest dye. Pray, my lord, how does this appear? Or, what right has he upon the present occasion, to assert any such thing? There is no indictment for such an intention, nor any foundation for such an assertion; and therefore I humbly pray your lordship will order that gentleman, in conducting this prosecution, to confine himself to his duty, and direct him to open evidence that is proper, and no more.

Mr. Harward. My lord, I am very unfortunate, to be so often taken down by gentlemen of great experience and knowledge, and must apply for your interposition, else I shall not know how to proceed.

Court. Go on, Mr. Harward.

Mr. Harward. I was going on, as I apprehended I had a right to do, and as I have observed to be the constant practice in all cases of this kind, not to confine myself to the bare assault, but to shew it in all its concomitant circumstances, that the whole truth of the fact may appear to the Court; and the reason why experience justifies every body to do this is, because the fine which the Court is to impose is discretionary, and will be greater or less in proportion to the nature of the offence; and therefore every thing is proper to be laid before the Court, that may be an ingredient in their consideration for the imposing that fine. I say then, my lord, that this assault, when it comes to be considered upon its circumstances, will not appear to be the effect of a sudden passion, but to have proceeded from an implacable enmity, that has pursued this unfortunate client of mine from his age of nine or ten years old to this day. I choose rather to read, as to this, the very words of the exami-

nations in my hand, than to trust to my own representation of the former attempts on his life—

Mr. Spring. My lord, I must call upon that gentleman again to confine himself to the fact and the circumstances relative thereto, and hope, if he continues to offer any thing so extremely improper, your lordship will take notice of it, and direct him not to proceed.

Court. I think you go too far back, Mr. Harward.

Mr. Harward. My lord, to be sure I am up your lordship's judgment, and therefore it is, when I understand it, I shall pursue it.

Court. It is extremely proper to mention the circumstances attending this fact, and the nature of the case, for the reason you mention, that it may have a due consideration in the sense of the Court.

Mr. Harward. I desire to know, my lord, whether I have a right to lay any circumstances before the Court and the jury, to let them see whether this assault was a premeditated thing or not.

Court. Go on, Sir.

Mr. Harward. Now, my lord, I can shew, out of these examinations, that it was a premeditated thing; for this assault happened to be committed on the 16th. The first day of the meeting of gentlemen on the Curragh of Kildare, to see the diversion of the races, was on the 14th of September; on the 14th and 15th there was no actual assault committed; but there was a behaviour, there was language given, that was introductory, and pointed out most plainly what the consequences would be, that in reality happened the third day. I would be in your lordship's judgment, whether or no these two preceding days are not connected with the following ones.

Court. Extremely proper.

Mr. Harward. Why then, I submit to your lordship's directions, and I shall not take the liberty of mentioning any of the former attempts, or injuries of the highest nature, that my client has suffered—

Mr. Spring. My lord, this is for no other purpose but to inflame the minds of the jury, and to captivate the populace. There is no injury, no attempt of any kind, real or pretended, but that on the 16th, that is to be considered by the jury.

Court. The jury will be told, by and bye, that the single point they are to consider is the fact of the assault only. Go on, Mr. Harward.

Mr. Harward. I did mention that I would not enter into a narrative of the former attempts, but confine myself to the passages of this day. This gentleman, as son and heir to the late lord Altham (I hope the counsel will give me the liberty of telling who he is)—

Mr. Spring. There is no occasion for that neither, at this time.

Court. Go on, Sir, in stating the case.

Mr. Harward. I say then, that Mr. Annesley, along with these other gentlemen (some of them men of profession,) came into this king-

dom in the latter end of last summer, in order to assert and see for that, which he apprehended to be his right, the Anglesea estate in this kingdom: Mr. Annesley had brought an ejectment for recovery of part of it, lying in the county of Meath, which was then depending; and lord Anglesea had notice of this, and knew the errand these gentlemen came of, to assist Mr. Annesley in his affairs. He met them on the 14th at the Curragh; and the first thing (for I shall mention the facts in order of time, as they happened, from the first to the third day of the races), the first person that my lord did the honour to take notice of, was Mr. M'Kercher. My lord stood in a circle of the gentlemen of this country, and of many of his own attendants brought from another country; and seeing this gentleman, Mr. M'Kercher, who came to attend Mr. Annesley's affairs, the first thing that he was pleased to do was, to point to Mr. M'Kercher, and say, "See yonder that rogue, that scoundrel, and that villain M'Kercher: It is not above a month ago, though he is now dressed up like a gentleman, since I saw those very laced clothes hanging in Monmouth-street, in London." Mr. M'Kercher (who is a gentleman, and will appear in the course of this trial to have resolution of another kind) took no sort of notice of this public insult, as it was not his business to venture the conduct and success of his friend's affairs in a rash, hot quarrel, but very prudently passed it calmly and quietly by. That day, my lord, nothing more, that was remarkable, did happen: This was upon a Wednesday, I think the 14th. On the 16th, as these gentlemen, for whom I am counsel, were all in a knot, they and their few friends kept close together upon this Curragh, which is of great extent, many miles over; but no place whatever could serve my lord Anglesea's coachman, but to ride through and through them, to endeavour to trample down these gentlemen and their horses with his coach and six, and hunted them wherever they moved; and whenever he came near Mr. Annesley, this coachman (you will guess easily by whose directions) used to cry out, There he is, there's the shoe-boy, black your ball; and some other opprobrious language I can't now recollect. And by this repeated insult of driving these gentlemen wantonly from place to place, and calling out to them in that opprobrious manner, this man was determined, with his coach and six, to be upon the back of them, wherever they removed to avoid him. My lord, he is indicted also, but does not appear, though he still is the coachman of lord Anglesea; his name is Joseph Lawson. My clients, my lord, observing this behaviour, like prudent men, they began to be more than ordinary upon their guard, and to fear the worst. As they were but few, and strangers in the kingdom, they thought that sticking together would be the only means left in their power to preserve them: but all precautions were in vain. My lord observing, that neither abusive language,

words which must have pierced to the heart of the meanest vassal, nor the coachman's driving his coach at them, could have raised these gentlemen's tempers to take any notice of it, another expedient occurred to my lord, to put his purposes in execution. Mr. Mac Kercher, upon these repeated abuses of himself, and of Mr. Annesley, having waited upon lord Anglesea, with all the address and good manners imaginable, told him (without making the least mention of what happened to himself the day before) That he was come to acquaint his lordship with the rudeness of a coachman of his to a gentleman in the field, and hoped his lordship would do in it what became a nobleman and gentleman. Lord Anglesea asked, Who the gentleman was? He is told, Mr. Annesley. Upon that, my lord, instead of having any feeling whatsoever for the transgression of this coachman of his, A gentleman, Sir, says he, a blackguard shoe-boy! I won't turn off my coachman for any abuse either to him or to you; and you are a rogue and a villain, and he is a bastard, the son of Juggy Landy, by my brother. With this, one of the traversers, Mr. Francis Annesley, a relation to my lord, without any provocation, gave Mr. Mac Kercher a stroke over the head with his whip. Then my lord began to insult him in a higher and louder tone, and made a proclamation to the company, getting up and resting himself on his stirrups, that his voice should reach them all, that this Mr. Annesley was a bastard. I do, says he, declare before you all, that that fellow is no gentleman, but a bastard of Juggy Landy's, a kitchen-maid; and continued his abuse of Mr. Mac Kercher with the most scurrilous language. As soon as Mr. Francis Annesley saw that his relation's blood was a little up, he repeated the blow, and with the butt-end of his whip struck Mr. Mac Kercher on the forehead, which stunned him in some measure. This blow was followed by some others; but however, Mr. Mac Kercher did not consider his own safety, but turned about to take care of that which concerned him more than any misfortune that could have attended himself; and there having laid his eye upon Mr. Annesley, Mr. Goostry, and Mr. Kennedy, desired them to make the best of their way off, or they would be murdered, and that he would follow: but before these gentlemen could turn their horses to gallop off, Mr. Francis Annesley was too nimble for them, and made a stroke at Mr. Goostry, which cut him to the scull; and he, with many other persons, repeated these blows, until there was scarce a part of him which did not feel the weight of Mr. Annesley's arm: he was stunned and knocked down by the first blow, and continued under cure of his wound for a month after. Mr. Kennedy, another of these gentlemen, without the least provocation, endeavouring to shift for himself, was most unmercifully beat by the traversers, assisted by several other persons unknown; and when stunned and knocked down, my lord laid on him, until some of the people of the country

cried out to him, For shame, for shame, for shame, don't kill him. Mr. Jans, my lord's agent, I had like to have forgot, had not the least hand in this affray, but punctually observed his lord's orders, who cried out, Knock them down, kill the villains. When they had thus levelled down Mr. Annesley's friends, who were his guard, my lord then thought it the proper time to look out for him, and called out, Where is the dog, where is the son of a whore? Kill him. Mr. Annesley, according to the intimation given him by Mr. Mac Kercher, that he was to be murdered, set spurs to his horse, and got out of the crowd; but a servant of my lord Anglesea's, upon my lord's inquiry where Mr. James Annesley was, said he had galloped off. As soon as lord Anglesea heard that Mr. Annesley had galloped away, who had no hand in this affray, or ever exchanged one word with my lord; I say, as soon as lord Anglesea discovered that he had got safe out of the crowd, and that his friends lay in the condition I have now mentioned, he cried out to his friends and servants, Follow the rogue, pursue the rascal, tear him limb from limb, and all that will support him. He directed them, my lord, to destroy not only him, but any who should have humanity to endeavour to protect him. Then this noble lord's influence over this crowd will appear to be so absolute, that to the number of 40 or 50 of them pursued this helpless gentleman. He had a horse, happily for him of great speed, and he made as good use of it; he soon outstripped Mr. Mac Kercher, who followed him, and so got out of the field, with this numerous train of people, some with sticks, some with staves, others armed with pistols and hangers, pursuing of them both. Mr. Mac Kercher was nearest to them, and overtaken by them; but however it will appear, that he was not intended to be the victim of this rabble that did pursue. I don't say that any of the traversers did pursue, but I say of this rabble that did pursue, as they understood Mr. Mac Kercher not to be the devoted head, though they overtook him, and he was the only man that could have given the lord Anglesea the least offence, they passed him by, but made all the speed after Mr. Annesley they possibly could; and indeed, when he got into a road that was leading to a neighbouring town or village, to Newbridge, where he lay the night before, to seek for protection, this enraged and furious mob, thus armed and pursuing, came so close, as that he thought it would be safer, or at least more decent, to die with his face toward them, than to be destroyed, behind his back. He was called out to by some people, that had nothing to do with the affair, that there were people with pistols at his back, ready to shoot him; upon this, he turned his horse, and in the turn the horse's hind feet fell into the ditch, and the horse fell upon this unfortunate gentleman in the ditch, and bruised him in a very terrible manner. Whilst he lay speechless in this deplorable condition, up came this mob; and had it not been that one Mr.

Archbald, who is a gentleman of great humanity, and well deserves the influence he has in that country, interposed and rescued him, half dead already in the ditch, from their violence, there had been a speedy end put to all this gentleman's right and pretence to the Annesley estate, by an end being put to his life. My lord, we will shew your lordship the condition that this unfortunate gentleman was in; how he lay in the ditch till he was taken away speechless and senseless to Newbridge, in a chaise, being not able to ride or stand, and his life despaired of for some months.

Now, my lord, I have only one other principal fact, concerning this matter, to trouble you with, which I am instructed to charge lord Anglesea with in the most express terms; and that is, when the mob had returned from the pursuit into the field where lord Anglesea was, some of them seeing him impatient to know what was done, they cried out to him, By God, my lord, he is killed, he is dead. I cannot, without violence to myself, mention what is said to have dropped from that lord upon the occasion, and would be pleased I could mistrust the truth of it; but I am instructed to say he could not conceal the emotions of joy which he felt on these glad tidings, but cried out, I am glad of it, then all is well. So, my lord, this that was intended to be the most tragical scene, and came within a hair's breadth of it, I say, by the interposition of Providence, falls out to be this day but a finishable offence; therefore I shall not trouble your lordship any further with the circumstances of this fact; they will come out more emphatically upon the testimony of the gentlemen, who have had more reason to have felt them than I have. We shall examine but a few out of many witnesses, and shall endeavour to lay this matter before your lordship, without taking up more of your time than an offence of this public nature can deserve from a court of justice.

Mr. Mac Manus. My lord, as the case has been stated to you, I shall trouble your lordship but with a few words; which are, that as the circumstances of this assault will be a great aggravation of the crime, so will they increase the punishment: and this, my lord, will, in evidence, appear to you to be an offence of as rude, angry, and revengeful a nature, as ever appeared in a court of justice. We have the happiness to have alive at this day the gentlemen thus assaulted, to shew your lordship and the jury the danger and violence of this assault. I shall call one of the gentlemen—Mr. Mac Kercher, who will tell you in what manner and by whom he was assaulted; and (what will still more heighten this offence) the quality and dignity of the offenders, the time, and place where committed. My lord, the Curragh of Kildare was the place where this assault was made; the time when it was given, when thousands of persons were assembled at a public horse-race; one of the offenders, a noble peer of this kingdom; and another of

them in the commission of the peace; and the manner of it, which he will tell you, will appear to you to be without any the least provocation. This, gentlemen of the jury, will very particularly and very fully appear to you, from the evidence which we shall lay before you.

Mr. Morgan. Here are four persons, my lord, concerned in the four several indictments now depending, and they are all included in each indictment; but, I hope, if it appears that any one or more of them is not affected by the evidence that shall be given on behalf of the crown upon any one particular indictment, such person or persons shall be allowed to give testimony on behalf of such of the traversers as shall be affected by the evidence given on behalf of the crown on such particular indictment. Suppose, for the purpose, it should appear, upon the indictment for the assault upon Mr. Mac Kercher, that one or more of the gentlemen mentioned in that indictment is not guilty of the charge laid in that indictment, it would be against reason that such innocent person should not be admitted as a competent witness on that indictment, and highly injurious to such of the traversers (as may be affected by the evidence on behalf of the crown) not to have the benefit of that person's testimony, who, by the evidence on behalf of the crown, has no guilt imputed to him on that particular indictment; and may, perhaps, be able to give as good an account of the matters charged in that indictment as any witness on behalf of the crown can pretend to give. For this reason, and in as much as these several indictments are but mere accusations, I humbly conceive, that, after the evidence for the crown is given, the jury should be sent out to consider of their verdict, as to such of the traversers separately, as we apprehend shall not be affected by the evidence given on behalf of the crown, on any one particular indictment, and if they are acquitted, that we may be at liberty to examine them as witnesses for the other traversers on that indictment.

Court. This will be almost an impossibility; it will be an impracticable thing, as this case is stated by Mr. Harward, to keep the indictments separate; but, however, I don't see that the going on with them all together will affect you in this point.

Mr. Morgan. If the gentlemen concerned for the crown shall not, in the course of their examination, particularize the indictment to which they produce this or the other witness, but examine each witness to all the indictments generally; from thence a necessity arises, on our part, to take notice what witness or witnesses spoke to this or that indictment, and to what person or persons mentioned in this or that indictment; for otherwise, according to this scheme of including four persons in four several indictments, a man may lose the benefit of the testimony of his most material witnesses, nothing more being necessary to be done to strip him of that benefit, than to have his wit-

nesses included in the same indictment with himself, be they never so innocent of the charge contained therein; the consequences of which must be very fatal, if the law has not prescribed some method, whereby such witnesses, notwithstanding such indictment, are to be at liberty to be examined; and I must beg leave to rely upon it, that such method is known in law, and is what I have before mentioned.

I say therefore, my lord, if this prosecution is to be managed and proceeded upon in that manner, though any one or more of these traversers should be guiltless as to three of the indictments, yet he or they can't be examined for any of the other traversers upon all or any of those three indictments; because all the traversers being upon their trial upon the four indictments at one and the same time, and the examination on behalf of the crown being applied to all the four generally, such guiltless person as to three of the indictments, being guilty as to the fourth, cannot be examined upon any of them, because by that means he may possibly set about swearing himself off of the charge of the fourth indictment, which perhaps by the evidence on behalf of the crown might be brought home to him. Suppose, for the purpose, that Mr. Jans is innocent as to the assault upon Mr. Mac Kercher, yet your lordship will not suffer him to be examined upon that indictment, because there is another indictment upon which he is on his trial at the same time, and upon which he may possibly be found guilty.

Court. You won't be under any difficulty at all by proceeding upon all the indictments together; for suppose now, Mr. Jans shall be affected with evidence given upon two of these indictments, but with none upon the third; why then I shall tell the jury, that to such an indictment, and such an one, they are to receive evidence against Mr. Jans, and to such not.

Mr. Harward. I apprehend this course that we are proceeding in is the proper one, that the Court may be thoroughly satisfied of the nature of the fact.

Daniel Mac Kercher, esq. sworn.

Mr. Malone. I desire, my lord, that the traverser who has now submitted to the indictments, may go out of court, whilst the other witnesses are examining.

Angus Byrne is ordered to withdraw.

Mr. Mac Manus. Mr. Mac Kercher, were you assaulted at the races of the Curragh by any and what persons—and in what manner? Tell the whole affair.

Mr. Mac Kercher. As well as my memory can suggest after so great a distance of time, I will. Upon the 14th, the first day of the races, Mr. Annesley—

Court. Of what month?—Of September, my lord—Mr. Annesley, several other gentlemen, and I, came to the Curragh, for the diversion of the place.

Mr. Mac Manus. What Mr. Annesley?—Mr. James Annesley.

Go on, Sir.—We had not been long there, when passing by a tent where the noble peer, who is one of the traversers, stood with some other people—

Raise your voice.

My lord, we had not been long upon the race-ground, when lord Anglesea, who was standing at a tent with several other people, called out to me in particular, (pointing to me) That Mac Kercher, though he appears here like a gentleman, is an arrant scoundrel; and the coat you see upon his back, I saw not above a month ago in Monmouth-street. As I looked on this of too low a nature to deserve resentment, and as I came there with a firm resolution not only of keeping the peace myself, but had recommended it to all along with me, I took no manner of notice of this insult. After the diversion was over, we retired to Newbridge; and on the Friday, the last day of the races, we returned again to the Curragh, with the same view as before, of seeing the diversion of the place only; we arrived there as the first course was at an end; we were no sooner descried by lord Anglesea's coachman, than he immediately drove his coach and six full butt at us.

At whom, Sir?—At Mr. Annesley, the other gentlemen of our company, and myself.—This he repeated three or four different times, which we as often avoided; at length, when he found we could not be provoked by that behaviour, he began in a gross and insolent manner to insult Mr. Annesley.

Who did?—The coachman.—Calling him Shoe-black, shoe-boy; when he found that Mr. Annesley did not seem to take any notice of it, he repeated the insult, and at length pointed out to him, There he is, the shoe-boy.

Whom did he point to, Sir?—To Mr. Annesley, my lord.—Though I thought this a very great insolence, and scarce to be borne, yet I would not resent it upon the fellow, as he was a servant; but thought it more advisable to complain to lord Anglesea, to the noble peer his master, and expected proper redress from him. Accordingly I went to look for him, and it was some time before I found him. At length I was told that he was at the winning-post, in the middle of a great circle of gentlemen, and others, who had assembled there in relation to some disputes that had happened about the horses. I came up in the civillest manner I could, and said, My lord, I beg leave to speak with your lordship aside; I was unwilling to expose the fact before the crowd, and for that reason I called him aside, to acquaint him of it in a proper manner; whether he misapprehended me or no, I can't tell; but he replied, This is no time nor place; you see I have no pistols before me. I told him, For what I have to say to your lordship, every time and place is proper; I come only with a complaint against one of your servants, who has insulted a gentleman; and I should be glad to know, my lord, whether it be by your orders or approbation he behaveth so. My lord asked me, who the gentleman was that was insulted. I pointed

out to Mr. Annesley, who stood behind out of the circle, and out of the crowd, and said, That is the gentleman, my lord. To which he replied, He a gentleman! a shoe-boy, by God, a blackguard and a thief. One or two who stood by the noble lord, upon that, said, What, my lord, will you turn off your servant for that scoundrel? I have omitted something, my lord, I beg pardon; I likewise said, As the affront was very public, it is proper the satisfaction should also be so, therefore—it is expected that you should strip your servant, and turn him off in the field.

[Mr. Baron Mounteney here lets the jury know what Mr. Mac Kercher had hitherto said; and then says, Repeat that again, that the jury may hear the very words.]

Mr. Mac Kercher. I said, That as the affront was very public, that it was expected his lordship should give adequate satisfaction, which was, that he should strip the servant of his livery, and turn him off on the ground; or words to that effect.

Mr. Harvard. Are you positive that you explained yourself in such a manner that he could not mistake you?—I am satisfied I did.

Court.—And after this it was some gentlemen said, What, will you turn off your servant for that scoundrel?—It was after this that some gentlemen interfering, said that.

Mr. Mac Manus. Do you know who said that?—I cannot be positive, but I think it was the same person that struck me afterwards; I think it was Francis Annesley.

Are you sure it was he?—I say, Sir, I cannot be positive. Lord Anglesea then said, No, by G--d, I won't; and you are a villain, a scoundrel, and a thief; and a great deal more of the like decent sort of language he gave me.

Court. Whom did my lord apply to when he said that?—To me, You are a villain, a scoundrel, and a thief; as near as I can recollect, those are the very words. With that I believe I might say, in return, That his lordship lied, and that he durst not single himself out and tell me so. Whereupon five or six persons, whom I don't know (but Mr. Jans was one of them) called out, My lord, you shan't go fight such a scoundrel; here are abundance of people to go out with him. My lord, I don't know whether it was precisely at that point of time or not, when a gentleman came and struck me on the head; but I think it was.

Mr. Mac Manus. Who was that gentleman?—It was Mr. Francis Annesley, of Ballysax.

Do you see him in court?—That is the gentleman.

Court. With what did he strike you?—With the butt end of a whip; which stroke occasioned a contusion; and there was a little bit of the skin broke, which occasioned a bleeding.

What further passed, Sir?—I returned the blow, my lord, with the lash end of my whip. I had a case of pistols before me, but would not make use of them in the crowd. Then

lord Anglessea finding himself so well supported, raised himself up in his stirrups, accosted the populace, and all that were present there, and poured out a great deal of scurrilous language against Mr. Annesley.

Go on, Sir.—Declared, That he was not his brother's lawful son, but a bastard of Juggy Landy's, and a shoe-black. When I perceived lord Anglessea attended by so great a crowd, who seemed all to side with him, I began to be apprehensive that there might be some danger of a design against Mr. Annesley, and thereon I called to Mr. Goostry and Mr. Kennedy, who were two of our company, to come away. I myself turned about my horse immediately, and went in quest of Mr. Annesley. I had no sooner turned my horse, but I heard lord Anglessea (for I know his voice very well) call out distinctly, There is one of the villains, knock him down.

Mr. Mac Manus. Did you see my lord Anglessea when he said so?—I did not; but I know his voice perfectly well.

Are you positive you know his voice?—I am positive I know his voice, if one voice can be distinguished from another.

What were the words?—There is one of the villains, knock him down.

Did you hear him name any person's name?—I heard him name Mr. Goostry, and say, that That Goostry is one of the greatest villains, knock him down. And I apprehend that it was then that Mr. Goostry was struck, though I did not see it. I went in quest of Mr. Annesley, and when I found him carried him a little aside from the crowd. We had not been there half a minute, when one of my servants and a gentleman or two, strangers to me, came up to us, and with great emotion and concern said, For God's sake get away, get you gone as fast as you can, there is a design to murder you all.

Who were they that said so?—There was a groom belonging to us; but I don't know the others.

Mr. Bagot. Was it the groom or the gentlemen that desired you to get away?—The groom came first, and desired us to go off; I did not give credit to what he said, being resolved to wait there till our company joined us; but immediately there came up two gentlemen, and said, For God's sake, gentlemen, get away as fast as you can, for there is a design to murder you.

Court. Who was with you at this time?—

Mr. Annesley only.—The two gentlemen varied in their expression a little; for the one said, Go off, for there is a design to murder Mr. Annesley and you; and the other said, For God's sake go off, for you will all be murdered. Upon which I desired Mr. Annesley to put spurs to his horse, and we galloped away at a gentle canter. We had not gone above 50 or 60 yards, when we perceived people moving after us, which made us whip and spur our horses; but Mr. Annesley was mounted on a horse that had more speed than mine, and he made a

VOL. XVIII.

great deal of way before me. There was a gentleman passing by, one Mr. Hacket, mounted upon a good horse, and I desired him to keep close to Mr. Annesley. After we had passed over the sod, the Curragh ground, and had entered into the road, a lane leading to Newbridge, a good way up the lane, there I found Mr. Annesley lying in a ditch.

Whereabouts was that?—A good way up the lane, leading from the Curragh to Newbridge, speechless and senseless, and as I imagined dead, my lord. I found him with several people about him, to the number of nine or ten.

Do you know those persons?—Why really there are two that I can now recollect; one Mr. Archbold, quite a stranger to me at that time; and a gentleman, who is an attorney in Dublin, I think his name is Keravan, or Cochran.

Go on, Sir, if you please.—There was a surgeon called for.

Do you know who the surgeon was?—That gentleman, Mr. Hacket, who I had spoke to, and who had passed me. I don't know whether he had lancets himself, or borrowed lancets, but he attempted to bleed Mr. Annesley, and he could get no blood. In this condition Mr. Annesley continued for about three quarters of an hour, to the best of my judgment; and there being no carriage, nor he able to get on horseback, I rode directly to the inn, to order the coach which had brought us from Dublin; but before the coach was ready, he was brought to the door of the inn in a chaise. I don't know whether I ought to go any further, or to relate what passed the next day, which had still a darker and more wicked complexion.

Court. Go on, Sir.

Mr. Morgan. I hope your lordship will think, that as these indictments are indictments for assaults committed upon the 16th of September, any thing that happened after that day is not proper to be given in evidence, and more especially as they are not laid with a 'Continuando,' and therefore submit it to you, whether it should not be given in direction to the gentlemen of the other side not to travel into the transactions of any subsequent day. I think every fact before that day relative to the fact laid in the indictments is proper to go to the jury; but any distinct transactions of the following day, no way relative to such fact, are not proper to go to them, and therefore ought not to be admitted as evidence, and more especially as the traversers can't be supposed to be prepared in any defence thereto, not being charged with any thing but what was previous to the 17th. I apprehend that Mr. Mac Kercher is just about giving an account of what happened on the 17th, which I conceive is no way material or relative to these indictments, and therefore hope that the evidence only that he can give to the very facts laid in the indictments will be admitted, and looked upon as proper evidence, and no other permitted by your lordship to go before the jury.

P

Court. I hope you won't unnecessarily lose time about matters that are obvious, and need no debate. To be sure, any thing not relative to the fact is improper to be given in evidence, or to come into the consideration of the jury; but any thing relative to the fact, which can help to explain it, whether before or after it happened, is extremely material for the consideration of the court and the jury. This case, or cases of the like nature, I have heard practised a hundred and a hundred times; for I did, for three or four years together, constantly attend in a place where such cases as this were carried on, and I found it always the practice for every thing tending to shew and explain the fact, whether it happened before or after the committal of it, to be allowed as proper evidence.

Mr. Spring. My lord, I own it is very proper for every thing to be given in evidence relative to the fact; but nothing can relate to, or be the occasion of this fact, but what happened before it was committed; and therefore it is highly improper to take in any supplemental transaction of the following day, no way relative to the fact for which the traversers stand indicted, and which can only serve to inflame the minds of people. I think it enough for us to have prepared ourselves for any actions that happened before the 16th, and not be called upon to answer for any thing that occurred after indictments were laid, and no way relative to it. This has been the constant practice, and I think it to be as clear as any thing in the whole course of the proceedings of the law.

The Counsel for the Traversers were overruled in their objection.

Mr. Malone. I desire, since Mr. Mac Kercher is permitted to proceed, that he may be confined to the transactions of the next day, which are relative to the fact only.

Court. I shall take care to confine him to such evidence as is proper. Go on, Sir.

Mr. Mac Kercher. We went early to bed, with a design to get up in the morning betimes, and return to Dublin; but before we could get out of our beds in the morning, we were alarmed by the landlord of the house and his servants, who acquainted us, that the ways were beset all round the house with a great number of people with all sorts of weapons; and that he apprehended it was with a wicked design against the life of Mr. Annesley, and the other gentlemen; that some of them, he knew, belonged to lord Anglesea, and others to Mr. Francis Annesley.

Court. What was that man's name?—Burchell. We got out of our beds, and expecting the worst, put ourselves in a posture of defence.

Go on, Sir.—This alarmed us a good deal, my lord, and we got out of bed, and put ourselves in a posture of defence. The same advices were repeated over and over again to us.

By the same persons, or by others?—By the same, and other persons. Several gentlemen

that lodged in the same house that night, who were not of our company, were very much alarmed, got their horses, and rode away.

Do you know who they were?—I don't know, my lord: Mr. Hacket and one Mr. Carrick stayed; perhaps they can give you some account of them. We were likewise told, before we could venture down stairs, that the passage was occupied by three, four, or more of lord Anglesea's people, armed in a very extraordinary manner.

From whom had you that information?—From the landlord, from Burchell. My lord, as our company was not very numerous, and consequently not able to defend ourselves long against such a multitude, we fell upon a stratagem, which was, to make the landlord whisper among them, That we expected a troop of horse from Dublin. In a short time after he acquainted us, that he had whispered it about, and he believed it would have the desired effect, for some of them were frightened. I then ventured down stairs; I no sooner came down, but I was seized upon by one Michael Lacy (attended by a constable), who is a principal agent of lord Anglesea's, as I am informed. I asked the constable at whose instance I was arrested; Lacy answered me, it was at my lord Anglesea's, and produced a warrant from one Mr. Benjamin Fish, a justice of peace of that part of the country. I told Lacy, that my lord Anglesea had no occasion to bring all this crowd together with arms to seize upon gentlemen, who were always ready to submit to the king's orders wherever they appeared, unless he had some wicked design to execute under that colour. However, I desired him to walk up stairs, that I would follow him, and give bail.

What was the warrant for?—For an assault. Lord Anglesea had sworn examinations against me, Mr. Goostry and Mr. Kennedy, for an assault the preceding day upon the Curragh, wherein he had sworn that he was in fear and danger of his life, as I was told.

Go on, Sir.—Lacy walked up stairs, and I shewed him Mr. Goostry and Mr. Kennedy, the other gentlemen that were charged with the assault; they likewise submitted. We breakfasted, and ordered the coach to be got ready to carry us before a justice of peace, to give bail; they struggled hard to have us go back towards the Curragh to give bail; but we told them, that as we were going forward to Dublin, it was more reasonable we should give bail to a justice on the way; in which we prevailed, and went into the coach.

Who went into the coach?—Mr. Kennedy, and I, and Mr. Carrick, one of the gentlemen that was to be our bail. We would not so much as carry a sword, or any sort of weapon, as we looked upon ourselves to be in the condition of prisoners, and respected the laws. Mr. Annesley rode with pistols, as he was not charged with any assault; Mr. Goostry, the servants, and Mr. Hacket, rode along with him. We had not gone far from Newbridge, in our

way towards Naas, when the coach was stopped, and Mr. Goosty came up and alarmed us.

Who stopped the coach?—Mr. Goosty; and told us, that there was a man there that was going to shoot Mr. Annesley, and desired we would take him into the coach.—I forgot to acquaint your lordship, that Lacy followed us likewise, armed with pistols.

On horseback?—On horseback.

Go on, Sir.—When we were about half-way, we were met by several people from Naas, who had been informed of our danger, and came to our assistance; and in this order we went to Naas, with all this crowd attending us.

How many met you from Naas?—There were, I believe, about fourteen or fifteen people. We sent for the magistrate of the place, one Mr. Bonner (who is now here in this town), told him what had happened, and desired that one Angus Byrne, who at that time called himself a servant to lord Anglesea, and carried a rifled barrelled piece, might be examined for what purpose he carried it. Before the magistrate would proceed to examination, he would see whether the piece was loaded or not. It was a screw barrel; the barrel was unscrewed in the presence of the magistrate, as I was told by Mr. Hacket and Mr. Carrick, who unscrewed it, and they extracted eight bullets. Then Angus Byrne was called into the room, where there were nine or ten gentlemen present, and examined. He was asked, Whose gun that was? He answered, It is my lord Anglesea's. What were you to do with this gun? I was desired to pursue Mr. Lacy's directions. What directions had Mr. Lacy? To that he answered in general, In case there had been a rescue; without explaining himself any further. Then he was asked, In case of a rescue, what was he to do with this gun, loaded as it was with eight bullets? Lacy upon that came up, and told him, Sir, answer no more questions, you are not obliged to answer. Then Lacy, pretending to be lord Anglesea's servant, and claiming the gun as lord Anglesea's, the gun (indeed contrary to my opinion) was delivered to him by the advice of another gentleman who was present. Mr. Bonner, not thinking himself sufficiently authorised to take bail in a case of so high a nature where a peer was concerned, referred us to Mr. John Bourke, a gentleman in that neighbourhood; from whence, after bail given, we proceeded to Dublin. I have narrated the principal facts, as near as I could recollect them, my lord, and have nothing further that is material.

Mr. Harvard. Mr. Mac Kercher, if I don't mistake it, you have mentioned that you were apprehensive, I think, upon the information of a servant, and two gentlemen that you don't know, who came up to you upon the Curragh, to tell you to get away as well as you could, that you might be killed;—you say, you were apprehensive that you and your friends there would be murdered; what I desire is this, that you will satisfy the Court and the jury, what

your reasons were for apprehending there was that design?—Why really, Sir, I had several intimations long before that time, of lord Anglesea's designs, of which I could give many instances, were it proper, on this occasion; and I saw him that day supported by a great number of people, who bore no agreeable countenances to Mr. Annesley, or any of our company; these I thought grounds sufficient for my apprehensions.

You gave an account of a rifled-barrelled gun the next day; were there any other arms when those people came to apprehend you, and who had them?—Yes, Sir, I perceived one man, that belonged to lord Anglesea, with a pistol on each side of his breast. He was one of his servants, as I perceived by the livery.

[Cross-examination.]

Mr. Spring. You were pleased to say, that on the 14th, the first day of the Curragh races, you were insulted by lord Anglesea?

Mr. Mac Kercher. Yes.

Did not you go the first day attended by a great number of gentlemen and servants, all armed? The first day, Sir?—I believe there were about three of the gentlemen armed, and two servants.

Were they armed with pistols and back-swords, or with pistols, blunderbusses, and carbines?—I can't recollect whether there were any blunderbuss, or not.

Were the servants armed?—They were, and always were when we travelled in England, as well as there.

Is it the custom to go to races armed?—I don't know that it is the custom. Any gentleman that pleases may carry arms, if he will; I have known it the custom in Scotland for gentlemen to ride with furniture and pistols; and I saw some at the Curragh that day.

Is it the custom in England or Ireland?—I believe not of late the general usage; but any body may, if they please, ride in furniture.

You said just now, Sir, that you were insulted the first day?—I did so.

Can you take upon you to say, that it was lord Anglesea called out, and gave you the opprobrious language you mentioned?—I can take it upon me positively to say it was he, because I saw him and heard him.

You saw him and heard him?—I did.

Pray, Sir, had not you reason from thence to conclude, that if you went thither, you should meet with the same treatment the next day?—I own, I might have reason from lord Anglesea's behaviour, and attempts before that time, to apprehend every thing that's evil; and it was for that reason that we always went very well armed.

You went therefore apprehensive of ill treatment?—No, Sir, I did not say I was apprehensive of ill treatment there more than at any other place, because I looked upon us not only to be under the protection of the law, but also securer, where all the gentlemen of a country were assembled, who would not suffer us to be insulted.

But I would know, had not you reason to expect the like treatment again?—I had all the reason in the world to expect it from lord Anglesea; but was determined to keep out of his way, if possible.

You'll recollect the preparations you made the night before, for any possible event that might happen?—We made no extraordinary preparations.

Were there no fresh chargings?—We always charge our carbines, if we have any, and pistols every morning, when we ride.

Were not your servants' blunderbusses charged?—I know not that they had any.

Pray, Sir, recollect the directions you gave for their loading their arms.—By your ensnaring question, you seem to take for granted that I gave particular directions; but I gave no particular directions.

Did you give any general directions?—I always gave general directions for having our arms loaded, and in good order, every morning.

Did any of your company load any of those arms?—I do not recollect that they did.

Did not you load some of those arms yourself?—I loaded none; I leave that to the servants to be done every morning.

What! to load every morning?—Not to load, but prime; to see that the arms are tight, and in good order.

You say, that Friday you met my lord Anglesea's coachman; explain, did he drive round you, or at you?—He made several pushes at us directly, so that if we had not avoided him, he must have run over us, and have done us mischief. He made several pushes at our company within the rails, which obliged us, in order to avoid him, to go without the rails; and he followed us without the rails, and made several pushes at us there also.

How far was lord Anglesea from this place?—I do not know where he was at that time. I went in quest of him afterwards, and was a good while before I could find him, and in the end found him at the winning-post.

How far was that from the place where you were insulted by the coachman?—He pursued us all over the place.

What place?—The place where the company resort, by the winning-post; the other side of the winning-post from Burchell's.

But he could not drive at you, without driving at others at the same time?—He drove at our company directly, and followed us when we avoided him.

You looked upon this treatment as an affront, and without question resented it in such a manner as men of honour would, not on the servant, but on the master, and went to look for lord Anglesea, to get satisfaction in the way usual among men of honour?—Quite the contrary, Sir; I went with a resolution to keep the peace.

Had you no directions from Mr. Annesley to go to call lord Anglesea to account?—I had no directions.

Then you did it of your own head, I suppose?—I did.

I say, you went to find out lord Anglesea either by directions, or of your own head?—If you will let me know your meaning, if you will speak so as to be understood, I shall give you an adequate answer.

Did you go up to lord Anglesea of yourself?—I went of myself, Sir.

Did not you know that my lord Anglesea had not only at that time insisted that Mr. Annesley was the bastard son of Juggy Landy, but knew your errand into this kingdom?—What if I did? what is that to the present purpose?

Answer the question, Sir; did not you believe that?—I heard he had; I believed it.

Could you, Sir, then expect from lord Anglesea in reason, any kind of apology, or satisfaction, or correction of his servant, for saying of Mr. Annesley what lord Anglesea himself always insisted he was?—I did, and ought to have expected it; and much more in the case of Mr. Annesley than of any other, if my lord Anglesea had acted properly.

You were his champion, I suppose, and must have satisfaction for the affront done him?—I did not turn champion for him; a man turns champion for another that goes to fight his battles; I did not go for that purpose, but in order to avoid a breach of the peace.

Could you expect that lord Anglesea could submit to turning off his servant for saying that, that he himself had said to all the world?—I have repeated it two or three times, that I did, and had reason to expect it, if lord Anglesea had acted as a reasonable man, and a man of honour.

But you knew lord Anglesea said he was the son of a kitchen-maid, could you then expect from him, consistently with his constant and repeated declarations, that lord Anglesea should strip his coachman for an affront offered to such a person?—What lord Anglesea said proves nothing, nor is it any way pertinent to the present purpose. I thought it not only consistent, but what lord Anglesea of all men in the world should have done. Nor did what lord Anglesea thought or said, give his servant or himself a right to insult Mr. Annesley in so public a manner.

Did you imagine it reasonable for any person to strip his coachman at such a time and place, and turn him out of his box?—I looked upon it to be as gentle a chastisement as the nature of the case admitted of.

Must my lord Anglesea have driven his coach home himself?—I saw lord Anglesea on horseback.

Was not your intention, in case he refused, to tell him he must fight Mr. Annesley or you?—No really; I had no such intention.

Was it not to provoke him to a quarrel?—I do say it was not.

Yet you expected, when you went to make a demand of this kind, that he would have complied with this request of yours?—If I had

been of that disposition, I should have done it the first day.

You mentioned the words 'public satisfaction'; had you no other view than to receive it by his stripping his servant?—Sir, I have told you three or four times I had not.

Did not you strike my lord Anglesea that day?—I did not.

Did not you break his head, Sir?—I did not, Sir; I heard lord Anglesea swore I did.

Did you see any body else strike him?—I did not; nor do I believe he was struck that day.

Did not you come up in a very violent manner, and force your way through a crowd to come at him?—I believe I might, I believe I did press through the crowd.

Did not you apprehend that lord Anglesea knew you were the friend of Mr. Annesley?—I am persuaded he did.

Did you not, upon some conversation between lord Anglesea and you, raise your hand?—Why really I do not know whether I did or not; for it is pretty common and habitual with me when I speak to raise my hand in this manner.

And you do not know whether it was raised or not?—I believe there is no man that is obliged to stand like a statue when he speaks.

Did not you say that James Annesley was earl of Anglesea, and you an impostor?—I did not name the earl of Anglesea that day.

You did not tell him that he was an impostor?—I did not.

Did you turn your whip in your hand?—I do not know how I held my whip.

I ask you, Sir, whether during that conversation with lord Anglesea, whether with or without provocation, you did not tell him that he was an impostor?—I now recollect; I remember very well, when he called Mr. Annesley a shoe-black, a bastard, and a thief; I told him, he lied, he was no bastard, he was the lawful son of lord Altham, that before two months went about, it would appear to the world to be so; and in that I have the satisfaction to think I spoke prophetically.

Mr. Spring. You are somewhat too early, you must wait further for the completion of your prophecy.—A. And you, Sir, are too hasty in forming conclusions.

Pray, Sir, you remember the next day to have seen Michael Lacy?—Yes, Sir.

Did not you thank that Lacy for his civility to you?—Why really I believe I did; I believe I might thank him for executing the warrant peaceably, for I was persuaded, from the apparatus I saw there, his orders were otherwise; but even in that I cannot help saying that I was obliged to temporize so far.

Did not you thank him at Naas?—No, not at all, it was at Burchell's, for putting the warrant in execution as he did peaceably, for we expected worse usage.

Do you recollect that you desired my lord to turn aside with you?—I believe it was the first word I said to him.

Did not you say after, that he dared not?—After he had called me a scoundrel, a thief, and villain, I told him, he lied, and he durst not for the soul of him single himself out and tell me so.

Was not that before you were struck, Sir?—I believe it was before. I cannot well remember, but I think it was.

In what manner was lord Anglesea armed? What arms had he?—I saw none about him.

Did not you see his pistols?—I saw none.

How was Mr. Francis Annesley armed?—I did not observe him so particularly; I know he was armed with a whip, which I felt the weight of.

Did you see any of lord Anglesea's company armed?—I saw some people armed that were of his side, that were about him, and who seemed to take part with him.

Are you sure they were of his company?—I concluded they were, as most of them seemed to side with him.

You mentioned something you apprehended from their countenances that you withdrew yourself from thence, from mischief; describe those terrible faces?—By their countenances, I apprehended some mischief might happen; but I am not so good a painter as to humour you in drawing the attitudes they were in.

Who were the persons who pursued Mr. Annesley and you?—I can't tell you particularly who they were, being a stranger; I know there were a great many.

Did you know none of them?—There were two gentlemen I knew, whose names I am sorry you force me to mention, for I did not intend it, sir Kildare Borrowes and Mr. Warren that pursued Mr. Annesley.

Don't you believe that they pursued out of curiosity?—I don't know their intent; but I know I was treated rudely by one of them.

Well! but you can't point out any of lord Anglesea's retinue or servants that pursued you at this time?—I can't, except Mr. Jans; he was one of the company; I was a stranger, and did not know the rest.

Was he one of the pursuers?—I don't know; I did not observe him; he might be there for aught I know.

Did you observe Mr. Lacy there?—I did not observe him, yet he might be there for what I know.

But you concluded they were his people, because they pursued you?—I concluded so, and do so still.

Mr. Archbold too, I suppose, was one of the pursuers?—I don't know whether he was, or not. I found him where Mr. Annesley lay, and he might, for aught I know, have come the contrary way, from Newbridge.

When you came up to where Mr. Annesley was, you found some people attending him, did any body strike him?—I did not see any strike him, nor would I tamely have seen it.

Did you see any servant of lord Anglesea's in livery there?—I did not see any of his

livery there, but I have been told since they were there.

You know Angus Byrne?—I do.

How long have you been acquainted with him?—I have been acquainted with him ever since that affair of the Curragh happened.

Did not you invite him into your service?—I did not.

And he is not your servant?—He is not.

Was not he in England with you?—He was in England, but not a servant.

How did he live there?—He lived upon my bounty there, but not a servant.

Did not you invite him into England?—I never invited him there, but received him when he came.

Did not you bring him over again?—I did.

Did not you give him some advice about submitting to these indictments?—I did not.

Did he never complain to you that lord Anglesea had used him ill?—He never did.

Did not he tell you that lord Anglesea had sent him to gaol?—He did not; he only told me that lord Anglesea owed him his wages.

Had you ever Angus Byrne at your house on College-green?—Yes, Sir, since we came last into this kingdom.

He was there?—He was.

Did you never threaten to send him to gaol, if he did not do as he was directed?—I gave him no directions; but did at first, immediately after the assault, and before he made his declaration, threaten to send him to gaol.

What do you mean by his declaration?—A declaration that he made in Dublin, when he first turned evidence for the crown.

Did you take any declaration in writing from him?—I did not.

Did you know whether Mr. Livingstone did or not?—I do not know.

Did he take down in writing, in your presence, any thing this man had to swear?—I do not know that he did.

Do not you believe he did?—I cannot frame any belief about it.

Is Mr. Livingstone an agent of Mr. Annesley's?—He is a friend of his, but no agent.

Is he not an assistant in his affairs?—He has a share of the trouble of his affairs.

Did not he take in writing what that man had to say? Recollect.—I cannot recollect he did.

Were these people, that you call servants of lord Anglesea, that surrounded the house, in the livery or not?—I understood Lacy to be his servant and chief agent, but I saw none in his livery, save one.

Did you see any in his livery on the Curragh?—I saw one in a livery, that I took to be his livery.

Did Burchell tell you that any of Mr. Francis Annesley's servants were at the inn in arms?—I do not recollect whether they were servants or not, he said his people were in and about it.

Court. Is it your belief or opinion, that if you had not made the application to lord An-

glesea, whether this pursuit, and every thing that happened after, would have happened?—I could then frame no judgment about it, my lord; I have since, indeed, in my own mind, from what I have seen, been thoroughly persuaded that something of that nature would have happened; and that the provocations given us, were intended on set purpose to draw us in.

You are asked to your present opinion?—I am of opinion now that it would have happened some way or other, I was not then.

Mr. Spring concludes from thence that Mr. Mac Kercher solicited it.

Court. The jury desire to know whether your pistols, when you were upon the Curragh, were charged and primed, or not?—I believe they were.

Whether when you and my lord were discoursing together you put your hand to your pistols?—I do not remember I did, and I am positive I did not.

Hugh Kennedy, esq. sworn.

Mr. Callaghan. Where were you upon the 16th of September last?—Mr. Kennedy. Upon the Curragh of Kildare.

Inform the Court and the jury of the transactions of that day; tell what happened to Mr. Annesley, Mr. Mac Kercher, and yourself.—When we came first upon the Curragh, we were told there was a rising ground upon the other side of the field, from which we might better see the diversion; accordingly we made towards it; in our way we were insulted by the coachman of my lord Anglesea, who drove at us, pointing to Mr. Annesley, and calling him Shoe-black. Mr. Mac Kercher perceived him sooner than I did; he asked me if I had seen him? I told him I had. Immediately after that we perceived him making up to us with his coach, which he drove again at us, and repeated it several times. Perceiving he continued still to drive at us, Mr. Mac Kercher then said, he would see where lord Anglesea was, to complain of the abuse of his coachman: accordingly, we went in search of him, and were for some time before we could find him. We found him at the winning-post, where Mr. Mac Kercher went up, and in the mildest manner possible told him, he wanted to speak to his lordship. All the words they had together I cannot distinctly repeat; but thus much I heard, that when Mr. Mac Kercher told him he wanted to speak to him, he said, It was not a proper place. Mr. Mac Kercher told him, Every place was proper for what he had to say to his lordship, which was to complain of the insolence of his coachman, and to desire he would give satisfaction for the affront he had given a gentleman on the field. Lord Anglesea asked, What gentleman was affronted? Mr. Mac Kercher pointed to Mr. Annesley, and told him that gentleman. Upon which words arose between them, which I cannot distinctly repeat at this time; but in consequence of those words, soon

after I saw Mr. Francis Annesley of Ballysax strike Mr. Mac Kercher over the head, so that the blood came. Lord Anglesea quickly after that happened, raised himself in his stirrups, and made use of the language already repeated, That Mr. Annesley was not his brother's lawful son, but the bastard of Juggy Landy, a shoe-black, and to that effect. Soon after which Mr. Mac Kercher desired Mr. Goostry and me to retire; as soon as we heard him desire that, we turned our horses to follow him. Immediately on the turn of my horse, lord Anglesea struck me a violent blow on the head, so as to stun me.

Court. With what?—With the handle of his whip, my lord.

During what part of the transaction was this?—Immediately after the language that passed between him and Mr. Mac Kercher.

Did he say any thing before he struck you?—I believe he might say, “There is one of the villains.”

Did he name any man?—I believe Mr. Goostry, There is that villain Goostry, or to that effect.

Was it at the same time that he struck you that he said those words?—A very short time before I was struck he said those words.

Describe the stroke you got.—The stroke I got was on the back part of my head with the butt end of his whip.

Did it do you any hurt?—It stunned me to that degree that I almost fell upon my horse's neck.

What was the consequence of that stroke?—There was a very great effusion of blood followed.

What ensued upon that?—Immediately after that blow, it was followed by a number more from other people which knocked me down on my horse, so that I should have fallen to the ground, if I had not been supported by the people on each side of me.

Who gave those blows?—I cannot tell, my lord, I was knocked down, in a good measure, by the blow lord Anglesea gave me.

Mr. Callaghan. Tell what you remember happened after you recovered yourself.—As soon as I recovered and sat straight on my horse again, lord Anglesea came from the company he was with, and struck me seven or eight times running over the head.

Court. With what?—With his whip.

Which end of his whip?—It was the lash end the last time he struck, but he repeated his blows so long that the people cried out Shame, saying, 'Tis a shame to abuse a gentleman so, or to that effect; and soon after that he had done, and I rode off the sod.

Mr. Callaghan. Was there any conversation between my lord Anglesea and you before you got that stroke from him?—I never spoke to lord Anglesea in my life, Sir.

Had he spoke to you before he gave you the blow?—I do not know that he did.

Did you give him any provocation to strike?—I gave him no provocation at all.

I think you said you saw Mr. Francis Annesley strike somebody; who was it he struck?—I did, I saw him strike Mr. M'Kercher.

With what, Sir?—With the butt end of his whip.

Was that stroke a moderate stroke, or given with such violence as carried an intent of doing mischief?—His forehead immediately swelled pretty big, and a little blood came from it.

Before Mr. Annesley gave the stroke, did you see Mr. M'Kercher give him any provocation to strike him?—I saw no provocation that Mr. M'Kercher gave, for I believe he did not speak to him at all.

Do you believe that Mr. M'Kercher could have given him provocation without your seeing it?—I think not, for I was pretty near him, and must have observed it, if any had been given.

Tell what passed after the people cried Shame, and you got off the sod.—My finger was almost broke by one of the blows, and that occasioned my whip to fall from my hand.

Court. Explain yourself, Sir.—Immediately after my lord Anglesea struck me, I was struck by a number of other people whom I did not know, and among them I got this wound on my finger, which occasioned me to lose my whip.

Mr. Callaghan. What became of you after this?—As soon as I could, I rode down the hill in quest of Mr. Annesley and Mr. M'Kercher; I found Mr. M'Kercher just by where Mr. Annesley lay; I did not stay to speak to him, but went on to Mr. Annesley, whom I found fallen in the ditch, lying senseless, speechless, and pale.

Court. What number of people were about him in the ditch?—Ten or a dozen.

Did they appear to be friends, or any of the people you apprehended he was in danger from?—I cannot say who they were, or what their intention might be, I was a stranger, and could not distinguish.

Was it at that time in the power of any body to do him mischief?—He had been so long in the ditch when I came up, that they had got a surgeon to bleed him.

But do you think it was in the power of those people to hurt him?—I believe they might if they had a mind, had not Mr. M'Kercher, and others of Mr. Annesley's friends come up.

Mr. M'Manus to Mr. Kennedy.

Mr. Kennedy, where did you leave Mr. Goostry?—I left him, I believe, upon the Curragh; I cannot say, I did not see him after I was struck.

Was he assaulted by any one?—He was wounded at the instant of time I was.

Did you see any body strike him?—I cannot say distinctly that I did, but he was wounded about the same time.

After you took Mr. Annesley to Newbridge that night, did you observe any thing on the Saturday after?—Yes, we were alarmed very early that morning before we were up; the landlord

and others coming to tell us that the house was beset by a number of people, who, they said, they believed had evil intentions; upon which we got up, and did the best we could to make our defence in case they attacked us. This continued for some time, till at last Mr. M'Kercher went down stairs, to see if what we had been told was true; when he found it according to the information he had received from the people of the house, that there was a number of people armed about the house. Mr. M'Kercher returned very suddenly, and with him one Lacy and a constable, and told us, that there was an action brought against him at the suit of lord Anglesea—

Mr. *Callegahan*. What do you mean by an action?—A warrant granted by a justice of peace. The person then told me he had the same against me and Mr. Goostry. What for, Sir? we asked him: He told us, on my lord Anglesea's affidavit that he was assaulted by us, and put in fear of his life.

When Mr. M'Kercher, and Lacy, and the constable came up with the warrant, what happened then?—Lacy told me and Mr. Goostry that he had a warrant against us.

And what did you do upon that?—We submitted directly. Soon after we had breakfasted, we disarmed ourselves, and went into the coach, and were carried to Naas.

Who went into the coach?—Mr. M'Kercher, Mr. Carrick, and myself.

Did Mr. Annesley go into the coach on the road?—He did.

How came that?—Mr. Goostry called out to us to take him in, for it was not safe for him to be there.

Did Mr. Goostry give any reason for his saying that?—He gave it as a reason for taking him into the coach, that it was not safe for him to ride, for that one of those fellows was going to shoot him.

When you came to Naas, what happened then?—We sent for the sovereign of Naas to give in bail, and there this Mr. Lacy, who came along with us, followed us into the room, when this person that appeared here, Byrne, was questioned in regard to his gun.

What kind of a gun was it?—The gun was a screw-barrelled gun, such as game-keepers use.

Who questioned him about it?—He was questioned by Mr. Mac Kercher what he was to do with it. He answered, to follow Lacy's directions; and soon after Lacy stopped him, and bid him answer no more questions.

Was that gun charged?—The gun was unscrewed before us in the room, and from it taken eight bullets.

In your presence?—I was present.

Did any body claim that gun back again?—Yes, Sir.

How many bullets were there?—There were eight, Sir, said by all the gentlemen in the room. I did not count them, but I believe there was that number.

By whom was the gun claimed?—By Lacy, as lord Anglesea's.

Had Mr. Lacy any arms?—I cannot say as to that; I do not remember; I think he had.

[Cross-examination.]

Mr. *Morgan*. Pray, Sir, were you at the Curragh the 14th of September?

Mr. *Kennedy*. I was, Sir.

Did you see lord Anglesea there?—I did.

Was he in a coach, or on horse-back?—I think he was in a tent.

On the 14th?—Yes, Sir.

Recollect yourself whether you saw him in a coach at any time that day?—I did not, to the best of my memory.

Do you know his coach?—I can't say I did then.

Why then, how can you take upon you to say that the coach and six which haunted you was his?—I had particular reason to know it then, from hearing from the coach-box the man's insults to Mr. Annesley.

On the 16th you knew it, but not on the 14th?—I did, Sir.

Did you see lord Anglesea more than once on the 14th?—But once.

Recollect whether you saw his coach driving more than once on the 14th?—I did not see it more than once.

Now I ask you whether any violence, or attempt of violence was made on the 14th?—There was none that I was privy to.

How long, how many hours were you on the Curragh?—I can't be precise as to the time.

Were you one hour?—Yes, Sir.

Were you two?—Yes, I believe we were there or thereabouts.

Where did you lie the night before the 14th, on Tuesday night?—In Dublin, Sir.

What hour did you come to the Curragh on the 14th?—I can't call to mind exactly.

Where do you say you were the night before the 14th?—We came from Dublin to the New-inn the 14th.

Did you lie at the New-inn the night before you went to the Curragh?—We did not.

Did you inquire, or any of your friends inquire, whether my lord Anglesea was to be at the Curragh or not?—I do not remember that the question was put by any of us.

Did you converse with any body in relation to his being at the Curragh?—I remember none.

Had you, at any time after, any conversation about him?—Yes, undoubtedly, having so many remembrances of him with our blows and broken heads.

Had you any particular conversation of him between the 14th and 16th?—We had not that I remember.

Mr. *Spring*. Now, Sir, I would ask you, whether any body prevented Mr. Mac Kercher's going up to my lord Anglesea, when he came to the crowd where my lord stood?—I can't say I saw any body prevent him.

Do you know one Chapman?—No really, I don't.

How near were you to Mr. Mac Kercher

when he had the conversation with my lord Anglesea?—Not so far as I am now from you.

I ask you, Sir, whether the words that passed between them were not loud words?—They were not loud of Mr. Mac Kercher's side, because his words were intended for nothing but to be peaceable and quiet; the words became louder afterwards; lord Anglesea was particularly loud enough.

I ask whether Mr. Mac Kercher did not challenge my lord to fight?—Mr. Mac Kercher's words I can't distinctly repeat.

Well, but I ask whether he did not challenge my lord to fight?—After many insults that Mr. Mac Kercher had met with, I believe he might say, That he dared not single himself out, and tell him so.

But did he not challenge him in direct words?—I do not apprehend he made use of any words that imported a challenge to lord Anglesea.

You say you heard part of the words that passed, did you hear Mr. Mac Kercher give my lord the lye before he was struck?—I really cannot say whether it was before or after; I rather believe it was before he was struck. I cannot say positively, but it was after my lord had given him abusive language.

You mentioned your going to Newbridge after you had received your abuse?—I did, Sir.

Now I ask you, whether you saw any and what number of people riding to Newbridge, as if in pursuit of any body?—When I came to the place where Mr. Annesley was lying, I saw forty or fifty people, horse-men and foot, who I suppose had pursued.

Did Mr. Mac Kercher and you ride to the place where Mr. Annesley lay, together?—We did not.

How far distant might you be?—I did not see Mr. Mac Kercher till I came up to where Mr. Annesley was, and the distance between Mr. Mac Kercher and Mr. Annesley was about the length of this court, or better.

Did you see any and what number of people pass by you that seemed to be in pursuit of any body?—I cannot say; a good many people rode past, but I could not tell with what intent.

What did you apprehend they rode for?—I really do not know.

Now do you imagine they, or any of them, were riding in pursuit of Mr. Annesley?—I do not know. I rather believe they were the pursuers, otherwise what should make them go after him?

You said at first that you saw some forty or fifty people, on horseback and foot, round the place where Mr. Annesley was; who do you imagine they were, friends or enemies?—For aught I know they might be the pursuers, I cannot say.

Did you see any one of them offer violence?—I did not then.

Did you see any body lay hold of him, other than in a friendly manner to assist him?—I cannot say I did.

Did you enquire of Mr. Annesley if any

body had hurt him?—Mr. Annesley was not capable of speaking.

But when he came to himself, did you ask him how he came by any hurt?—I did.

What did he then tell you was the occasion of that hurt?—The principal occasion was the fall of his horse into the ditch upon him.

And what occasioned his horse to fall into the ditch?—The occasion of his horse's falling was that of his being close pursued; and when he perceived that, he pulled the horse back, in order to defend himself, and he fell into the ditch upon him.

Before Mr. Mac Kercher and you went up towards my lord Anglesea, to complain of the coachman, were you cautioned not to do it, for fear of entangling yourselves in a quarrel?—I cannot say that I had any particular caution from any body.

Did you hear any such caution given to Mr. Mac Kercher?—When I came down the hill, I was advised by some people to go off the ground, or else I should be murdered.

I ask again, did you or Mr. Mac Kercher receive any caution not to go to lord Anglesea?—No, I did not; nor do I know that he did.

Do you know one Abraham Robinson?—I do.

Recollect whether he cautioned you or Mr. Mac Kercher not to go?—He gave me none.

Did he Mr. Mac Kercher?—I know not, I did not hear him say any thing to him.

Now then I ask you, whether at any time during this affray you struck any body, and who?—I know not, indeed, Sir.

But did you strike any body?—The blow I received made me incapable of striking any body.

Did you strike any and what person before you received that stroke?—I cannot say, in the hurry particularly, whether I did or no: I know this, I never altered the position of my whip: if I happened to hit any body, it was with the lash of my whip.

How can you be particular concerning what Mr. Mac Kercher did, and cannot recollect what you did yourself?—That was some time before the confusion happened, so that I could better judge then than afterwards.

Was not the time that Mr. Francis Annesley struck Mr. Mac Kercher a time of hurry and confusion?—There was no hurry and confusion till that blow, which occasioned it all.

Did you, or did you not, strike any body, before you were struck yourself?—I cannot really say; but after my friend was struck, perhaps I might.

Do you not believe you struck, before you were struck?—Yes, I believe I might; when I saw Mr. Mac Kercher struck.

Who was it you did strike?—Why, Sir, I cannot tell.

Did not you strike lord Anglesea?—I did not.

Can you be certain you did not?—I am positive I could not, for he was rather behind me than otherwise.

Q

You say, you believe after your friend was struck you did strike; can you recollect whom you struck?—Why really I cannot positively say, I struck one of those who struck Mr. Mac Kercher.

And yet you are positive you did not strike lord Anglesea?—I can be positive I did not strike lord Anglesea before he struck me.

Endeavour to recollect who it was you struck?—I cannot recollect who the person was I did strike, for in a minute's time we were all in confusion. I am sure it was not lord Anglesea I struck, I knew him.

Might you not have struck lord Anglesea then, as well as another?—It was impossible, for he was behind, and his blow prevented me from striking any body.

Did not you strike Mr. Francis Annesley?—I cannot tell—more probably him than another, as he struck Mr. Mac Kercher.

You know Mr. Goosey?—I do, Sir.

Did you see him strike any body?—I believe I did.

Who?—I believe I saw him strike Mr. Francis Annesley, after he had struck Mr. Mac Kercher.

Are you positive it was not before?—No; it was not before.

Had Mr. Goosey received any blow before that?—He received a violent blow, and I cannot say whether before or after.

Did you see any of lord Anglesea's servants upon the ground that day?—I think I did.

Do you know his livery?—I cannot be positive as to that, I know what is deemed his livery.

How were your servants armed that day?—As they are when we travel.

How is that?—One or two of them had pistols before them.

Do you believe they all had?—I really cannot say positively whether they all had or not.

You can say whether you believe they had or not?—I believe they had not all.

Had any of them a blunderbuss?—Not that I know of.

A musquet or a gun?—No.

Had not every one of them back-swords?—I cannot call to mind; I believe not.

Do you travel with back-swords?—No.

Tell how the servants were armed.—They were armed so far as to have pistols before them, but I believe they had no blunderbuss nor back-swords; to the best of my memory and belief they had not.

Jury by the Court. Did you see Mr. James Annesley ride off the Curragh? Was he in your view?—He was in my view when Mr. Mac Kercher called to Mr. Goosey and me to come away, he was just by us, but he was quickly lost to me, because on my coming away I received the blow that stunn'd me.

What might be the space of time between his going off the ground and his lying in the ditch?—About ten minutes.

Can you tell what was the space of ground

from the place you saw him in the ditch?—A quarter of a mile.

What time might a man ride that in?—A man might gallop it in five or six minutes.

Mr. Malone to Mr. Mac Kercher.

After those words of the coachman that you went to complain of, were you, or were you not advised not to go to lord Anglesea?

Mr. Mac Kercher. I believe I might.

By whom?—Who the person was I cannot really recollect; but my particular reasons for going, notwithstanding that caution, was, that I saw the insult was continued, and not to be discontinued, unless my lord Anglesea gave directions to his coachman to desist.

Was there any new insult offered after you received the caution?—Yes, while I was in search of lord Anglesea.

What distance were you from lord Anglesea when you received the caution?—I do not know where lord Anglesea was at that time that I was in quest of him.

But at what distance did you find lord Anglesea from the place where you were cautioned not to go to him?—I cannot tell that; I had occasion to traverse the ground several times after I had received that caution before I could find him.

Court to Mr. Kennedy.

Did you see any persons pursue Mr. Annesley?

Kennedy. I cannot say I did see any persons pursue him, for soon after I received my blow.

Did you see any people riding that way?—I saw a great many people galloping down the hill, which they told me was after Mr. Annesley.

Did you ride in arms that day?—I had no arms that day, I rode a hunting saddle.

John Kirwan sworn.

Mr. Morton. Where were you on the 16th of September last?

Kirwan. I was upon the Curragh.

Whereabouts on the Curragh?—A good piece this side of the winning-post.

What winning-post?—On the Curragh.

What part of the Curragh?—Upon the high ground.

Tell what you observed to pass there that day.—What I observed was my lord Anglesea was talking to the gentlemen about him.

Do you know any of the gentlemen?—I do not know their names.

What did you hear my lord Anglesea say?—I heard him telling, That this young gentleman was only a bastard got by the kitchen-maid. And with that two or three came up and told him that he was gone off the sod, and with that he bade them follow him, and I tear him limb from limb, and every one that takes his part.

Who did he say this to?—I took one of them to be his servant.

Why so?—Because he wore his livery.
Are you sure he was his servant?—I could not swear that he was his servant, but I took him to be so. But he came back and told him that he was killed. That's well enough, says my lord.

Go on, and tell your story.—That is all that I heard, and I have no benefit to tell any more than what I saw, and it is against my will that I came here at all, for I had no mind to meddle, but I was brought to it.

[Cross-examination.]

Mr. Malone. Where do you live?
Kilwan. I live at Newbridge.
What do you follow?—I follow dealing.
What dealing?—In linen cloths.
Are you a married man?—I am.
What family have you?—I have two.
Two what?—Children.
Do you hold any land?—I do.
From whom?—From Mr. Brown.
How much?—Not much.
Tell how much?—Only three acres.
What rent do you pay?—Three pounds a year.

Do you owe any rent?—I owe no rent.
What day was it you were at the Curragh?
—It was the 16th of September I was at the Curragh, as I understand.

How come you to understand it to be the 16th?—Because I took notice of it.

Can you write?—I cannot write.
Did you make any memorandum of it?—I made no memorandum of it then.

How do you know then it was the 16th?—Because I am sure of it. Are not you sure that you have that paper in your hand?

Suppose I am, that is nothing to the purpose; upon your oath, Sir, what day of the week was the 21st of September?—I do not know that.

Were you at the Curragh the 14th?—I was.
Were you on the 15th?—The 15th and 16th too.

Did you see the horses run?—I did.
How many were there?—Four, and sometimes three; that's nothing to the purpose, Sir.

Yes, but it is, Sir; I ask you how many horses ran that day?—I do not know, I remember that there were many running.

But I ask you how many?—I do not know, but I believe there was three.

What colour were they?—Some of them were bay.

Was there any white horse ran?—No.
Any grey horse?—No.

Did you make any bets?—I made no bet. I drank my belly-full.

Had you drunk your belly-full that morning?—I did not drink much that morning.

What time of the day was it that you heard lord Anglesea say those words?—I had not my watch about me; about the time we drive the cows home.

What time is that? About duskish?—Thereabouts, Sir.

How long before it was duskish?—I cannot tell.

Was it two hours?—Indeed, Sir, I had not my watch about me.

Have you a watch, Sir?—No, Sir.

What time of the day was it that you heard my lord Anglesea say he was a bastard?—I cannot tell.

But you must tell? Recollect.—About the time of the cows driving home.

Did you stay upon the sod after that?—I did, a good while.

Was there any race after?—No, no horses ran, not as far as I can understand.

What did you do after that?—I went into a tent to take a glass of ale after.

Do you know lord Anglesea's livery?—Yes.

What colour is it?—He gives red.

Red! Why man, he that you saw in red might have been a soldier for what you know?—I do not know but the man that I saw was a soldier, but he had his livery on him.

Was the man that you took for his servant dressed in red?—I did not take him to be his servant then, but I took him to wear his livery.

You said he wore my lord's livery?—I did.

Did you at that time understand that he was his servant?—I took him to be his servant.

Why?—Because he wore his livery.

What livery?—Facing with red.

What colour was the outside?—Blue, Sir, and was faced with red; and this was red.

[Pointing to his vest.]

Red inside? What, the lining?—No, the facing. [Pointing at the same time to the cuff of the sleeve and the vest.]

Was there any lace upon the livery?—I believe there was; I did not take sharp notice.

Had you ever seen any of his servants before?—I saw several of his servants before.

Are you sure you know his livery?—I know his livery pretty well.

Had you seen that man before that time that you took to be his servant?—I do not know whether I saw that man's face before that day.

You live at Newbridge?—I do.

Does any gentleman there keep a servant in blue livery?—I cannot tell whether there be or not.

Did you at that time understand the man to be a servant to lord Anglesea?—I took him to be his servant, because he wore his livery.

What clothes did my lord wear that day?—My lord wore brown that day, a brown coat.

What sort of hat had he?—He had a laced hat.

Had he lace upon his brown coat?—I do not remember.

I ask you if he had lace on his coat?—I do not know; I believe he had.

What sort of lace?—I do not know whether silver or gold lace.

Was he in his coach, or on horseback?—He was on horseback, riding a bay mare.

Do you know any of the company that

was about him?—I cannot tell any man that was about him.

Do not you live near that place?—I live within a mile or two of it.

And yet you did not know any of the gentlemen?—I did not know one of them.

Can you name any one man that was present when my lord made that declaration?—I cannot, I did not take notice.

Did my lord ever speak to you before that time?—He did.

Did he ever eat or drink with you?—I never drank or eat with him, he would not be so great with the like of me.

Do you know Mr. Francis Annesley of Ballysax?—I did hear of him.

Do you know him?—I know him.

Were you ever at his house?—I was at his house.

Do you know his servants?—I do not.

Nor his livery?—No.

Do you know Mr. Steel?—I do.

How far does he live from you?—He lives about three miles from where I live.

Were you ever at his house?—I was.

Do you know his livery?—No.

Nor Mr. Francis Annesley's livery?—No.

Can you name the livery of any man that lives near you?—I cannot, Sir.

Mr. John Archbold sworn.

Mr. Callaghan. Where were you on the 16th of September last?

Archbold. At the race of the Curragh.

Did you see any thing particular that happened that day between lord Anglesea and any other gentlemen?—I did.

Give an account of it; tell your own story.—I will, Sir. I was drinking, my lord, in a tent, on the 16th of September at the Curragh, and I heard some people cry out, Knock that son of a whore Kennedy down. With that I thought it was a friend of mine that had been at the Curragh that day, that was in danger; upon which I immediately got on horseback, and saw Mr. Jans and lord Anglesea beating this Mr. Kennedy, and Kennedy had his head down in this manner, and they were fleeking him, beating him, my lord, very severely: and seeing this, I went up to Jans, and laid my hand upon his arm, and said, I wonder you would be guilty of beating a man in this inhuman manner, and whatever the fact is you beat him for, he cries out, I have nothing to say to it; that ought to satisfy you. I myself did not understand what the quarrel was about; but after I had spoke to Jans, he went to my lord Anglesea, and he said, My lord, it is not worth your while to beat him, let him alone. With that my lord desisted, and I went to Mr. Kennedy, and told him, You had better get off in the best manner you can, for you'll be murdered if you stay here. Mr. Kennedy said, he could not go for his friends, he could not leave them. With that the mob said, Mr. Annesley is gone off the field: and with that lord Anglesea said, Follow the son of a whore, and knock

his brains out. With that the people rode off after him, and we rode after the crowd from the place where we stood, towards the turnpike-road to Newbridge; and by the time I came up, Mr. Annesley was fallen into the ditch with his horse, and some gentlemen came up, and were for striking him as he lay there; and I said, I believe he is dead already, and there is no need to kill him again. And with that I alighted, cherished him, and opened his stock, and the surgeon came to bleed him, but could get no blood; and I got a chair and sent him to Newbridge, and within an hour or two after I went to see him.

Did you think, when you saw him in the ditch, that he was dead?—I did believe he was so hurt that he would not recover in a good while.

Did you hear any directions given by lord Anglesea to any persons?—I only heard him say what I have said already.

Repeat that again.—When the mob cried out Mr. Annesley's gone off; my lord Anglesea said, Follow the son of a whore, and knock his brains out.

Did any body pursue upon that?—I cannot say whether it was upon his saying it or no that they followed him, but there was a great many people followed him upon his saying so.

Do you know who those gentlemen were that would have struck him, if you had not prevented them?—I do.

Who? Name them.—Mr. William Warren of Grangebaggy.

Did any body strike him?—No, not one; I believe I prevented that pretty much.

Do you believe any body would have struck him, if you had not been there?—Upon my word, I believe some would have struck, if I had not prevented it; for Mr. Warren was alighting in order to strike him; and I told him, Do not strike him, for he is killed already, I believe; and you are a gentleman of fortune and figure in this country, and not proper to be seen in such a riot as this.

[Cross-examination.]

Mr. Green. Did you see any other people pursue Mr. Annesley besides Mr. Warren?—I saw several.

Did you see any in lord Anglesea's livery?—I cannot tell; I did not take notice whether any in livery pursued him or not.

Did you stand by him for any time after you came to the ditch?—I did, till I put him into the chair.

Did you see any of lord Anglesea's servants there?—I did not observe if any servant of lord Anglesea's was present, or not.

Recollect whom you found at the ditch.—I found sir Kildare Borrowes, Mr. William Warren there; and so was Dillon Ash, and a good many acquaintance.

How soon after his fall into the ditch did you come up?—He was some time down I believe, for the horse had got up before I came.

Did you see Mr. Annesley soon after this at

Newbridge?—I turned back at that time when I put him in the chair, and saw the other beat at the Curragh, and after that went to Newbridge.

Had he no bruise, or cut, or stroke with a whip, that you perceived?—He had not, that I perceived; nor did I look.

Was he in his senses when you put him into the chair?—He was not.

Did he tell you then, that he got ever a stroke from any body?—He did not tell me that he got ever a stroke. How could he tell me then, when he was senseless?

There was a heat, you say, after he fell?—There was, Sir; I went back to see the heat.

Mr. Digby. Did you see any body pursue him before he fell down?—When I came up he was in the ditch; there were a great many running that way.

Did you know any of them?—I knew Mr. William Warren, and sir Kildare Borrowes, and spoke to Mr. Warren not to strike him.

Did you see Mr. William Warren's horse run away with him that day?—I did not observe his horse run away with him.

Mr. Malone. Do you think the people you saw there intended to do him any harm?—God knows whether they intended him harm, or no.

Do you believe all the people you saw there were bent to do him mischief?—I believe there were several, among such a concourse of people, that did not: sure, if they were all bent to murder him, he would have lost his life in a moment.

Court. You said that you heard lord Anglesea say, Follow the son of a whore, and knock out his brains?—Yes, I did.

Give your opinion, whether any pursuit happened in consequence of those words?—My opinion of the matter is this, that I saw them pursue him, as soon as lord Anglesea spoke; but I do not know whether they followed him out of curiosity, or by my lord Anglesea's means; how can I know their intention?

Mr. Spring. Was it not usual for a crowd to follow him wherever he appeared?—Why, I cannot tell; I never saw him till the race day before.

Was he not followed to whatever part of the ground he went the first day?—I only saw him come on the ground from the turnpike-road with his servants, and I was shewed him there, and do not think I saw him after, that day.

When you came up, did you see Mr. Warren attempt to hurt Mr. Annesley?—Mr. Warren was alighting when I came up, and said some words that made me think he meant to hurt him in that manner; and what reason should I have to speak to him, to beg he would not hurt him, if he did not attempt it?

What was it he did say, that made you imagine he intended to hurt him?—I think that he called out to sir Kildare Borrowes; I was in such a hurry of spirits, that I cannot tell well

what happened, but I think, by the words Mr. Warren said, they were something tending to hurt Mr. Annesley; upon which I begged of him not to alight; and he did not, nor did not strike.

Did you observe lord Anglesea's dress that day? Had he a plain or a laced coat on?—I cannot tell you; I do not remember whether it was a plain or a laced coat, but I know he was on horseback, and Jans went up to him, and bid him give over beating Mr. Kennedy.

Did you ever see lord Anglesea before?—I have seen him very often.

Are you acquainted with him?—I know him by eye-sight, but have not the honour of being acquainted with his lordship.

At the time you heard lord Anglesea make use of the words you mention, how far were you from him?—No farther than I am from you.

Was there not a great crowd about him?—The crowd was dispersed pretty much upon Mr. Annesley's going off.

Can you judge whether they followed Mr. Annesley through curiosity, or at my lord's instigation?—I could not judge whether through curiosity, or at his instigation; they followed as soon as he ordered them.

You said, that the crowd went away and followed Mr. Annesley?—I do not say all; but a great many followed him.

Do not you believe they attended him out of curiosity?—I told you before that I could not tell whether out of curiosity, or at my lord's instigation.

Did you know any other person present to have heard those words?—I did not stay to look about me, but rode off directly.

But do you know any body that was there present?—I do not know any body that was by, for I did not stay to examine who was by.

When you came up to him in the ditch, would any gentleman have done him hurt, but for your interposition?—If I had not thought Mr. Warren had a design to do him hurt, I should not have said the words I said to him.

Mr. William Hacket sworn.

Mr. Morton. Where were you on the 14th and 16th of September last?

Hacket. On the 14th I was in Dublin, and the 16th I was at the Curragh.

Do you know what happened the 16th between Mr. Mac Kercher, Mr. Annesley, and my lord Anglesea?—I was in a tent drinking a bottle of wine with some gentlemen, and a boy came in and said, The young earl was killed. Immediately on hearing that, I ran out, got my horse, and followed them. There was a cry out, He's gone that way, pursue him, pursue him! Upon which I followed as fast as I could, and came up to Mr. Mac Kercher, and said, Why don't you go on faster, Sir? He said my horse has no speed; pray, Sir, do you follow Mr. Annesley, and keep close to him till I come up, for he will be murdered. Upon that I followed as fast as possible, but he

was fallen in the ditch, and many about him before I got to him. I saw he was very much hurt, upon which I attempted to bleed him; he was quite senseless and speechless, and though I made two punctures in his arm, he would not bleed, and after that he was sent off to Newbridge.

Was he recovered before he was sent to Newbridge?—He was not recovered.

Did he say any thing?—He did not speak a word.

When did you see him after this?—I saw him that night after.

In what condition did you find him then?—He had recovered his senses.

Did you stay any time with him?—I lay there that night.

Do you remember any thing remarkable to have happened further?—The next morning I got up early, and went out to look at my horse. And Mr. Mac Kercher was apprehensive of some danger, and said over-night they would go away very early. I went into the house again after I had seen my horse, and a boy came in and said, The house was surrounded, and that the gentlemen in the house were way-laid. I told Mr. Mac Kercher what the boy said, upon which he and some more went down stairs to see if it was true, and then they were assured of it.

How do you know that?—I went out with them to the ditch of the garden to see if we could perceive any people, and then we saw them plainly. We came in again, and then the landlord told them the same thing.

What followed after this?—Some time after that, Mr. Mac Kercher was taken up on a warrant by one Lacy and a constable, and they came up stairs together, and then he took Mr. Geostry and Mr. Kennedy. Then we got ready, and were going to Naas to give in bail there; and when we were a good way from Newbridge, one Angus Byrne came up in full gallop with a gun in his hand; Mr. Annesley was then on one side of me, and Mr. Geostry on the other; and he laid his gun upon his thigh when he came up, and he immediately turned about and gave his whip to a countryman, came close to me, and laid his hand upon the cock of the gun. I cannot say positively I heard it snap, but he made a noise as if he cocked the gun.

Court. How was the gun directed?—The muzzle was directed towards Mr. Annesley, cross the pommel of the saddle.

Did you perceive him touch the cock of the gun?—I saw him put his thumb upon the top of it.

Can you say that he cocked it?—I cannot be positive; I did not see it cocked, but I heard it snap: upon which I made Mr. Annesley alight; I called out to the coach to stop and take him in, and Mr. Geostry came up to us.

What kind of a noise was it you heard?—It was the sound of a gun cocking.

Did Mr. Annesley alight and go into the coach?—He did.

Who advised him to go into the coach?—I did, and I believe Mr. Geostry did.

Why so?—Because I thought that the man intended to shoot him.

Mr. Mac Manus. You said Byrne gave his whip away?—I did.

With what intention did he do that?—I cannot say.

Was it in order to be the more ready to shoot?—I suppose it must be so, Sir; it looks as if it was.

Did you say any thing when he gave away his whip?—Not a word.

In what manner did he give it away?—He rode up in a hurry, gave his whip to the man, and turned back immediately.

What further happened after this?—After that we met some people on the road, who came from Naas to meet us, and they conducted us to Naas.

What became of Byrne?—He turned back immediately after Mr. Annesley got into the coach.

How soon after this man had given away the whip, and put his hand to the gun, did Mr. Annesley go into the coach?—Immediately.

Did you see him take his whip again?—I did not.

Did he go with you to Naas?—He came up to us again, and went there with us.

What happened after you got to Naas?—When we were going to give in bail for the gentlemen; Byrne came in and laid down the gun upon a bed in the room where the gentleman that took the gentlemen in custody from the constable was; I think he was sovereign of Naas. I went in, Mr. Carrick and that gentleman was there, and we were desirous to see if the gun was loaded; and it being a screw-barrelled gun, immediately I unscrewed it, and took out eight bullets.

Court. Who unloaded the gun?—I unloaded it myself; unscrewed it, and took out the shot.

What kind of shot?—Large swan-shot.

How many of them?—There were eight; I brought them in to the gentlemen.

How big were they?—They were very large.

How large?—Describe them.

They were thus big. [The witness describes them to be as big as the tip end of his little finger.]

Mr. Bagot. Were they cast in a mould, or were they rough and uneven?—They were quite round.

Mr. Mac Manus. Tell what happened after that.—Then the sovereign took the gun, and Byrne was examined with what intent he carried the gun, and whose it was? He said, It belonged to my lord Anglesea, and he was to follow the directions of Mr. Lacy, in order, if there was any rescue intended, to prevent it. They then asked him what he was to do with it in case of a rescue? He was going to answer, when Lacy stopped him, and said, You have answered it already, and answer no more questions.

Had Lacy any arms?—When the men from Naas were coming up, Lacy took out a pistol upon the road, and I said to him, Sir, Mr. Mac Kercher told you before we came out, that we expected a guard from Dublin or Naas, and you need not fear any rescue.

What kind of a pistol was it?—It was a pocket pistol.

Mr. Bagot. Did you observe lord Anglesea's coach driving at any person on the Curragh?—Really, Sir, I did not mind, I was in a tent drinking a glass of wine.

[Cross-examination.]

Mr. Morgan. You say when you heard this noise of the gun, that the muzzle was presented to Mr. Annesley?—Yes, the gun lay upon the pommel of the saddle with the muzzle towards him.

Which side of you was Byrne on?—The left.

And where was Mr. Annesley?—On the right.

You rode then between Mr. Annesley and Byrne, when Byrne came up?—I did.

At the time you heard this noise of the cocking, would not the gun have shot you, or your horse, if it had gone off?—I believe it possible it might.

Describe the position of yourself.—I had Mr. Annesley on the right hand, and Byrne drove upon the left side of me, and I got close to Mr. Annesley.

In which hand had Byrne the gun?—He had the gun in his left hand, and the bridle in his right.

You said it was pointed to Mr. Annesley?—It was lying on the pommel of the saddle, across the horse's neck, with the mouth towards him.

Could he have shot him before he got into the coach, if he had had a mind?—To be sure he might, if he pleased; but it would not have been possible for him to have escaped if he had shot.

If the gun had gone off, must it have shot Mr. Annesley?—If it had gone off instantly as he came up, it might have shot me.

What happened after Byrne came up?—Mr. Annesley alighted, and Mr. Goostrey came up, we called to the coach to stop, and he went in, and then Byrne turned about and went back again.

Do not you believe that Byrne carried that gun to prevent a rescue, and for no other purpose?—How can I tell?

What do you believe?—I protest, I cannot tell what to believe.

Had the gentlemen any arms in the coach?—They had not.

How many servants attended Mr. Mac Kercher and his company at Naas?—I know there was the groom, and a footman, and I really cannot recollect any more.

Were there not five?—I cannot recollect any more.

Were the servants armed there?—I know the groom was.

What did the people that came from Naas say when they came up?—I cannot tell; some went on one side of the coach, some on the other, some on horseback and some on foot.

Did not you hear it rumoured by them, that we will attempt a rescue?—I did not.

Did not you hear them cautioned not to attempt a rescue?—I did not indeed.

Lacy took out a pistol you say?—He had a pistol in his hand when the men came up.

Did the men say any thing to him about his having his pistol in his hand?—They did not.

Did Lacy give any reason for having that pistol in his hand?—He gave me no reason for it.

Did you hear him give a reason to any body?—I did not hear him give any reason.

Did not you hear him say that he took it out to prevent a rescue?—I did not.

What did you say to him?—I told him Mr. Mac Kercher said, before we came out, that we expected people from Naas, and that there will be no rescue.

What did he say when you told him there would be no rescue?—He made me no answer to that.

Court. Before Byrne came up with the gun, how were you and Mr. Annesley riding?—Mr. Annesley was first, a little distance before me; immediately upon Byrne's coming up and giving the whip to the man, I got up to Mr. Annesley.

Was Byrne nearer than you to Mr. Annesley at any time?—I was nearer all the time.

How near was Byrne to you?—He was within a yard of me.

If the gun had gone off, could it have shot Mr. Annesley or you?—It might as well have shot him as me; I believe it possible it might have shot me.

On what side of Mr. Annesley were you?—I was on the left hand side of him after I joined him.

In what position had Byrne the gun at his coming up?—It was upon his thigh, and immediately upon his coming up he laid it across the pommel of the saddle.

Mr. Spring. At the time that the gun was pointed towards you, where was Byrne's right hand?—I cannot tell.

Did not you say that his right hand was upon the bridle?—At his coming up he had the gun upon his thigh in the left hand, and the whip and reins in the other hand; he gave his whip away, and then held the gun across the pommel with his left hand.

In what position was the gun at his coming up?—The gun was pointed up into the air at his coming up.

Was the bridle in his right hand then?—It must have been in the right hand, because the gun was in the left.

Was the time Byrne came up any considerable time before you met the people coming from Naas?—Yes, it was.

How long?—I cannot tell.

Was it ten minutes?—Yes, it was, and more.

A quarter of an hour?—I cannot tell exactly.

What was it Byrne did after he came up?—He immediately gave the whip away, and came up close to us, and immediately upon Mr. Annesley's alighting and going into the coach, he turned back.

Did you ever see Byrne before?—I never saw him in my life before.

Did he say any thing to you?—He did not speak to me.

Did he know you at that time?—He did not appear to know me.

Did you know him?—I did not know his name till we came to Naas.

How long after Byrne turned back was it that he followed you to Naas?—A good while.

Was it an hour?—I cannot say.

Half an hour?—To the best of my knowledge it was thereabouts.

Was it after the people met you?—I believe it was, I cannot be positive.

How long after?—I cannot tell exactly how long it was.

Mr. William Goostry sworn.

Mr. Mac Manus. Were you at the Curragh last September?

Goostry. I was there the first and last day of the races.

Give an account of what happened there; tell the whole affair.—The 14th of September last we went to the Curragh, and there was but one horse to run that day, and there being no great diversion, we rode a little up and down the course that day, and came off again.

From what place did you go to the Curragh?—We went from Dublin to Newbridge-ion, and from thence to the Curragh.

Did any thing remarkable happen to you on the 14th?—We saw lord Anglesea and other gentlemen standing at a tent as we rode up the Curragh, and when we were coming back again from the course, just before we came to the end of it, lord Anglesea said, See that scoundrel Mac Kercher, though he now looks like a gentleman, that coat he has upon his back I saw not a month ago in Monmouth-street. Mr. Mac Kercher said, Do not let us take any notice of it, it is not worth while; so we rode off the ground, and went to Newbridge; that was all that happened that day. The next day was Thursday; there was no race that day; and we went to gentlemen's houses in the neighbourhood, where Mr. Annesley was known when he was young. On Friday we went to the race again, and just as the first heat was over, we came upon the Curragh, and went up to the company. After some little stay there, we left that, and rode on further; and as we were riding, the coachman of lord Anglesea came full gallop through the middle of us; we got out of his way as fast as we could; he turned short about again, drove at us, and we got on the other side of the rail to avoid him, and he came there with his whip, and pointed to Mr. Annesley, crying,

Shoe-boy, that's he, shoe-black. Presently he came to us again—

Court. Which side of the rail?—The outside of the rail, my lord—and drove at us there. Mr. Mac Kercher then said, There is no bearing of this, we must either go out of the course, or else speak to my lord to chastise him.

Were there other people on the other side of the rail besides you?—There were other people there besides us, but very few.

Go on.—Mr. Mac Kercher went up and down to find my lord Anglesea, and we went up along with him to the winning-post, and there my lord and others were standing; and Mr. Annesley was rather behind, out of the crowd; five or six horse lengths behind he might be: so Mr. Mac Kercher said, with a low voice, I want to speak with your lordship. My lord said, I have no pistols, and was startled, and changed colour a little, I thought. This was no time and place, he said further, to talk thus, I have no pistols. Mr. Mac Kercher said, For what I have to say to your lordship, every time and place is proper; for all that I have to say, is against one of your servants that used a gentleman ill, or words to that effect. My lord asked, Who the gentleman was? Mr. Mac Kercher said, That's the gentleman, Mr. Annesley. My lord hesitated a little, and said, he was no gentleman, but that he was a bastard. Mr. Mac Kercher said further, We expect your lordship will turn your servant away on the field, as it is a public affront. My lord then flew into a passion, and called Mr. Mac Kercher a great many opprobrious names; and Mr. Mac Kercher told him, he lied; with that Mr. Mac Kercher said, Your lordship durst not single yourself out, and tell me so. With that Mr. Francis Annesley up with his whip and struck Mr. Mac Kercher on his forehead, and with that a little blood came, and his forehead swelled very much. Immediately upon that, I had a little whip in my hand, and I struck Mr. Annesley. Upon this it was over, and Mr. Mac Kercher said, Come, we will go away. There were some other words passed afterwards between lord Anglesea and Mr. Mac Kercher, and Mr. Mac Kercher said, turning to go away, Come along, Goostry and Kennedy, it is not worth while to talk to a man who dare affront a gentleman, and refuseth him satisfaction. I could not get away very readily, being in a crowd of people; and I believe a minute or two passed before any thing further happened at all. When I was turning my horse to ride off, There's Goostry, says my lord, another of the rogues, as great a rogue as any in Ireland, knock him down. Upon which Mr. Francis Annesley struck me again, and a great many more struck me. I was stunned with the first blow, and bled so prodigiously, that I was all over blood. I got a blow here [on his wrist] that swelled as big as an egg; and I had fallen off my horse, if I had not been supported by a crowd on each side, who were so near me that I could not fall.

What distance of time was there between the first blow and the second, given by Mr. Francis Annesley?—It was two minutes after the first stroke, that Mr. Annesley struck again.

Did he strike you of himself, or by any directions from any body?—He did not strike me till lord Anglesea ordered him.

Did you leave the Curragh immediately upon that?—I did not; I thought the quarrel had been over, and had a mind to stay to see the sport. There were some English horses to run, and I clapped my handkerchief to my wound, that I might stay and see the diversion. I rode forward on the ground, and immediately I heard the pretender, as they called Mr. Annesley, was killed. Thinks I, I'll go down to the starting post to see what is the matter, and there I heard that Mr. Annesley was in the lane leading to Newbridge; I rode after him, and when I came about half way down the lane, I saw a great crowd of people about him, and found him lying senseless, his arm stripped up in order to bleed him, but he would not bleed. I got a chaise that was coming by, put him into it, and got a man to go with him to hold him in the chaise that he should not fall out of it, and so carried him to Newbridge. The next morning we were to go early to Dublin; Mr. Mac Kercher said, it was very prudent to get to Dublin as early as we could. But before we were up, we were alarmed by the people of the house saying, That the house was beset, and that there were a hundred men, fifty one way, and fifty another, and that there were men in the entry that had fire-arms. We immediately got up, and had nothing but pistols to defend ourselves: we thought them not sufficient to defend us against such a number of men, and sent to the landlord to get us more arms, if he could; who brought up a case of pistols and a gun; and we were determined not to stir till we could get some assistance. Mr. Mac Kercher and Mr. Kennedy went out to see if they could discover what number of people there were in arms; they returned immediately, and told us, They saw a great number of people; so we were determined to secure ourselves in the room till we should get assistance. Some time after it was day-light, an hour or two after, Mr. Kennedy went out into the garden to try if he could see any body; and when he returned, said, He saw none: I went down into the garden, came back, and was told there was a warrant granted by a justice of peace, on the complaint of lord Anglesea, against Mr. Mac Kercher, and Mr. Kennedy, and myself. I asked Lacy, who came up stairs to execute the warrant, if he was a constable; he said he was my lord Anglesea's steward; the constable was hard by.

Where was this?—In the house; they came up stairs, and shewed the warrant: says I, What occasion for all these people to execute a warrant? Whose complaint is this upon? I looked, and found it was a complaint of lord Anglesea's. Upon this Lacy said, We must

VOL. XVIII.

go back to the gentleman that had granted the warrant, to give in security. I said, No, we did not care for that, we have got enough of this country, I am all over blood, I don't like it so well to go into it again, and you see the dress I am in, and I'll go to Dublin; and thinking there was some dirt in my wound, I had a mind to go where I might have it searched and dressed, for there were two gentlemen there that offered to bail us. Lacy would not go towards Dublin, but insisted on our going to the justice that granted the warrant. This occasioned us to dispute about it till the constable whispered us, Naas is the county gaol, gentlemen, and if you say you will go to that gaol, I must carry you there, whether they will or no: Upon this we told Lacy, That we insisted to go there, and if we did not give bail, we would be secured there. There being so much noise, and the landlord cautioning us, that there might be danger of going the road, we sent for some people from Naas to come and meet us; so we got ready, and Mr. Annesley and I would not go into the coach.

Who went in the coach?—Mr. Kennedy, Mr. Mac Kercher, and Mr. Carrick went into the coach; Mr. Annesley, Mr. Hacket, and I, rode on horseback; when we had gone a little way, riding almost all three a-breast, I saw several people follow, and a fellow came galloping after us: I heard the horse coming, and I looked, and saw a fellow coming up with a gun in his hand, in a green coat, and a lusty man. I said, I wondered what that man's coming after us in that manner could mean. So I drops behind Mr. Hacket and Mr. Annesley a little, and let the fellow come between us; he came close up to Mr. Annesley, and just as he was dropping back, I got up. Immediately I heard the gun cock, as I thought, and I instantly dropped betwixt him and Mr. Annesley, and then Mr. Hacket and I called out, Mr. Annesley, You'll be shot; get into the coach this minute, or this fellow will fire at you. Mr. Annesley upon that alighted, and got into the coach, and the fellow said he was going to Dublin. I spoke to the servants to bid them not let the fellow come between them and the coach, and said to Mr. Hacket, Let us keep between him and the coach to prevent any mischief. When the fellow saw that, he turned back again.

Was he so near as to hear you give those directions?—It was impossible he could avoid it.

Mr. Mac Manus. Were there any others that had arms besides that man?—There was a country fellow by, that had a pistol, and Lacy had a pistol too.

What happened after that?—As soon as we had secured the coach, the fellow turned back, and Lacy kept behind, and just as they saw the Naas people coming, they galloped up again, and they went with us to Naas.

What happened when you came to Naas? Tell what you observed there.—Then we came to examine the man that had the gun, and

R

sent for the sovereign, and desired him to examine that man; so he was asked, Whose gun that was? He said, Lord Anglesea's. He then was asked, What was he to do with it? He said, To follow Lacy's directions. He then was asked, What directions? He said, He fancied, in case of rescue, he was to make use of it. We asked, If Lacy gave him any directions?—He said, Yes. We asked then, What directions? Before he could answer, Lacy stepped in, and bade him not answer any other question.

Did you give in security there?—No; we went before the justice of peace, and gave in bail.

Mr. Digby. You said that Mr. Francis Annesley struck Mr. Mac Kercher?—Yes.

Did Mr. Mac Kercher, or any body else, strike Mr. Annesley before he struck him?—He did not, nor nobody else.

Did you strike him?—I struck him after he struck Mr. Mac Kercher.

With what?—With a whip, upon his striking Mr. Mac Kercher.

Did you apprehend the quarrel continued one, or that it was ceased?—The beginning of the quarrel was, Mr. Mac Kercher and lord Anglesea's speaking together; and after Mr. Francis Annesley struck, it ceased for about two minutes.

[Cross-examination.]

Mr. Spring. Pray, Sir, do you recollect the particular words lord Anglesea made use of to Mr. Francis Annesley before he struck you?—*Gostry*. I did not know Mr. Annesley at that time, but a gentleman said, that it was he that struck me.

When lord Anglesea used the opprobrious language you mentioned, did not he say to Mr. Annesley, There is he that struck you?—I cannot say that I did hear him say that.

Were not you near him?—We were side by side; Mr. Francis Annesley and I faced Mr. Mac Kercher.

Might not he have received a blow from you without knowing who gave him that blow?—Yes, I believe he might; and did not know, I believe, that I struck him; I dare say he did not see me, because he rode forwards to strike Mr. Mac Kercher.

Do you believe he might have asked my lord who struck him?—I can't tell.

Was not he struck by Mr. Kennedy at the same time?—He was not.

Did not Mr. Mac Kercher lift his hand in this manner with his whip, upon his talking to my lord Anglesea?—No, Sir, he had his whip in one hand, and bridle in the other, and spoke as coolly as any man in the world could; and before he went up, said, He would have no quarrel.

Did not he lift up the butt end of his whip?—He did not lift it up.

Did not Mr. Mac Kercher speak to my lord Anglesea in such manner as tended to a breach of the peace?—He did not, to my knowledge.

Did not he tell him, He dared not come aside with him, after he had given him the lie?—He did not, until my lord Anglesea had abused him, and called him names.

Were not you cautioned by somebody not to go to my lord Anglesea?—No person cautioned us not to go up to him, that I heard of.

Did you yourself caution Mr. Mac Kercher not to go?—I did not.

Did not somebody, in your hearing, tell Mr. Mac Kercher, it was your own fault, if you had taken my advice, this would not have happened?—No person told him that, that I know of.

Do you know Abraham Robinson?—I do. It was his chaise carried Mr. Annesley to New-bridge.

Mr. Harward. We have a vast number of other testimonies of the gentlemen of this country to examine as to the assault, and what happened at the Curragh, which we shall not trouble your lordship with, for we have now taken up six hours of your time; and the only further evidence that we shall lay before you to conclude this scene, is to introduce the person, who shall account for the premeditated contrivance of this black scheme; who the persons were that were employed to execute it; whose directions they were to have obeyed; and all the preparatory steps taken in order to come at this gentleman's life. We shall trouble you but with this one witness; and, as it is a matter of great concernment to the public to have detected, and to my clients in particular, we shall crave your indulgence and patience to hear this witness.

Angus Byrne sworn.

Mr. Harward. Mr. Byrne, begin to give an account of what you know, and what directions you received, and what conversation passed between you and any other persons at Killcullen-bridge. Do you know the earl of Anglesea?—Yes.

Were you huntsman to any person, and whom?—I was, to the earl of Anglesea last.

Do you know Mr. Jans?—I do.

When were you huntsman to lord Anglesea?—I parted from him the 24th of March last, Easter Saturday was the day, at his own house at Bray.

How long have you known Mr. Jans?—Six years, or thereabouts.

What is he to lord Anglesea?—I always found him in the nature of an agent, or a man to take care of his business.

You know Michael Lacy?—I do.

What has he been to lord Anglesea during the time you knew him?—In the nature of a house-steward, and to sell my lord's woods.

Do you remember any races in September last?—I do.

Where?—At the Curragh.

Now give an account, whether you saw the earl of Anglesea, Mr. Jans and Lacy, before the races at the Curragh, at Killcullen-bridge, or any place?—I did.

Begin, where you first saw them, and tell gradually, from time to time, day after day, and night after night, what passed from the time you first saw them, until you came to Naas.—I will, Sir. Wednesday, being the first day of the running, I came to Killcullen-bridge, about ten or eleven o'clock, and, as I was going to the stable, my lord and Mr. Jans were standing at Cavenagh's door, as I passed by them to put up my horse. In some time after Jans came to me to the stable, and asked me, Where I had been? I told him, I came from the county of Wexford. He asked me, Had I left Mr. Colclough? I told him, I had. He then asked me, For what reason? I told him, On account of a sore leg that I had, and was not able to do any thing. Upon that, he said, I am sure you must know a great deal of this affair (meaning the Pretender, as they called him.) It would do great service to tell us what you know of it. I said, I know nothing of it, at present, I give my word. Says he, You can be of service to my lord, if you please; you must have heard a great deal of it. I told him, I did not hear a word of it, but only talking about Bliss, Mr. Colclough asked me, if I knew where he was, and I told him I did not. And then Lacy came up, and Mr. Jans went out; and Lacy came to me, and asked me, How I did? I told him, Very well; and with that I walked out of the stable. Mr. Jans desired Lacy to fetch me in, and make me drink; accordingly I went in, got a drink, and we came to the Curragh that day.

Court. Who came to the Curragh?—Michael Lacy and I together, and saw the running that day. There was no great sport, and then I came back to Cavenagh's, and lay there that night: And, lying there, I got up in the morning, and went into the entry, and lord Anglessea saw me; he was standing in the back-side. So, Byrne, says he, how are you? Very well, my lord, says I. I was a little angry with you, says he, I heard in England you swore some things against me, about that woman called lady Anglessea, and I find they are lies, and am sorry I was so long angry with you. You are come from Wexford, what news there? I told him, None strange. Says he, You shall go back to Camolin again; there are a good pack of hounds for you, but your favourite hound Forrester is dead. You can be of great service to me; I shall pay you what I owe you, and double the quantity, and you shall stay a little, and Michael Lacy will stay two or three days, for he has some business with you. What is it, my lord, says I? Lacy will tell you, says he, follow his directions. So that was very well; my lord went to Mr. Annesley's to dinner at Ballysax—

Mr. Harward. Were there any promises made you at that time by any body?—My lord told me, he would pay me what money he owed me.

Did he say nothing further?—He said, He would pay me what he owed me, and double the quantity, and I should never want.

Go on.—So then my lord went to dinner at Mr. Annesley's and some of the rest of the gentlemen, I do not know how many; but Mr. Lacy, and one Cavenagh, a dancing-master, staid at the bridge; and Lacy, and Cavenagh, and esquire Berkeley dined together.

Court. What day was this?—Thursday, my lord.

Well, go on.—Then Lacy ordered me to get my dinner, and after I had dined, there was a sneaker of punch, and Bob Meakins brought it in.

Who?—The drawer. And after that Mr. Lacy called me into the parlour, and made me drink wine.

Who did?—Mr. Lacy and Mr. Berkeley of the county of Carlow; they gave me several glasses of wine each of them.—Lacy and I went to the Curragh on Friday, and we were at the Curragh a good while before the running; and after the first heat was over, and the horses were starting the second heat, Mr. Lacy and I were standing at the starting-post; says he, G—d, I'll hold you a crown that yonder is Mac Kercher and the pretender. Where, says I? There, says he. So they passed up till they came almost facing the starting-post, and turned off to the right towards the winning-post. Lacy said, he would shew them to me. With all my heart, said I; So we rode after them and crossed them, and says he, That's Mac Kercher, and that's the pretender; Would you know them again? I would, to be sure, says I. Take notice, says he; that you know them again. So we crossed them again; we came to the starting-post, and the horses being started I rode to the round-hill to see the heat, and when the heat was over, I went into a tent and drank a pot of beer.

Mr. Harward. When Lacy desired you to take notice of them, and asked whether you would not know them again, was there any talk between any persons about bloody noses?—Yes. He said, They will have good luck, if they have not broken heads and bloody noses before they leave this ground.

Was that before, or after he desired you to take notice of them?—It was after.

Now, go on.—So then, I tell you, we came to the starting-post, and went round the course; and I went into a tent to drink, and while I was there I heard there was a quarrel; and hearing that, I got up, and saw people galloping down towards Ballymany; and when the race was over, I went to Cavenagh's that night again: So, coming there, I did put up my horse, and had him turned out to grass; and my lord Antrim's keeper, Arthur Cooch, met me: We went in and called for a bowl of punch; we drank about the third part of it, and Mr. Lacy came in. So, Angus! says he. Your servant, Mr. Lacy, will you sit down, says I, and take a glass of punch? I came in, says he, with design to drink with you. So we drank till the bowl was out, and I called to the drawer to get another. Says Mr. Lacy, Angus, you shall drink no more, for you shall

go to bed, I shall want you in the morning upon earnest business. So he went up stairs and saw me go to bed.

Pray, do you know of any pistols or fire-arms that were a-charging that night?—I will tell you by-and-bye.

Well, go on.—Then, Sir, when I went to bed I lay there till in the morning Lacy came and called me up betwixt one and two o'clock; I got up and I dressed myself, and he waited till I dressed myself.

Court. What time did you go to bed?—I went to bed between 10 and 11 o'clock, I believe; I got up, he brought me down stairs into the kitchen, where Mr. Jans was, and several other gentlemen, and they were charging and priming arms when I came into the kitchen.

Who were they?—There was Mr. Jans, Cavenagh the dancing-master, one Williams of Piccadilly, a gentleman they called capt. Stewart, and my lord's nephew.

What were they doing?—They were charging and priming of arms.

What arms?—Pistols and small pieces.

What pieces?—A fuzee, travelling pieces.

Well, go on.—Mr. Jans asked me, Would I drink? I told him, I would; so the drawer brought a mug of ale, and Mr. Jans afterwards gave me a case of pistols. What am I to do with these? says I. You are to go along, says he, with Mr. Lacy, and you are to take his directions, he'll tell you what to do. Then I told him, My horse is at grass, I must send out for him before I can go. Mr. Jans said, You must ride my horse. I then called for my surcoat-coat. He said, I must not ride in it, but go as I was, it will be cumbersome to you.

For what reason?—I cannot tell. So, with that, the groom went out, and saddled Mr. Jans's horse, and the other horses, and Mr. Chapman my lord's gentleman, and Michael Doyle the groom, and Mr. Lacy, and I went out. I got Mr. Jans's horse, and mounted him in the road at the end of the stable, and they all got on horse-back; and as we got to the door, there was a number of fellows with pitch-forks and staves, I believe twenty of them; and we turned along the road towards Kinua; and when we came as far as Castlemartin, then I asked Lacy, Where we were going? He said to Newbridge, to take Mr. Mac Kercher, Mr. Goostrey, and Mr. Kennedy, for the assault at the Curragh, for striking Mr. Francis Annesley and my lord. I said, I'm sorry you did not tell me this before, for I am sorry to have any hand in it. Sure, said Lacy, you are not afraid, you need not fear, what are they to you? What are you to expect from them? If you wanted me to go with you, I'd go farther than this with you. So we went forward to Newbridge, and when we came near the house, the signal was given, that none of the fellows should go to the house, but one Brennan, a tenant of Mr. Annesley's of Ballynax as I heard after, the constable, Mr. Lacy, and I.

What was the constable's name?—I cannot tell his name. So when we went in, Lacy went into a little room on the left-hand-side of the door, called for white-wine, asked me to come in, and we drank it together; and Brennan and the constable went into a room on the right-hand as you go up stairs, and got ale, and they were there for a while; and by-and-bye comes down stairs Mr. Mac Kercher, about half an hour after we were there; and he came down, and that time I pointed at the constable, that, That was Mr. Mac Kercher, and the constable came up, and I said, That's he, that's your prisoner, take him. So the constable came up and said, You are the king's prisoner. With that Lacy came out and told him he had a warrant against him for an assault on lord Anglesea; and Lacy and the constable went up stairs with him; I did not. And the other gentlemen above stairs were taken. In about an hour Mr. Lacy sent Chapman and the groom to my lord, to let him know that they were taken; and Doyle the groom left the gun and the pistol he had behind, by Lacy's directions. So, in some time after, I believe an hour, the gentlemen got into the coach, and Brennan got Doyle's pistol and put it in his bosom; Mr. Lacy had his case in his pockets, and took the gun in his hand, and a quarter of a mile beyond the bridge gave me the gun.

How near the inn was this bridge?—As near as from this to the market house. So, a little while after, as I said, he gave me the gun: Here's this gun for you, says he, your bread is baked, you shall be provided for while you live; and, says he, you are to use this thing, fire at the pretender, be sure do not miss him; we have horses to carry us off, and never fear, if we are taken, we'll make a rescue of it, we have people enough here to prove it for us.

Repeat those words that he said to you.—Angus, says he, you shall be provided for, your bread is baked, fire at him, and never fear, we have good horses to carry us off, and if we are taken, we'll make it a rescue, we have people to prove it for us, and there is none that can prove it against us.

Mr. Harward. When he gave you the gun, what did he desire you to do?—He desired me to fire at Mr. Annesley. I will not, says I, nor have any hand in it for all the world.

What followed after that?—I believe we went about as far as Morristown, when there was a mob met as in the road. As soon as Mr. Lacy saw them, They are coming, says he, to rescue Mr. Annesley; Now is your time, there is no fear, we can make it a fair rescue, and go you on one side of the coach, and I'll go on the other, and if you miss him, I'll hit him. With that he took my pistol out of my holster. What do you take my pistol for, said I? He said, You have another pistol, and we'll have three shots a-piece, says he. I have it not, for Brennan has it, says I, and I will have no hand at all in any man's blood, and will not commit murder. So I came up to the coach-door, and

he to the other, and I did no more, and he fell back again.

He made a further application to you when he saw the people coming from towards Naas?—Yes, he did.

Where was Mr. Annesley at this time, on horseback, or in the coach?—In the coach.

How soon before this, of seeing the people coming from Naas, was it that Mr. Annesley got into the coach?—I believe about a mile beyond that place, where we saw the people, but I cannot be sure.

Well now, while Lacy was persuading you by these inducements and promises to shoot Mr. Annesley, pray how many miles might you have gone along with one another from the first time that he began to discover his mind, and give you directions?—I believe near three miles from Newbridge, better than half-way, before the people from Naas met us, there or thereabouts.

You had gone a mile after Mr. Annesley got into the coach before you saw the people?—Yes.

Whereabouts was it that Lacy first applied to you to persuade you to shoot Mr. Annesley?—He began that minute after he gave me the gun, and he held the discourse till Mr. Annesley went into the coach.

After that did he renew his applications?—He told me, that sure I did not fear, that I never was a coward, and that I need not fear now, and that I might be done for as well as any man of the world.

By whom, pray?—He told me by my lord Anglesea.

Was there any mention of any thing, upon your refusal to contrive your escape?—He said, That I need not fear if he was killed, for, says he, we have two good horses to carry us off, and we have three shots a-piece, and shall be brought off in case we are taken.

By whose means did he promise you should be carried off?—He said these very words; when I told him I would not do it, nor have any hand in it, he said, You need not fear, for you'll be done for; never fear.

Did you get to Naas?—Yes.

Were you brought to any magistrate there?—We were brought into the house of Drake there, and I went out with the two horses to the backside; and I came in, and gave the gun to Drake to put up, and went into a street-west, and called for some drink. So, in some time after the sovereign came, and examined, Who gave me the gun? I told them, Mr. Lacy. They asked, if it was my lord's gun? I told them, it was.

Court. And whose was it?—It was my lord's. How long have you known the gun?—I have known it these six years.

Is it a gun of value?—It is a screw gun.

Did you charge that gun?—It was not I charged it.

Do you know who did?—I cannot tell who did.

Well, go on.—So then they asked me, what

was I to do with it? Why, says I, I was to be directed by Mr. Lacy, and to do what he would have me. So then, Lacy said, You are not to tell any thing to any man here. Then I staid there some time, and I thought to go back to Killcullen-bridge for my wallet; and my lord's man comes up to me to Drake's house, and said, You must go to Dublin. Says I, John, I'll not go. Says he, my lord says you must follow him to Rathcoole. So I went, and my lord was going off as I got there. Mr. Jans gave me a shilling to get my dinner, and Lacy stayed with me. We went on to Dublin together, and I was hired the next day by Lacy for the same wages I had before from my lord.

Mr. Harward. What day was it lord Anglesea spoke to you at Killcullen-bridge?—Thursday.

Was this apart, or in the place he met you in?—In private, in the backside; I was standing in the entry leading from the kitchen, and my lord was in the backside; he called me, and said the words I have told you before.

Did he take you privately or not?—He took me about as far as from this to that door, into the back-yard.

Was any person present when he spoke to you?—Nobody was there then.

Court. You did not charge any of the arms? I did not.

Do you know who charged the gun?—I cannot tell.

Did not you see people charging arms that morning?—I saw people in the kitchen; they were priming of them.

Did you see any body charge them?—I saw Mr. Jans charge them; it was he gave me the case of pistols.

Mr. Digby. I would ask him whether, as Jans gave him the pistols, he got any, and what directions from Jans?

Court. He said, I was to follow Lacy's directions, and I was to follow what he bade me.

[Cross-examination.]

Mr. Morgan. Did you refuse Lacy to have your hand in blood?—I did.

Did not you consent to murder Mr. Annesley?—I never did.

Did you not ride up to Mr. Hacket and Mr. Annesley, with your gun rested upon your saddle?—I did, and had it this way on my thigh.

On what account did you do so?—I rode up as Mr. Annesley was going into the coach.

How did you hold the gun then?—It was upon my thigh.

Was your hand upon the cock?—It was.

Was the gun cocked?—It was not cocked; nor can I say that I did cock it.

In what manner did you hold the bridle and the gun?—It was in my right hand I had my bridle; I gave my whip to the constable, thinking it too cumbersome; I had my right hand on the bridle, and the left had the gun with my thumb on the cock.

Did you cock up the gun?—I cannot say that I did cock it up.

Was it cocked?—I had the cock half bent, and let it down again.

How long was this before Mr. Annesley went into the coach?—Just as he was going to alight.

In how long time after did you turn back? A man, one Bernard Neale, came to me, and kept me back.

How long; half an hour was it?—No; only the coach went on a little before us.

Did you go from Newbridge with an intent to guard them?—I did.

How near did you ride to the coach all along, till you met the people?—Sometimes near, and sometimes at a distance, and was not above fifty or a hundred yards at the most from it; never further, but sometimes nearer.

How many servants attended Mr. Mac Kercher and his company?—I cannot tell; I took notice of one that kept by the coach-door all the way; there was such a number of people along the road, that I could not tell which were servants, and which not.

How many people might there be in all?—A good many, I cannot tell the number; I believe the matter of thirty or forty in all.

What number attended these gentlemen along with you and Lacy to Morristown?—They attended them as well as I, and went all the way to Naas.

Did not you ride in company with them to Morristown?—I did.

Where and when then had Lacy the frequent opportunities you mention, to make the applications to you to take away Mr. Annesley's life?—Why, because we kept company together all along, and the rest went on before us; we went slow as our horses could walk; the constable was on one side along the coach commonly, and Brennan was before, and I took no notice of the rest one above another.

Now, Sir, I would ask you, did not you, between Newbridge and Morristown, frequently ride up to the coach, and just behind it?—I did.

With Lacy?—Yes; and he and I were constantly together.

Mr. Spring. How far is Kinna from Castle-martin?—About half a mile; it is not a mile out.

Did you not ask Lacy there, what it was you were going upon?—I did.

Did not he tell you, to arrest the gentlemen for assaulting my lord Anglesea?—He did.

Was any body in conversation with you?—Nobody was by.

Was not Chapman with you?—He was before us.

Now, did Lacy at that time communicate to you any design of taking Mr. Annesley's life?—Not at that time, he did not.

When, then?—Not till I went over the bridge, and he gave me the gun.

How far were you from the bridge of Newbridge, at the time of his giving you the gun?—Just beyond it; at the two cabbins that are there.

How many yards do you think it was?—I cannot tell the number of yards.

You know where King lives over the way?—I do.

Was it as many yards as his house from this?—I cannot tell you to the number of yards; but it was just at the house on the right hand.

Are the cabbins from the bridge farther than the houses over the way from this court-house?—I cannot tell that; but it is hard by the bridge.

At the time that he gave you the gun, was the coach on before you?—It was.

How far?—Just afore us, and we rode up to it.

Were all the other attendants behind the coach at this time?—Some behind and some before.

Were not the greater part of them behind?—I do not know, for I never minded to reckon them.

Did not they all leave the inn along with you?—I cannot tell.

Did not a great many of them?—Yes, a great many; I do not know the number.

Did you perceive any body near you, when Lacy gave you this gun between the bridge and the houses?—I do not know; I believe there was people, to be sure.

Well then, did he tell you then you were to take away Mr. Annesley's life?—Before I went three hundred yards beyond it he did.

You went from Rathcoule to Dublin with him?—I did.

You were hired in Dublin?—I was, by Lacy, for lord Anglesea.

Did you, when you were hired, go to lord Anglesea's house?—I did not go to lord Anglesea's house, but kept my horse upon the Merchant-Quay at my lord's inn, and there kept for a week.

Where did you go from that inn?—I went to the Bull's Head, in Abbey-street, and kept there.

Where did you go from that?—I went to my service; two days before Christmas-eve I left town.

Where did you go to?—I went to Camolin; my lord gave me his hounds and my own horse, and said, There was another mare, a black chaise-mare I might ride; but I did not like her, and I took my own horse.

How long did you stay there?—I stayed there till March, till after the assizes of Naas, and that I heard there that I was indicted, and that Lacy was come home; I said it was very hard I should be obliged to run my country, when I had done nothing to deserve it.

How came you to leave my lord's service? I asked Lacy first for money to buy shoes, and he would give me none; I then said, I would stay no longer; delivered up the hounds to the keeper, and the horse, and so came to Michael Lacy's house in Camolin, got a dram there, and came towards Dublin, and lay at Bray, and came the next day to Dublin, and put up my horse at the York-Minster. Then I went

to my lord's house, and when I saw my lord, he asked me, What I came there for? I told him, I had neither clothes nor money, and in dread of the indictment found against me at the assizes. Well, says he, stay in town a little, and go to Camolin, and bring up some hounds that I have given to my lord Tyrone; and asked me, If Fortune's hound was at home? and said, Fortune he would not give him. And one morning, when my lord went to Bray, I went to him for some money, and found he was gone; and I went to him to Donnybrook: Sure, says I to one of the servants, he would not go, and not leave me money! Go to Donnybrook, says he, and you'll meet him there; he's gone in a hackney-coach, and is waiting till his own is ready. I accordingly went and met him, and I walked in my boots. He asked, What brought me there, and made me wear boots? I told him, Because I had no shoes, nor money to buy any, and came to get some from him. He swore he would give me none; and seeing that, I asked the coachman to carry me to Dublin. My lord said, Do not go; and said, He would give me half a guinea, and bid me follow him to Bray, and that I should then go to Camolin, and carry the hound to my lord Tyrone; and then he would make a present of me and some hounds to some gentleman in England. After this, Joe the coachman told him I made a great noise for money in Dublin; so my lord came out again, and called me Mr. Byrne; when he called me Mr. I thought he was angry with me, and he came and gave me a chuck under the chin, and said, You villain, do you make a noise about my house? get about your business. Green, his nephew, bade me not go away, but to beg pardon, and I'd get half a guinea; and afterwards my lord came out and gave me half a guinea; and, Follow me to Bray, says he.

Did you ever threaten my lord, and tell him, It should be worse for him if he did not pay your wages?—I never did.

Do you know Thomas Stanley?—I do.

Is he any relation to your wife?—I do not know but he was a relation of my wife's.

What character has he?—Aye, aye, he is a very honest man.

Mr. Spring. I desire the jury may take notice, he says Stanley is a very honest man.

Mr. Mac Manus. He does so; but every body may easily see in what manner he said it.

Witness. But he is a noted villain in Dublin, and as any man in Ireland.

Do you know Mr. Francis Annesley?—I do very well.

Had you any conversation with him returning from the Wexford assizes about lord Anglesea?—I had; I told him at Killcullen-bridge the gross usage I had from my lord, that I got no money; and he said he would speak to counsellor Annesley; and, says he, you shall be ordered your wages.

Did not you make use of some threatening

expressions if you were not paid?—I made no use of any threatening expressions.

Were you ever in England?—I was.

How long was it that you went there after this conversation?—About a month, I am sure; I cannot tell what time, for I have not the day of the month; I went soon after, but cannot tell the time.

What business carried you to England?—I tell you. First, I went there to see two sisters I have married there, and a brother I have married there. Secondly, I was in dread of these indictments, and as I was bred and born in this country, and not noted for any thing that was bad, I went to England to beg the gentlemen's pardons, and try if I could clear myself.

In what part of England are your sisters and brother?—I have a brother lives in the Coal-yard, he is in the guards; one of my sisters lives at St. Mary Axe, next door to the Hoop and Grapes; the other sister is married to a chairman.

Was not this in April you went over?—I cannot swear to the month, nor the day I left Ireland.

How many weeks after you left lord Anglesea were you in Dublin?—I cannot tell.

Was it a month?—I cannot swear; I believe it was a month.

Do you know Mr. M^r Kercher?—I do.

Did you see him in England?—I did, in London.

How long were you in London before you saw him?—I believe ten days before I seen him.

Were you inquired after by him, or did you enquire for him?—Indeed I enquired for him.

When you met him, did not you give him the account you have mentioned here?—I gave him no account; I gave them to a gentleman that drew them in Dublin.

What gentleman?—To the best of my knowledge his name is Bailly.

For what reason was it that you never disclosed the matter till April?—I would not then, but only that the indictments were found against me in the county of Kildare.

Who is Bailly?—An attorney.

Where does he live?—I cannot tell the place; to the best of my knowledge he lives in Golden-lane.

Is not he now in this town?—I cannot tell; I have not seen him to my knowledge.

Where do you say he lives?—To the best of my knowledge his office is in Golden-lane.

Is he a young man, or middle-aged?—He is a young man, a middle-aged man, tall and long visaged.

How came you to find him?—I sent a man for him.

Were you acquainted with him then?—I was acquainted with him two days or three before.

How came you acquainted with him?—A friend of mine recommended me to him, that

he was fit for my service, that I should employ him to give my testimony.

Where did he draw this testimony for you?—He drew it for me in the house of Robert Kennedy on the Blind-Quay.

Who was present when he drew it?—Nobody was present but himself and me.

Who wrote the words you said?—He is the person that wrote the words himself.

Was Mr. Mac Kercher in England when this was done?—He was.

Was there no draught of what you had to say drawn by your directions before Mr. Bailly drew that, by any one else?—I had myself drawn one before that.

By whom?—I do not know the man.

Where was it drawn?—At Mr. Robert Kennedy's.

The first time?—The first time and second time too.

Did you shew Mr. Bailly any draught, but what you gave out of your mouth?—I did not, Sir.

What did you do with your first draught?—It was tore to pieces.

Had you any paper drawn for you in England?—Not for me, indeed.

Have you any paper of instructions about you what you were to swear?—I have not.

Did you swear to the examinations you gave in this kingdom?—I did.

Before whom?—I do not know the master in Chancery, I forget his name.

Where does he live?—He lives about Chancery-lane.

Is Mr. Bailly here?—I cannot say that he is here.

Who advised you to go to that master in Chancery?—Myself.

Did any body attend you there?—Mr. Bailly attended me.

Did he read it and sign it?—He did.

Who paid for that swearing?—I did; I borrowed the money from Mr. Robert Kennedy.

Where did you live from the time you left lord Anglesea till you lived with him again?—I lived with Mr. Colclough, and Mr. Gerard in Dublin, and Mr. Marsh.

How long did you live with Mr. Colclough?—About seven months.

Where did you live after that?—Lord Anglesea put me in the Marshalsea.

For what?—I will tell you for what. I came to demand my wages and my wife's wages, that lived with him seven months, and my lord would give me no money at Bray, but said, my wife was the vilest woman upon earth; and I said I was very sorry his lordship thought so; and he gave me a shake, and said, my children were not my own.

But what did he put you in the Marshalsea for?—He put me in for a sham writ for 50*l*. and I cannot tell what.

Did you owe him any money?—No; I owed him none; he owed me my own and my wife's wages.

How long was it after that you were to kill

Mr. Annesley?—It is near three years; the latter end of this month it will be three years.

Court. What was the reason of your giving your whip to the constable?—Because that I could not keep the whip, the gun and bridle in one hand.

How long had you had the gun before you gave the whip to the constable?—I did not go, I believe, a quarter of a mile, before I gave it to him.

You carried them that way?—I did; but they were troublesome to me.

You put the gun, you say, out of your right hand into the left?—I did.

For what reason?—Mr. Lacy was at me to fire, I would not, and I did it to let the cock down again.

Are you right-handed?—I am, my lord.

When you go a fowling, on which side do you put your gun?—On my right.

Always?—Always, my lord.

Your gun was at first held upwards?—Yes.

Did you after that level it?—I held it this way; directly fore and the coach-door the gun pointed.

When you shifted the gun out of your right hand into your left, and laid it upon your thigh, how stood the muzzle?—It stood this way.

Did it point towards Mr. Hacket or Mr. Annesley?—I cannot tell; but I had it this way facing the coach door.

Did you never rest it upon the pommel of the saddle?—I shifted it backwards and forwards.

After you told Lacy you would not be concerned in blood, how long did you continue to ride with him?—All along.

Did you see Mr. Annesley alight?—I did.

Who was by him then?—I cannot tell the man's name.

What posture had you the gun in?—This way. [Holding it in his left hand, with the muzzle cocked upwards upon his arm.]

Mr. Harward. My lord's house-steward, Michael Lacy, is indicted, we have had warrants against him, and cannot find him; I want to know from this witness, where this Michael Lacy now is, in whose service, or upon whose estate he lives.

Mr. Malone. He is now in this town, and you shall have him.

Mr. Harward. Pray, gentlemen, where is he?

Mr. Malone. You shall have him; we will bring him hither before this trial is over. [He never was produced.]

Angus Byrne. I shall wait three hours in court till I see him and talk to him.

STATE OF THE CASE.

Mr. Spring. May it please your lordship and you gentlemen of the jury, I am of counsel with the noble earl and the other traversers of these several indictments.

The traversers, my lord, stand charged with a crime, which upon the face of the indictments appears to be no more than an ordinary as-

sault; but this offence, though in its nature one of the lowest which the law takes notice of, has by infinite skill and address been heightened into a crime of a most enormous size; but I hope we shall be able to shew to your lordship and the gentlemen of the jury, that there is not the least foundation in truth for the light in which the counsel for the prosecutors have endeavoured to put this transaction.

Our case, my lord, will appear to be this; that the noble earl and his friends, who are now upon their trials, happened to be on the 16th of September last on the Curragh of Kildare, to partake of the diversions of the place: thither repairs Mr. James Annesley, attended by his friends, Mr. Mac Kercher, and the other prosecutors, whether with intent to meet the earl, and take hold of any occasion that might offer of a quarrel with him, their subsequent behaviour will best explain.

The earl and his friends will appear to your lordship to have repaired to this race-place without any preparation for what they did not expect, a battle; they all go unarmed, as gentlemen always do to a horse-race, when nothing is intended but to partake of the diversions of the day.

The prosecutors, one of whom had, as it is pretended, received ill treatment two days before from the earl, and had consequently reason to apprehend the like treatment upon the next interview, go to that very place, where they were thus ill used, and where it was very notorious the earl was: but they go prepared for every event, prepared for that skirmish, which they had reason to expect from the earl's pretended misbehaviour of the 14th; they go in a hostile manner, *in terrorem populi*, no less than five or six of them armed with sword and pistol, attended by a numerous train of servants armed in like manner with pistols, cutting swords, carbines and blunderbusses; they go thus armed and attended to see a common horse-race. A race, my lord, is a place of entertainment, to which gentlemen repair without any such hostile preparations: I cannot tell indeed what may be done in North Britain, but in England and Ireland we have no such custom; the usual manner of riding to races, is on a hunting-saddle, and with a snaffle bit.

It will appear, my lord, by positive testimony, that the words charged on lord Anglesea, of the 14th of September, as spoken to Mr. Mac Kercher; "He is a dog, a scoundrel, a villain, and the coat you see on his back, I saw not a month ago in Monmouth-street," were not the words of lord Anglesea, they were words uttered by another person. These gentlemen, two days after these words they complain of were spoken, repaired to this same Curragh. And here I must beg leave once more to observe a circumstance in itself most extraordinary: that the prosecutors, aware of ill-treatment, aware that my lord Anglesea intended to breed a quarrel with them, alarmed, as they pretend, with the grossest insolence that could be offered to a gentleman and a man

of honour, go to the same place where they apprehended they had reason to expect the like or worse treatment. It might be expected, if these gentlemen had not imagined they might have derived some benefit, some reputation to their cause, I mean to Mr. Annesley's claim to the earldom and estate of Anglesea, that they might have avoided a quarrel with the earl, however disposed he might have been to enter into one; but these gentlemen, who had nothing in view but a quarrel, go there designedly to seek one, which they at last brought upon themselves by their own means, and without even the concurrence of the earl.

It will appear to your lordship, that these gentlemen, taking some offence at some expressions charged upon the coachman of lord Anglesea, taking offence at his driving on the plain, as he had a right to do, go to my lord and demand public satisfaction for the offence his coachman had given, by stripping him in the field. It will appear that Mr. Mac Kercher seeks out for lord Anglesea, whom with difficulty he found; that he was cautioned and advised not to do it; yet it will appear that he goes to lord Anglesea; that he, who is the known supporter of Mr. Annesley, calls to lord Anglesea for public satisfaction for an injury not done to himself, but to another; that as the champion of Mr. Annesley, considering himself as well the guardian of this gentleman's honour, as the asserter of his right, he went up towards my lord, and, in a menacing and violent manner, forces through a crowd, and then, with his whip lifted up ready to strike, cried out, My lord, you will not turn him off! step aside with me. Lord Anglesea, who knew the man and his business, which, considering all circumstances, could be nothing but to quarrel, endeavours to avoid this quarrel, declines going, and says to him, Sir, you can have no business with me; and if you have, this is no proper place to talk about it. Mr. Mac Kercher says, I have no business but what may be done here, every place is proper. My lord then enquires what he wanted, and is answered, My business is about your coachman, who has affronted a gentleman on the field. My lord asks, Who is the gentleman? He is told the gentleman is this very person thus claiming his honour and estate; and that, as the affront has been public, the satisfaction must be adequate, and you must strip your servant, and turn him off directly, and drive yourself home. My lord, this treatment, which will appear to have been attended with circumstances sufficient to aggravate it, if it had been quite of another nature, will appear to be the occasion of the quarrel; it will appear that lord Anglesea declined this combat, to which he was very unequal, as he was not armed, and to which he was not obliged to expose himself: he refuses, my lord, to turn off his servant. Mr. Mac Kercher resents this; he raises his whip in a threatening manner, and loudly demands satisfaction. I had almost forgot saying, that, during his whole conversa-

tion, he held his whip over the earl's head. These circumstances and menaces will appear, I apprehend, to be no less in point of law than that he first assaulted lord Anglesea. Then it will appear that Mr. Francis Annesley, the friend and relation of lord Anglesea, who saw the head of his family, his friend and landlord, thus assaulted, gives Mr. Mac Kercher a blow. It will appear, that though lord Anglesea did not strike Mr. Mac Kercher, yet Mr. Mac Kercher struck him and broke his head. Mr. Annesley stands indicted for assaulting not only Mr. Mac Kercher, but all the other prosecutors: it will appear that he, upon the giving of this blow, received two blows, one from Mr. Goostry, and one from Mr. Kennedy, and both behind his back. My lord, Mr. Annesley will appear to have been thus assaulted by those two persons, and yet this is he that is indicted for assaulting Mr. Goostry and Mr. Kennedy. It will appear that Mr. Annesley called out, and desired to know who had struck him; and being informed who they were, then, and not till then, returned the blows. With respect to Mr. Jans, it will appear that he is the agent of lord Anglesea, that he saw his employer, we may call him his master, struck and affronted; and that will be a proper defence for him. As to the assault upon Mr. James Annesley, there is no evidence of any such assault. I shall give your lordship no further trouble at this time. If I have omitted any thing material, there are other gentlemen joined with me in this service, who will supply my want of recollection.

Mr. Morgan. I believe this is our time to have the benefit of the testimony of some of the traversers in favour of others of them. As to the indictment for assaulting Mr. Mac Kercher, lord Anglesea, Mr. Francis Annesley, Mr. Jans and Lacy stand charged with that indictment; and I beg leave to appeal to your lordship's notes, whether there be any colour (from the evidence given on behalf of the crown) for this indictment as against Mr. Annesley and Mr. Jans; and therefore hope that they only will now be given in charge to the jury, and that the jury may be directed to bring in their verdict as to them, in order, that if they be acquitted upon that indictment, my lord Anglesea may have the benefit of their testimony upon the same. When that is done, we shall beg leave to proceed in like manner upon the several other indictments, as to such of the gentlemen as we apprehend have not been affected by the evidence given on behalf of the crown.

Court. Upon the whole evidence, I take it, that the assault upon Mr. Mac Kercher stands already proved against Mr. Francis Annesley only, by Mr. Mac Kercher, Mr. Kennedy and Mr. Goostry; the assault upon Mr. Kennedy stands proved against lord Anglesea and Mr. Jans, by Mr. Kennedy and Mr. Archbold: as to the assault upon Mr. Goostry, the only person that speaks to that is Mr. Goostry himself, who says, Mr. Annesley struck him with his whip two minutes after he had struck Mr. An-

nesley; so that upon that indictment Mr. Annesley is not guilty in my apprehension, and may be admitted as evidence to that.

Mr. Harvard. I do not know, my lord, what those gentlemen would be at; I apprehend the practice they would introduce is new and unwarranted. Here are in each of these indictments my lord Anglesea, Mr. Jans, Mr. Francis Annesley, and the out-standing man indicted; there are four of them in each indictment —

Court. It is my opinion, the gentlemen of counsel for the traversers may separate the indictments.

Mr. Harvard. My lord, I do admit the practice to be, that where it has appeared to the Court upon the trial, that all the persons who could give any account of the offence have been indicted, or bills have been found against all the persons present when the offence was committed: if it appears upon the trial, that some of those persons have not been guilty of the offence, for which they were indicted, I cannot say, but it may be the practice in such a case to separate the indictments, and permit such as shall be found not guilty to give testimony for the rest, who happen to be indicted; and that may be reasonable from the necessity of the thing, as there can be no other evidence for the traversers, there being no other persons present at the time of committing the offence; otherwise the consequence might be, that all would be found guilty where the offence was privately committed, though, in fact, some of them were innocent. But where the offence has been committed before thousands, as here, and that four persons only are indicted for this, and that after six hours examination it does appear most evidently, that each of these four have had a hand in the general affray, though not in the assault of every of the prosecutors, I would submit it, if that be such a case, as from the necessity and nature of it, where there can be no want of other indifferent witnesses presumed, the Court will permit that one of them should be at liberty to give evidence for the other. The consequence of it may be, that they may acquit each other of the several indictments, and they are not such equal and indifferent witnesses as the law requires, each of them being proved to have had some hand in one part or other of this general affray, though not in the actual assault of every of the prosecutors, and the evidence in the whole reaches every one of the traversers. Can it be said, that those gentlemen, against each of whom evidence has been given, are so unbiassed as to be fit persons to be examined as evidence in the case of each other? I humbly apprehend not; and that it may be an inlet to perjury, and in great measure defeat the end of all public prosecutions for the breach of the peace. I beg leave to say, that lord Anglesea is guilty of the assault upon each of the prosecutors: it has been sworn that he cried out, Knock them down, knock them down. By those words he is a trespasser against every man that was

knocked down there. I apprehend the law to be, that he who directs a man to be knocked down is a principal, as well as the man who commits the fact. Has it not been sworn, that he not only encouraged, but also gave directions to pursue Mr. Annesley?—Why, then, as to Mr. Annesley of Ballysax, does it not appear evidently, that he was the person who rushed out upon Mr. Mac Kercher and struck him, and that afterwards he fell upon Mr. Goostry? I think there can be no doubt but that my lord Anglesea and Mr. Jans have been most deeply concerned in this whole affray, not only of assaulting Mr. Mac Kercher, but also of the rest. When my lord was told by Mr. Mac Kercher, That he dare not for his soul single himself out; Mr. Jans said, Sure you would not do it; are there not enough of us here to go out and to fight him?

Court. Upon three of these indictments there has been no evidence given that can affect Mr. Francis Annesley, and therefore he is at liberty to be examined.

Mr. Harward. My lord, I humbly apprehend, that neither Mr. Annesley nor any of the traversers have the liberty to be examined until they are acquitted. I apprehend, though they may not be affected by evidence on this or that particular indictment, that they are not thereby cleared of this charge; because the gentlemen of the jury are to consider upon the circumstances and the evidence of this whole case, whether they are all guilty or not? And the Court are no judges of facts, the jury must determine, and are the proper judges of them.

Court. But you will allow the judge to say, that there has been no evidence of such or such a kind given that can affect such or such a person?

Mr. Harward. That I do not dispute, my lord; but what I say is true in point of law, that the Court have nothing to do with the determination of the fact; that is to be left to the jury; and if so, why then, I say, that in this case, the Court cannot foresee who shall be found guilty upon this or that indictment, and who not.

Court. Why, shall I not tell the jury, that there is no evidence against such or such a person, and that they ought to be acquitted?

Mr. Harward. You certainly will, my lord; but, notwithstanding that direction, may not the jury be of another opinion concerning this matter, and may they not conceive, that all those people in general have been guilty, though no evidence appears against Mr. Annesley in particular? Unquestionably they may. Now, if it should be done, perhaps your lordship will not fine them above a penny, unless the jury can satisfy the Court, that they went upon their own knowledge from the whole evidence, which, in all probability, some of them will in the present case. So that they are the judges of the fact; and, if so, I would submit it, whether or no the Court can say, in a case of that nature, we will let one of you be evidence for

another, and so the third for the fourth, and by that means shift and help one another quite out of this prosecution?

Court. I am greatly surprised that the time of the Court is taken up with contending about this fact of separating the indictments. You have debated it before, and it was mutually agreed, that that point should be given to them. For my part, I think in point of law they have a right to insist upon that, and when it was agreed upon that they should be allowed it, I thought that method was come into in order to save time. The argument which is insisted upon, that where an indictment is laid against a person *simul cum* others, they shall be all tried together, concludes against that which I have known done over and over again, and which hardly escapes ever being done in case of an action of assault against A, with *simul cum* other people.

Att. Gen. Here is an indictment against lord Anglesea, Mr. Francis Annesley, and Mr. Jans, for an assault, suppose, against Mr. Goostry; has not any one of these three persons a right to say Mr. Jans is put here to out me out of my evidence? They certainly have. I desire that Mr. Jans may be first tried, and that his indictment may be disposed of before any other proceedings be had against the other two; that if he be acquitted, he may be evidence for them. And as this would be the law and the consequence in the case of a traverse, so the law would be the same in any other case. Why then, this is clear that the agreement has passed in this manner; the gentlemen of counsel for the traversers made their objections to the indictments being tried together, and those on the other side replied. What was their answer? It was, that where this or that person was not convicted on any one indictment, he should be at liberty to give his evidence for the others on that indictment.

Mr. Mac Manus. Here are four several indictments against the traversers at the bar for four assaults; and they are jointly charged in each indictment.—And where an offence arises from a joint act, which is in itself criminal, the defendants may be indicted jointly and severally, as that they, and each of them, did so and so, or jointly only. So is the law. Now, my lord, consider, how it has appeared in evidence; it has most fully and clearly appeared, that all parties indicted have, one and all, jointly contributed to this unlawful act; and please to consider the objection these gentlemen make, that if they are deprived of this benefit, they may want the most proper and material evidence for their defence; as if some persons might have been here indicted in order to take off their testimony. Your lordship will please to observe where this action arose, at the Curragh of Kildare, a public place, where there were a multitude of people assembled; so that there could be no defect of testimony at all on their side, if any persons did or could see or hear any thing for their service; and numbers of persons did and must have seen this

whole transaction; curiosity, humanity, or some other motive, must have engaged every eye and every ear. Then, where there were no many witnesses that might be had upon this occasion, who would either voluntarily, or might have been compelled to come, if material; there can be no complaint of want of evidence, or that the prosecutors have taken this method to deprive them of their testimony. And, my lord, these indictments were of the last assizes, so there is no surprize; the gentlemen might have been fully prepared with any evidence they thought necessary for their defence, without this extraordinary, this new method of splitting indictments. And I do apprehend, in this case they are in no sort entitled to the testimony of each other.—It is a settled point, that in trespass, though one may act more violently, more injuriously than another; yet, when all join in an unlawful act of this nature, the act of one is the act of all. And though A did not strike B, yet if he struck C, where the whole is, as here, one continued affray, he cannot possibly be a legal and competent witness against the crown; the whole is given in charge to the jury; he has been in the affray, and actually committed acts of violence; and it has appeared uncontroverted in evidence, that every person here indicted has been guilty of one assault or another; and that all have been guilty of a public and dangerous disturbance of the peace.

Court. It has not appeared upon the evidence, that lord Anglesea or Mr. Jans actually assaulted Mr. Mac Kercher.

Mr. Mac Manus. My lord, all the acts of violence of the day proceeded from the directions of lord Anglesea; menacing words, lifting up of hands, his raising himself up on his saddle, commanding and inciting others to strike; he himself, as Mr. Kennedy and Archbold swear, violently striking Kennedy on the head, and Jans joining him in the strokes till the people cried out shame; and though opprobrious, abusive language may not be an assault, yet, there are many things that they carried into action, not only by words, but by gestures, that prove the assault. My lord Anglesea was so near Mr. Mac Kercher at the time when Mr. Annesley struck him, that he could have struck him himself. Every thing was done by his directions; and menacing words, with a lifted hand, are an assault in law; and I do insist upon it, in point of law, that whoever excites, persuades or procures another to commit a trespass or treason is a principal offender, and equally guilty in law, as he who strikes; and more especially so when all are present; and my lord Anglesea and Jans were indisputably present, aiding and assisting the assaulting of Mr. Mac Kercher, and are in law guilty of that assault.

Mr. Callaghan. My lord, as I do on the one hand agree, that traversers are not to be laid under extraordinary hardships, and that prosecutors by no means are to make use of any contrivance, any scheme to entrap men, in

order to deprive them of the benefit of defending themselves; so, on the other hand, they are not to elude the rules of justice, by becoming evidence for each other. I put it upon the gentlemen on the other side to show, that ever they met in any law-book, that where there was a fact done in the presence of many, and a few only charged with it, that, on the trial of those few persons, the indictments should be separated, to make them evidence, in case of their acquittal, for one another. I am the bolder in this assertion, because it is never done, but where extreme necessity requires it; that necessity can never happen, but when all that were present at the time the offence was committed, are charged in the indictment with the committing of it; the necessity, therefore, of examining any of the people charged with the offence, if acquitted, as evidence for the rest, cannot be, but where there is nobody else to give evidence. In that case, it appears but just and reasonable; but, on the other hand, if you let those four people be evidence for one another, when many other witnesses might be had, who must have seen the whole transaction; there is no prosecution of this nature that will not be eluded. But, my lord, I will go further, and I do say that every person charged here is guilty of every indictment with which he is charged. Wherever there is an affray or an assault, let who will be the first promoter, every man that does any act whatever, that is aiding and assisting in any manner, is guilty of every act which is done by the rest, as much as if done by himself; where there are several people that commit an affray, each is answerable for the act of the other. There is a charge against lord Anglesea in every indictment; it stands proved in evidence he has beat Mr. Kennedy; there, my lord, is a direct charge; and, though it does not appear he actually struck the rest, yet it is uncontroverted the rest were struck on his account, and by his directions, and in law he is as guilty of the assault committed on them, as if he himself had actually beat them; I say, in point of law he is guilty of all those facts for which he is indicted. Let any one of them separately be tried before the jury, and I will undertake to make them guilty in point of law; and if so, I humbly submit it, whether they can be permitted to try these indictments separately.

Court. Was it not agreed upon at first, that if any of the traversers were acquitted of any of the indictments, they should be evidence for the rest charged with such indictment?

Mr. Harward. Let us not be charged by the Court with a breach of consent. I will tell you very candidly what I meant, when the objection was made. My meaning was, that as all these indictments were but upon a single fact, if it should appear, through the course of the evidence, that any of the traversers had no hand at all in the fact, but were idle spectators there, I thought it reasonable that such person, who did appear to be only a spectator, should be examined as evidence for the rest.

That was my meaning, my lord; how I was understood I cannot account: but I beg leave to rely upon it for law, and desire your lordship's consideration; can any body that lifted his hand up that day in the field, be innocent of this assault? Can it be said that he is not guilty of all the consequences of it?

Court. Well; but have they not a right to be tried separately?

Mr. Harward. That is another point, my lord.

Court. Gentlemen of counsel for the traversers, you must go upon that indictment, which the jury are first charged with. The traversers are first charged with the indictment for assaulting Mr. Goostry.

Mr. Malone. The indictment for assaulting Mr. Goostry, is in no sort proved against the traversers. We have many witnesses to shew, that before ever he was struck, he knocked Mr. Francis Annesley down, which indeed he very candidly admits himself; and this appears so clearly from his own testimony, it would be mis-spending the time of the Court for us to call our witnesses to it. Your lordship observes, that in two minutes after Mr. Francis Annesley got up, and recovered himself, Mr. Goostry swears my lord Anglesea said to Mr. Francis Annesley, That is he, that is Goostry, the greatest rogue alive, damn him, knock him down. Mr. Goostry does not say, whether he heard Mr. Francis Annesley ask my lord, who had knocked him down; but, from the nature of the thing, it could not be otherwise; and the very answer itself imports such a question. A gentleman is knocked down behind his back (for so the evidence is), and instantly, when he gets up, was it not most natural for him to enquire who struck him? It was to this enquiry most plainly, that lord Anglesea gave that answer; and then Mr. Francis Annesley goes up to Mr. Goostry, and returns his compliment by breaking his head. I submit it, therefore, to your lordship, where a witness fairly owns he first knocked me down, whether that is not such a sufficient justification for my striking him, that I need not lay any other matter before the jury; for, if Mr. Francis Annesley, who gave the blow, be not guilty of this assault, it is impossible my lord Anglesea, or Mr. Jans, who did not strike, should be guilty of it. Therefore, I hope your lordship will acquaint the jury, that there is no colour for charging any of the traversers with this indictment.

Court. Mr. Goostry said, that he was struck, and was all bloody; but I heard none say that lord Anglesea or Mr. Jans struck him, and Goostry did acknowledge that about two minutes before he received the blow he had struck Mr. Francis Annesley, and at the time that he did strike him, did say, that he believed Mr. Francis Annesley did not know who it was that struck him, and that about two minutes after my lord Anglesea said, There is that villain Goostry, that struck you; upon which Mr. Francis Annesley struck him. This, as I remember, was Mr. Goostry's evidence.

Mr. Harward. I now desire to know when it was that lord Anglesea said, Knock them down, knock them down.

Mr. Callaghan. Mr. Goostry expressly swears, it was by the directions of lord Anglesea, that Mr. Francis Annesley struck him. He says, I thought the quarrel was all over, there were above two minutes between the strokes, and then my lord Anglesea said, There is the villain Goostry, knock him down.

Mr. Malone. It does not appear from Mr. Goostry's testimony, that my lord said, Knock him down; the utmost Goostry said, was, that my lord said, There is the villain, that is he.

Court. I have nothing upon my paper about his saying any thing concerning the knocking them down.

Mr. Bagot. My lord, I have it upon my paper, that Mr. Goostry said, There is Goostry, as great a villain as any in Ireland, knock him down.

Mr. Mac Manus. We desire Mr. Goostry may have leave to inform your lordship what he did say.

Mr. Goostry. My lord said, There is Goostry, another of the villains, as great a rogue as any in Ireland, damn him, knock him down.

Court. You see, gentlemen, Mr. Francis Annesley was struck by Mr. Goostry, on evidence, two minutes before he struck Mr. Goostry, can he then be found guilty of an assault on Mr. Goostry?

Mr. Grattan. Mr. Goostry said, that there was hurry and confusion, and that during that time he struck Mr. Annesley, and believes Mr. Annesley did not see him strike him. I take the liberty to say, that if Mr. Annesley did strike Mr. Goostry, and did not see Mr. Goostry strike him first, it was the same thing, in the intention of his mind, as if he had not struck him first: for, since he did not know who had struck him, and yet struck Mr. Goostry, it shews plainly he was determined to strike him, and nothing can justify Mr. Annesley for striking him, but the provocation of his striking Mr. Annesley.

Mr. Callaghan. There is another matter, my lord, which is to be considered, that Mr. Annesley struck Mr. Goostry after his passion was over. It is true, there is no limited time for determining a man's passion, and a man may in passion commit an act, and not be the assailant. Your lordship may remember many cases in the books to this purpose, which it is not necessary to trouble you with; but the rule is, where a man has cooled and come to temper, there the precedent act, which was the effect of passion, is no justification of the subsequent act. Mr. Goostry's evidence is: I did apprehend all that matter was over; I do not apprehend the stroke Mr. Annesley gave me was in consequence of the stroke he had received, but of lord Anglesea's directions; and if so, Mr. Annesley is undoubtedly guilty of the assault on Mr. Goostry.

Mr. Malone. As to the indictment for the

assault on Mr. Goostry, we contend for it, that there is no colour for charging the traversers with that indictment, and hope your lordship will let it go to the jury upon the evidence of Mr. Goostry.

The Counsel for the Prosecutors were overruled in their objection.

The Jury go to find whether lord Anglesea, Mr. Francis Annesley, and Mr. Jans, are guilty of the assault on Mr. Goostry, on the first indictment; and, after a quarter of an hour's stay, return into court, and find lord Anglesea, Guilty.—Mr. Francis Annesley, Not Guilty.—Mr. Jans, Not Guilty.

Court. Gentlemen of Counsel for the Traversers, call your evidence.

[*Neile O'Neile* is called to the second indictment, for assaulting Hugh Kennedy, esq.]

Mr. Malone. There are three gentlemen, my lord, lord Anglesea, Mr. Annesley, and Mr. Jans, indicted for assaulting Mr. Kennedy; they have traversed this indictment, and Mr. Kennedy himself swears this assault only on lord Anglesea.

Court. And upon Mr. Jans; and there is not only his evidence to prove it, but the evidence of Mr. Archbold.

Mr. Malone. But there is no sort of evidence to affect Mr. Francis Annesley, and therefore, I hope your lordship will direct the jury to acquit him, that we may have the benefit of his testimony upon this indictment.

Court. Have you any objection, gentlemen concerned for the crown? You have not offered a word upon this indictment.

Mr. Harward. What I have offered before, is all any body can offer to this; and I believe it will soon be seen what the consequence of it will be.

Court. I call upon you to know, whether you have any objection to the examining Mr. Francis Annesley on the indictment for assaulting Hugh Kennedy, esq.

Mr. Harward. We have an objection; we do object against examining him, and submit it to the Court.

Mr. Mac Manus. My lord Anglesea and Mr. Francis Annesley mutually assisted each other; it is all one and the same trespass, all one and the same affray, each is *particeps criminis*, and the whole scene is interwoven and mixed together.

Mr. Malone. There is not a single word of evidence given, to prove that Mr. Francis Annesley was concerned in the assault upon Mr. Kennedy, and Mr. Kennedy himself swore to that effect; therefore we desire that Mr. Annesley may be acquitted of that indictment, and permitted to give his evidence.

The Jury go to find, whether Francis Annesley, esq. is guilty of the assault on Hugh Kennedy, esq. or not; and, without quitting the box, find him Not Guilty of the assault in the indictment.

Mr. Malone. We are now upon an indictment of lord Anglesea and Mr. Jans, for assaulting Mr. Kennedy, and desire Mr. Annesley may be sworn.

Francis Annesley, esq. sworn.

Mr. Spring. Were you present upon the Curragh on the 16th of September?—*Mr. Annesley.* I was.

I ask you, were you upon the course at the time of the race?—I was.

Were you present when Mr. Mac Kercher and his company came up upon the horse-course?—I never saw one of them before that day in my life.

Did you see Mr. Kennedy come up to speak to lord Anglesea?—I don't remember that I ever saw his face before this day.

Did you see any body come to ask him about his behaviour?—I did.

Who?—Mr. Mac Kercher.

Do you remember any such person upon the course that day, as Mr. Kennedy?—I was told after, that his name was Kennedy, and I saw some strokes between him and lord Anglesea.

Can you say that the person you saw there was the same with him you now see here?—I don't remember his face at all, but was told it was he.

Can you take upon you to say you saw him that day?—I did not see him that day that I know of.

What coloured clothes had the person on you saw engaged with lord Anglesea?—It was scarlet.

And did not you see his face?—I saw his face, but I don't know it again.

In what situation were you when he struck you?—I had my back to him.

How do you know then that he struck you?—I apprehend, though my back was to him, it was he, and upon his striking me, my lord struck him.

Did you see him strike my lord?—I did.

Which of them gave the first stroke?—The first stroke that was given was by my lord to Mr. Kennedy, some minutes after I had got a stroke upon my head.

Were Mr. Mac Kercher and Mr. Goostry near?—They were.

Was Mr. Jans near Mr. Kennedy?—I believe Mr. Jans was pretty near, but not within reach of him.

Did you see Mr. Jans or he give any stroke to each other?—I did not.

Do you think Mr. Jans could have struck him without your seeing him?—I don't think he could.

Neile O'Neile sworn.

Mr. Morgan. Pray, Sir, do you know the inn at Newbridge?—*O'Neile.* I do.

Where were you on the 13th of September, in the night?—In the afternoon I went there, I was at lord Besborough's; and Mr. Mac Kercher, Mr. Kennedy, and Mr. Livingstone,

to the best of my knowledge, sent a messenger to my house to speak with me.

Court. Who told you they sent to speak to you?—My wife, when I came home.

Did you go to them?—I went to Newbridge. What day was this?—It was the 15th I went to the races.

You went to them?—I did.

Name them again.—Mr. Mac Kercher, Mr. Kennedy, Mr. Livingstone, and Mr. Goostry.

Mr. *Morgan.* Where did you go to, the 15th?—To Newbridge.

When you came there, who did you meet, and what passed?—On the 15th, the gentlemen never were upon the sod before, and they went all together to the Curragh.

Court. Upon the 15th?—Whatever day the race was, it was that day, on Wednesday,—as to the day, I cannot be positive, I did not observe the day of the month. It was the 14th. There was never a horse to start but one. They said, they never were upon the ground but at that time, and upon going to the Curragh, there was no diversion, and we came back, and Mr. Mac Kercher said, he saw lord Anglesea. See what a look, says he, he gave at us all that day; but, says he, I want nothing but to expose him to the populace, and I will make it my business to do it before I go back to Dublin.

Who was the company? Name them.—There was Mr. Mac Kercher, Mr. Kennedy, Mr. Livingstone, and Mr. Goostry present, and I don't know but Mr. Robinson was there.

Can you be positive who was there?—I know Mr. Mac Kercher, Mr. Kennedy. Mr. Livingstone, Mr. Goostry, and Mr. Annesley were there.

Mr. *Harward.* My lord, I desire the Court may take notice he swears positively that Mr. Livingstone was one of the company, and we can prove him to be in England at that time.

Witness. In England! I can bring people to prove, that saw him in Naas the next day after the races.

Mr. *Spring.* Were you upon the Curragh the 16th?—I was.

Were you there when Mr. Kennedy was there?—I saw him there.

What part of the Curragh did you first see him on?—I went along with him to the Curragh, for we dined at Newbridge that day.

Att. Gen. If you can prove, gentlemen, that Mr. Livingstone was not there, what need you ask this man another question?

Mr. *Malone.* My lord, we will produce the top men of the country to his character.

Mr. *Spring.* Were you by with Mr. Kennedy when he met my lord Anglesea?—I was by with him most part of the day.

Then give an account of what happened when they first met?—I cannot tell whether I was present at their first meeting; but when they met, they never spoke a word to one another, but at the time of the action.

What action, was there a quarrel?—There was a quarrel, and Mr. Mac Kercher was the beginner of it. So there happened some words

that the coachman had said to Mr. Annesley; and upon the same, Mr. Mac Kercher was very angry, and said, that the thing was intended on purpose.

Court. To whom?—To Mr. Kennedy and the gentlemen in the crowd with him; and I was there at the same time,

What words were they?—The words Shoe-boy, or some such thing. And upon that, he said, He would make application to my lord, and if he did not discharge the servant, he would have satisfaction for it. Upon which, my lord happened to be down where there was a dispute about sir Edward O'Brien's mare running on the wrong side of the post; and we rode around until they came to the winning-post, where my lord was. Upon which, Mr. Mac Kercher told him, that his servant used him ill, and hoped for satisfaction from him, and that he would turn him off. My lord said, He would not. And upon that Mr. Mac Kercher said, He did not use him well, and would have satisfaction. And he had the whip up in his hand in order to strike, and he rode a stone-horse, and he was vicious, and I don't know whether the stroke was intended for my lord or for the horse.

Mr. *Spring.* Did you see lord Anglesea and Mr. Kennedy together that day?—I saw them close together.

Did any thing happen between them?—I saw them strike one another.

Who?—Mr. Annesley and Mr. Kennedy.

Give an account of that?—When Mr. Goostry struck Mr. Francis Annesley, he was for about two minutes before he found out who it was. Upon which, he asked who it was; and my lord said, That is the man, that Goostry, pointing to him. Upon which he went over, and made a stroke at Mr. Goostry, and there were some strokes that passed; and upon that, Mr. Kennedy came and made a stroke at Mr. Francis Annesley, and hit my lord over the wig, but whether it hurt him or no I cannot tell, or whether the stroke was intended for him or not, I cannot tell.

Court. Did you see the stroke reach my lord?—I did see it reach him upon the wig.

Did you see my lord strike Mr. Kennedy?—I did. As soon as he received that stroke, he up with his whip and struck him.

Mr. *Spring.* Did you see Mr. Jans there?—I did.

Where was he at the time of this quarrel?—He was in a crowd.

Did you see any engagement between Mr. Kennedy and Jans?—I did.

Who struck first?—That I cannot swear to at all, which of them struck first; for the crowd rushing backward and forward, I could not be distinct.

Was the blow given by Mr. Kennedy to lord Anglesea, before Mr. Jans and Kennedy were engaged?—It was before I saw them engaged.

Which struck first, Jans, or Kennedy?—By virtue of my oath, I cannot tell which; I saw

blood run down Mr. Kennedy, and whether it was he struck Mr. Jans first or no, I cannot tell: for when I saw my lord receive the stroke, I turned about my horse, and did not mind. I was just crossing between him and my lord, and whether Mr. Kennedy struck at Jans first I cannot tell.

But you said you saw Mr. Kennedy strike lord Anglesea before you saw lord Anglesea give a stroke?—I did, Sir.

What happened between Mr. Kennedy and Mr. Jans?—I cannot tell.

Court. Gentlemen concerned for the crown, will you ask this man any questions?

Mr. Harward. We will not ask him any question, but beg, for justice sake, he may not be permitted to get out of the Court, till we proceed to give evidence against him for perjury.

Court. How long have you been acquainted with Mr. Mac Kercher?

O'Neile. I believe since his first coming into the kingdom.

And with Mr. Kennedy?—Yes.

And with Mr. Goosty?—No, not with him.

How came you to go with them to the Curragh?—I had an intimacy with Mr. Annesley, (for he was some time at my father's house when a child) on his first coming into the kingdom, and they sent for me.

On what business did they send for you?—I cannot tell, my lord.

Who went to the Curragh with you?—We went all together to the races, and we had discourse as we went along.

Mr. Mac Manus. Whom did they then send for you?—Several.

Who were they?—Their own servants.

Name the servants.—One Barney Neale, and several of them.

Mr. Digby. Foreman of the Jury. Did you meet me coming home on the road that day?

—Yes, Sir, I believe I did, I cannot recollect.

Did you say any thing to me?—I cannot say I did.

Did not you express concern to me at the treatment Mr. Mac Kercher and Mr. Annesley had received?—I do not remember that I did.

Did not you express yourself, that you thought they were used very hard?—I do not know but I might tell you so.

Mr. Harward. I desire, my lord, that Mr. Livingstone may be called, to satisfy you he was in England last September.

Court. You had better stay a little.

Patrick Caveough is called, and goes away again, being to be examined to another point.

Mr. Callaghan. We'll beg leave to produce Mr. Livingstone, to shew your lordship where he was in September last.

William Livingstone, esq. sworn.

Mr. Callaghan. Where were you in September last?—*Livingstone.* In London.

Were you any part of that month in Ireland?—I was not.

When did you come over to Ireland?—It was the middle of October before I came to this kingdom.

Mr. Malone informs the Court, that in October he saw Mr. Livingstone at Parkgate ready to embark for Ireland.

[Cross-examination.]

Mr. Spring. Do you know this Mr. O'Neile?—*Livingstone.* Yes, Sir.

Did you ever see him in Mr. Mac Kercher's or Mr. Kennedy's company?—I have.

Were they not well acquainted?—Yes, I believe they were.

Was he employed by Mr. Mac Kercher or Mr. Kennedy?—Sir, when we came first into Ireland about two years ago, O'Neile met us uncalled for at Kill; he told us a great deal of his knowledge of Mr. Annesley at Kinn, and the witnesses that knew his affairs; and often came about us upon that errand, till at last he came so often, that he was used with the utmost disregard; and when we found out his character, he was never suffered to come about the house at all.

Mr. Digby. What character has he? Do you think he is an honest man?—We were strangers in this country; he looked like an honest man to us at first, but upon a better information we found him quite the reverse.

Mr. Mac Manus. My lord, we desire my lord Allen may be sworn, to give a character of this man.

Right Hon. Lord Viscount Allen sworn.

Mr. Mac Manus. Pray, my lord, do you know this Neile O'Neile?

Lord Allen. I know him very well, and believe no man bears a more infamous character in the county of Kildare.

Does your lordship think he deserves any credit?—I am confident he does not; he is a very great villain; I would not credit him, nor believe one word he says. I know that no gentleman would admit you into his company at the time you were employed by me; and my uncle and I had often many words because I employed you, and we found you out to be the greatest rogue that could be.

Court. Do you think he is a man to be credited upon oath?—No, my lord, he is not.

Mr. Mac Manus. We beg leave to produce the minister of the parish where he lives.

Rev. Mr. John Dawson sworn.

Mr. Mac Manus. Do you know Neile O'Neile?

Mr. Dawson. I know him ever since I came into the parish of Naas.

How long is that, Sir?—I have been two years there.

What character has he generally bore during that time?—I have always heard he was a person guilty of as many frauds as he was capable of committing; I cannot account for his

merals, but he is a person that was always very litigious.

What is his general character?—Why, I protest, I have known him guilty of numbers of lies and falsehoods, and is a person, I think, not to be credited.

Do you believe him a person to be credited upon his oath?—The general character is, that he is a person not only litigious, but capable of any cheat imaginable.

Is he, or is he not to be believed upon his oath?—I should give little credit to his oath, because I have heard his word so often forfeited.

Lord Viscount *Allen*. He is the greatest rogue alive. 'Tis nine years since he robbed me; I have had warrants out against him, and could never catch him, but will now send him to gaol before I leave this town.

Mr. *Malone*. We desire Maurice Keating, esq. may be called to the character of O. Neile.—[Mr. Keating is called, but does not come into court.]

Mr. *Spring* to Mr. *Dawson*. Was not this Neile an agent to Mr. Mac Kercher and Mr. Annesley?

Mr. *Dawson*. He had the repute in Naas some time ago of being a strenuous friend of theirs; but I never saw him about them; I had no occasion to interfere in their affairs.

Court. Gentlemen of the jury, the lord Anglessea and Mr. Jans stand indicted for an assault on Mr. Kennedy. I shall only tell you, gentlemen, that I find, on the recollection of the evidence, it stands fully proved by Mr. Kennedy and Mr. Archbold, that both his lordship and Mr. Jans, without provocation, without any attempt in Mr. Kennedy to strike a blow, did strike and sorely beat this gentleman. Thus it stands proved upon their testimony; and, gentlemen, the only evidence offered to take off this charge was first Mr. Francis Annesley; and I do think you may lay what he says entirely out of the case; for he tells you he never saw Mr. Kennedy before this day, and did see lord Anglessea and a gentleman in red engaged that day on the Curragh; but who that gentleman was he cannot tell, and knows not whether it was Mr. Kennedy or not, but that he saw several blows pass between them. And Mr. Annesley with great candour and integrity said, that if it was proved that Mr. Kennedy and that gentleman were the same, he saw him give no provocation; so that it still remains clear and undoubted upon the testimony of Mr. Annesley, that my lord Anglessea and Mr. Jans are both guilty of the assault upon Mr. Kennedy; for he tells you farther, that the first stroke that was given between them was by my lord. Why then the only other evidence produced was a person of extremely different character from Mr. Annesley, one Neile O'Neile, a surgeon from Naas; and what does he say? He tells you that he was at the inn of Newbridge with these gentlemen; that he was sent for

VOL. XVIII.

by them to Naas, and being from home, was told, when he returned, they had sent for him, and that there he went and found Mr. M'Kercher, Mr. Kennedy, Mr. Goostry, and twice I am positive, I think three times, swore that he saw Mr. Livingstone there too. That with these gentlemen he went to the Curragh; that in the way Mr. M'Kercher told him, He wanted of all things in the world to expose the lord Anglessea to the populace, and was determined to do it before he returned to Dublin; that for that purpose he began the quarrel: but says he did not see Mr. M'Kercher strike my lord, nor attempt to strike him: That he was upon a vicious stone-horse, and whether he lifted up his whip to correct his horse, or for what other purpose, he cannot tell. He tells you further, that he saw Mr. Kennedy strike my lord, but knows not whether he intended to strike him or not: and says, he believes the stroke did not hurt my lord. That upon this, my lord struck him; but if you believe him, the first blow was hit upon my lord. Why then, this man having sworn that Mr. Livingstone was one of this company, and it being alleged that he was then in England, Mr. Livingstone was sworn to account whether he was or no. He declares upon his oath he was not in Ireland at that time, but in London, and came over to this kingdom in October; and says, he knew that this man was acquainted with Mr. M'Kercher and Mr. Kennedy, and employed by them; but that he met them on the road uncalled for, frequently attended them under pretence of serving them, until at length he became so troublesome, they were obliged to dismiss him, and forbid him to come near them. Then, in the next place, in order to discredit him further, the counsel for the prosecutors called my lord Allen to give a character of him; and his lordship tells you, that he is of a most infamous character, of such a one, that his lordship swears positively he is not to be credited on his oath. The same bad character is given him by Mr. Dawson, the minister of the place where he lives.

You see, gentlemen, there is nothing in the world offered but the evidence of this man to take off the weight of Mr. Kennedy and Mr. Archbold; and you will consider what credit he deserves.

The Jury go to find whether lord Anglessea and Mr. Jans are guilty of the assault upon Hugh Kennedy, esq. or not; and find lord Anglessea, Guilty.—Mr. Jans, Guilty.

THE INDICTMENT FOR THE ASSAULT ON DANIEL MAC KERCHER, ESQ.

Mr. *Malone*. This, in reality, is the main indictment, upon which all the rest have been grounded. It does not appear by any evidence, that my lord Anglessea and Mr. Jans had any hand in assaulting him; and therefore we hope, upon the rule you have laid down, to be allowed the benefit of their testimony. Mr.

T

Mac Kercher himself, in his evidence upon this indictment, does not pretend that either lord Anglesea or Mr. Jans did assault him on the Curragh. If I mistake your evidence, you'll set me right.

Mr. Mac Kercher. What do you understand, Sir, by assaulting me?

Mr. Malone. I mean a blow.

Mr. Mac Kercher. I cannot say they gave me any blow.

Court. The account Mr. Mac Kercher gave was, that after a good deal of opprobrious language, he told my lord Anglesea, He lied, and dared not for the soul of him single himself out, and tell him so. That upon those words Mr. Francis Annesley stepped forward, and struck Mr. Mac Kercher upon the forehead, which occasioned a swelling and a bleeding: and I do not recollect that Mr. Mac Kercher gave any thing in evidence that my lord said or did to him more than this.

Mr. Malone. As there does not appear any evidence that can affect lord Anglesea and Mr. Jans on this indictment, we beg leave to desire your lordship will give the jury some directions concerning them before we proceed further.

Mr. Harward. I believe there can be very little doubt, when you consider, but that Mr. Jans is guilty of the assault upon Mr. M^cKercher; and I'll tell your lordship the reason why I apprehend it so; because there is no controversy but that this man, upon the words which passed between lord Anglesea and Mr. M^cKercher, rushed out and said, Sure, my lord, you would not offer to fight this fellow, while there are so many here by to fight him for you. What follows upon this? Why then, one of this very company goes out and strikes him. Pray, my lord, are not they all guilty of the trespass committed against him? I do say they are all principals, and that there is no distinguishing in law between the man that struck, and the man that assisted by word or act.

Mr. Mac Manus. I apprehend the question to be, Whether my lord Anglesea and Mr. Jans assaulted a particular person whom they incited others to strike, and whom their rage and passion would have inclined them to strike, if they could as forcibly have struck him, as they did other persons nearer to them of the same party. In construction of law it is an assault; they both did assault Mr. M^cKercher, and that clearly appears from the evidence.

Court. The evidence of Mr. M^cKercher was, that upon my lord's calling him thief, scoundrel, and villain, Mr. M^cKercher said, You dared not for your soul single yourself out, and tell me so. Upon which some that were by said, My lord, you go fight such a scoundrel! here are enough to go out with him. What ensued upon this? Why, then Mr. M^cKercher tells you, that upon further words between them, he said, My lord, you lye; and that immediately upon his saying so, not a word said by any other person, Mr. Francis Annes-

ley stepped forward, and struck him a blow on the forehead.

Mr. Bagot. If I apprehend his testimony aright, Mr. Mac Kercher said the words, You lye, were antecedent to the other words.

Court. The jury, I see, have taken very accurate notes, and they'll take care to do what is right.

Patrick Cavenagh, dancing-master, sworn.

Mr. Morgan. Do you recollect where you were the 16th of September last?

Cavenagh. I do.

Where were you?—I was at the Curragh at the time of the races.

Did you see lord Anglesea there?—I did.

Did you see Mr. Jans there?—I did.

Did you see Mr. Mac Kercher there?—I saw him there.

Give an account to the Court and the jury, what you recollect to have passed touching Mr. Mac Kercher's coming up to lord Anglesea.—I heard some little thing when I was at Kilcullen-bridge before the race, of some design, and it made me a little more particular. My lord Anglesea was going down to the winning-post when the dispute was about the running of the horses, and I parted from him there: and as I was going, I saw these gentlemen, Mr. Annesley, Mr. Mac Kercher, Goosstry, and Kennedy, going towards lord Anglesea. When I saw that, I immediately recollected what I had heard at the bridge, that there would be a quarrel; upon which I returned immediately again, and when I came up, I found there was a crowd about them; and they were engaged in words: and I just came up at the time when my lord Anglesea said, Sir, I would not suffer my servants to affront any one, let alone a gentleman. I just came in upon that answer, and I don't know what passed before at all.

What did Mr. Mac Kercher reply to that?

—I could not hear well what he said, for he spoke very low; but lord Anglesea spoke very loud.

Was Mr. Mac Kercher near lord Anglesea?

—He was close to my lord, the horses heads were just together; and then I heard Mr. Mac Kercher some little time after say, My lord, your servant has affronted a gentleman. And my lord answered, What gentleman? And Mr. Mac Kercher assured him again, That he was a gentleman; but did not tell who he was.

Did not he tell my lord at all who he was?

—Mr. Mac Kercher assured him twice or thrice that he was a gentleman, and insisted upon my lord's doing him justice, without telling him who the gentleman was, but at last pointed to him; upon which, when Mr. Mac Kercher insisted on that, and desired him to turn him off, my lord said, Is it for you? or words to that purpose. And Mr. Mac Kercher still insisted upon it for affronting a gentleman.

Was Mr. Francis Annesley or Mr. Jans near my lord at this time?—Mr. Annesley was close

by my lord, and so was Mr. Jans; they stood close together, and my lord a little on one side speaking to Mr. Mac Kercher.

What was it my lord said to Mr. Mac Kercher?—My lord said, He would not turn him off for him.

What ensued upon that?—Mr. Mac Kercher insisted upon it, and held up the butt-end of his whip at my lord; upon which Mr. Annealey gave him a blow before he could give my lord a blow if he intended it.

Did he positively turn up the butt-end of his whip?—He turned up the butt-end of his whip, Sir.

How did he hold his whip when he spoke to my lord?—He had the proper end of it in his hand first; but upon my lord's refusing to turn his coachman off, he turned his whip, and said, You won't turn him off, my lord!

What kind of a whip was it that Mr. Mac Kercher had?—I cannot be particular.

Was it a long or a short whip?—It was a long whip; it either had a lash, or was one of the whips with a prodigious long end to it.

Mr. Harward. Was it not a short jockey-whip?—It was not.

Had it a lash to it?—I don't believe it had a lash, but he took it about the middle, or thereabouts, in his hand.

Did he hold it in a threatening manner?—He did, and said in anger, You won't turn him off, my lord!

Mr. Morgan. Was there, or was there not before that time in which he turned his whip, any stroke given, by virtue of your oath?—There was none given before that time, by virtue of my oath.

Did you observe Mr. Jans at that time?—I did.

Did you see him do any thing?—I did not.

Did you see him strike Mr. Mac Kercher, or any body?—I did not. He spoke to Mr. Mac Kercher, and asked him, Dared he ask any one else there, for he was not worth my lord's while?

Mr. Digby. I think you said, some conversation had passed at Kilcullen-bridge, about a design to quarrel?—I heard there, as I was mounting my horse, that there would be a quarrel.

When was it you heard so?—It was the morning, the 16th, before I went to the Curragh.

Who was it told you so?—I heard that a gentleman came from Dublin, and told Mr. Jans there would be a quarrel, and I think it was he told me, that there would be a great quarrel at the Curragh that day.

Who said this?—I heard it from Mr. Jans, and, I think, Mr. Tynan. Jans said he was informed by one out of Dublin, that there would be a quarrel there.

When did Mr. Jans say he was told so by one from Dublin?—He said, he heard by one from Dublin that morning, that there would be a quarrel.

Mr. Bagot. You say, that Mr. Jans told

you he heard from Dublin there would be a quarrel; did he hear it from Dublin, or from a gentleman that came from Dublin?—He told me from a gentleman that came from Dublin.

Do you know the road from Dublin to Newbridge?—Not very well.

Do you know whether Newbridge lies on the road between Kilcullen and Dublin?—I know it does not lie on the turnpike road.

Mr. Digby. Explain yourself, what you mean had passed when Mr. Mac Kercher had challenged my lord.—When my lord refused to give him satisfaction, he said, He dared not tell him so aside by himself. And my lord said, He would go with him aside. Upon which Mr. Annealey and Mr. Jans said, He should not.

You said Mr. Jans told you, he was informed of a quarrel that would happen; I ask you, whether he told you the gentleman that informed him gave him any reasons why he apprehended there would be a quarrel?—Mr. Jans told me, he was informed there would be a quarrel, that a gentleman from Dublin told him there would be a quarrel; and told me no more.

[Cross-examination.]

Mr. Harward takes a gentleman's whip in his hand, and says, A thong-whip is where there is a thong, this is a fox-hunter.

Cavenagh. I understand it to be such a whip as that; I cannot tell what you call it.

Mr. Harward. This is a fox-hunter. Now, Sir, will you take this whip, and shew us how Mr. Mac Kercher exercised his whip?—A. Sir, this is the way he had it when I saw him first, [holding the handle in his hand] and while I saw him talking with my lord, he took it up in this manner [holding the whip by the middle.]

Tell what people were next to you at that time.—I do not know who was next to me, for I did not know them; I saw Mr. Jans on the other side, almost opposite to me, and Mr. Francis Annesley, Mr. Kennedy, and Mr. Goostry, were, I think, together to my left hand.

Now, I think you said, when lord Anglesea was challenged, you understood it was a challenge to fight?—I did.

I think you have also said, that lord Anglesea upon that said, he would go out and fight Mr. Mac Kercher?—He said he would go with him, but I do not think he would have gone.

Are you sure he said he would go out and fight him?—I am sure he said so.

What was it my lord said?—Mr. Mac Kercher asked him the question twice, or thrice; upon which my lord said, Well, I will. And the others said, He should not.

Did what Mr. Mac Kercher said appear to be in a challenging manner?—It did.

When lord Anglesea said he would go out with him, did not you apprehend that he would go and fight with him?—How do I know, Sir, whether he would or no?

What did you understand my lord meant?—To me it looked indeed as if they would be engaged.

What did you apprehend my lord intended to do upon his saying those words?—I did not believe my lord would go out to fight.

You apprehended Mr. Mac Kercher meant that my lord should go to fight?—I did.

If so, what reason could make you not apprehend that my lord did not mean to fight?

—No, perhaps not, it might be otherwise; it did not come to that issue, therefore I cannot judge.

Had my lord any arms?—He had not.

Are you certain that Mr. Mac Kercher meant to fight?—Indeed I cannot tell. How can I be certain? If you challenge me, how do I know whether you will fight me or no?

What do you believe?—I protest I cannot answer whether they would have fought, if my lord had gone.

Do not you believe, if a man challenges another to fight, he who gives the challenge means to fight?—I do believe.

Do not you believe the man that accepts the challenge does?—It is probable he does; but I do not believe my lord intended to fight.

What kind of a whip had Mr. Kercher in his hand?—It was a long whip, a hunting whip.

Was it not a jockey whip that Mr. Mac Kercher had that day?—It appeared to have a tail twice as long as this almost; (the witness at the same time held out a hunting whip with a long lash to it.)

To Mr. Mac Kercher.

Had you ever such a whip?—I might possibly some time or other in my life have had such a whip in my hand, but I never make use of such a whip; I had a very small whip, one of the smallest size, that day.

Dennis Tynan sworn.

Mr. Spring. Do you know Mr. Jans?

Tynan. I do.

Recollect what conversation you had with him at the time of the races at the Curragh, the 15th or 16th of September, concerning my quarrel that you had heard there was likely to be. Had you any conversation with him?—I had.

Tell what it was.---On Monday before the races, I cannot tell the day of the month now, but I could if I was in Dublin, because I kept a regular table.

What do you mean by a regular table?—I mean of my business.

What business do you follow?—That of a druggist and a dyer.

Well, go on.—Mr. Usher of Balsoon and Purcell the butcher, as he told me he was, the man that kept the young earl some time, they were in my shop; I happened to be backwards when they came in, and when I saw them, I came out to know what business they had, and I first spoke to Purcell, and asked what he wanted.

He told me they were come there to wait for the young earl. I went backwards on that, and came into the shop again; and in a little while after, Mr. Mac Kercher came into the shop, and spoke to my man over the counter. I did not hear what he said, and my man had a room over the way, and they went there together and stayed for some time; and while he was away, says I, Is that the young earl? No, by G—d, says Purcell, but a cleverer fellow, a fellow that would whip the old earl if he had hold of him. Aye, says Usher, by G—d he would wring his nose. So Mr. Mac Kercher came back, took coach and went off; and they went off after him.

What day was this?—It was Monday.

Tell what you did relate to Mr. Jans.---I told him, that my servant had told me, that Usher had told him, there were ten men armed and gone to the Curragh.

[Note, Mr. Mac Kercher and his company did not set out till Wednesday.]

Court. (To Mr. Mac Kercher.) Do you hear what this man swears; were you ever in his shop?—I do not know that ever I was.

[Cross-examination.]

Mr. Mac Manus. Do you know young Mr. Annesley?—I believe I should know him.

Were you ever in England, Sir?—I was.

Were you ever concerned in the prosecution of Mr. Annesley at the Old Bailey?—Not upon the prosecution, upon my oath.

Were you a witness there?—I will answer you. I was to be a witness to tell what I knew of one Paul Keating.

Do you know Mr. Giffard?—I do. Mr. Jans brought me to him, and desired me to tell Mr. Giffard what I knew of Paul Keating.

[Hereupon this witness was turned off the table by the traverser's own counsel.]

The Jury go to try whether lord Anglesea and Mr. Jans are guilty of the assault on Mr. M'Kercher or not, and find lord Anglesea, Guilty—Mr. Jans, Guilty.

Mr. Spring. My lord, I do not know whether it will be necessary to trouble your lordship with any further evidence; for my part, I am satisfied to rest upon the evidence of the crown, and not trouble your lordship and the jury with any thing further upon that evidence; but my duty calls upon me to do every thing I can for my clients, and therefore with respect to Mr. Annesley, I would say a short thing. The jury will consider who was the first aggressor in this assault, and will find it was Mr. M'Kercher. I do insist upon it, in point of law, that the lifting up an hand in the manner Mr. M'Kercher did, as appears even from his own confession, is in point of law an assault; it appears, and the jury cannot forget, that these gentlemen went into the field armed and prepared for battle, that they went to this horse-race attended by many servants, all

armed in an unusual manner, in such an extraordinary manner, as cannot be justified by law ; because going armed to places, where all other people generally go unarmed, is in *terrorem populi*, and not suffered by the law. Why then Mr. M^cKercher and his company, who, as they pretend, had been insulted by my lord on the 14th, repair to the same place again armed in this manner, which plainly shews what their intent was, and that it was no other but to bring on a quarrel with my lord Anglesea. It appears from the evidence, that upon some indignity offered by a coachman to Mr. James Annesley, Mr. M^cKercher goes to call lord Anglesea to an account, and demand public satisfaction, and it appears that he was cautioned not to go for fear of bringing on a quarrel, and that, notwithstanding, he went and forced through the crowd to get at my lord ; so that it appears, instead of declining a combat, as he would willingly make you believe he did, he brought it upon himself, he went to call upon lord Anglesea for an offence not done to himself, he calls him out to fight him, and my lord declines doing so, by telling him, This is no time nor place, you see I have no pistols. Mr. M^cKercher answered, Your servant has affronted a gentleman, Mr. Annesley, and as it was public, it is expected that you strip him and turn him off. And so my lord, to satisfy Mr. M^cKercher, must take upon him to drive his own person home in this coach. This treatment of a nobleman must call for such a degree of resentment, as must of necessity have ended in a quarrel ; it tends plainly to a breach of the peace, and I would know what right Mr. M^cKercher had to resent an affront done to another, and demand satisfaction in such a manner, as no gentleman would have complied with. What right had he to prescribe the method of receiving this satisfaction ? That very circumstance plainly shews he had an intent to quarrel, and his manner of demanding satisfaction amounts to a challenge. Why then, if, besides this, your lordship and the jury will please to consider, who the person affronted is, and for whom this public satisfaction is demanded, that my lord Anglesea looked upon him as his brother's bastard, by a kitchen wench, and knew he was claiming his estate and titles ; I hope you will think my lord's behaviour was no more than could reasonably be expected from him, under such circumstances. But this is not all, Mr. M^cKercher gives my lord the lie, desires him to withdraw with him, and in case of his refusal, threatens him with a lifted-up hand. Mr. Cavenagh positively swears to his lifting his hand with the butt-end of his whip towards my lord, and threatening him at the same time ; and Mr. M^cKercher in his evidence does not deny but he might do it. He says indeed, that he has a different manner of carrying and holding his hand from other persons, that it was his custom in conversation to raise his hand ; it may be so to his footman, but to a peer of the kingdom, an earl of Great Britain, that raising

of his hand did not become him, and was in point of law an assault : why then, what is the consequence ? Here is a gentleman, Mr. Francis Annesley, attending lord Anglesea : this gentleman, his tenant, his relation and friend, sees him thus affronted and assaulted, and strikes the person who threatened to strike him ; I do say, that Mr. M^cKercher thus assaulting lord Anglesea, could expect no other return, than that which Mr. Annesley made him. It was incumbent in some measure on Mr. Francis Annesley, even for the safety of lord Anglesea, to do what he did. Was he to wait for this gentleman's drawing out his pistol ? Did it not seem incumbent on him to prevent this ? I beg leave to say it was, and that he was justifiable in point of law ; if he had been no relation or friend to my lord, but even a stranger, and saw him threatened in the manner Mr. M^cKercher threatened him, he ought to prevent the quarrel likely to ensue between them ; and if in so doing, he hurted Mr. M^cKercher, he is justified by the law. It would be taking up too much of your time to say more ; but for my part, all circumstances considered, I am only amazed, that instead of the slight injury done those gentlemen, they were not much worse off.

Court. What you have offered may be considered as a mitigation of the offence, but not by the law as a justification of it. I already find that the jury have determined that assault, to be an assault committed by my lord Anglesea upon Mr. M^cKercher ; because had it appeared from evidence that Mr. M^cKercher had assaulted my lord Anglesea first, the jury could not possibly have found the lord Anglesea guilty.—As to mitigation, that is a matter proper for the consideration of the Court when they come to give judgment for the offence. But as to the assault of Mr. Francis Annesley on Mr. M^cKercher, it stands proved against him by the evidence of Mr. M^cKercher, Mr. Kennedy, and Mr. Goostry, and in my apprehension he is guilty of that assault. Now, as to the fourth assault, that on Mr. James Annesley, I believe that fourth indictment may go to the jury. It appears to me, that the most part of the evidence as to that was principally material for the consideration of the Court to determine their discretion, to shew the nature and general tendency of this unfortunate affair. But, I say, that as I recollect it, it does not appear upon the evidence, that any person struck, or attempted to strike Mr. James Annesley ; and before any words were uttered by lord Anglesea, directing the pursuit of him, there was an account brought that he was gone off the sod, and then those words were spoke by my lord, Follow the son of a whore, and knock his brains out. Mr. Annesley gallops away, and falls into a ditch, and there lay in a very miserable manner ; but how that happened is accounted for, by the feet of his horse slipping into the ditch ; it does not appear that it was by a stroke given by any body ; it does not appear that any one person did attempt to strike

him; there was a gentleman, that one of the witnesses said, had not he interposed, would have struck him; but he is out of the case, and not to come within your consideration. If you that are concerned for the crown have any thing to say, proceed.

Mr. Harvard. We are ready to offer what occurs to us upon this indictment; and, my lord, I humbly apprehend that this question is reduced to a very single point of law upon the following facts; that Mr. Mac Kercher being apprehensive of an intention in lord Anglesea and his company to murder him and all his friends, desired Mr. Annesley, who was his chief care, to get away as fast as he could. It is given in evidence that Mr. Annesley did so, and also that upon my lord Anglesea's hearing that he had left the field, that he cried out to the people about him, Pursue him, and tear him limb from limb. In consequence whereof several did pursue, and drove him on full speed; and word being brought back to him that he was killed, my lord approved of it, and said, All was well. This being the fact as nearly as I can recollect it, I apprehend the law will be clearly determined by your lordship in our favour. Lord Anglesea, throughout this evidence, has appeared to have abused this gentleman, to have assaulted some of his friends, for which he and some of his associates are found guilty; here is an abuse given to this very gentleman precedent to every thing that happened; here follows an assault upon two or three of his friends, and advice being brought from the place where the noble lord and his associates were, of his bad intentions to this young gentleman, for fear the like fate should attend him, he is desired by one of them to run away, or he would be murdered. The minute my lord hears he has left the field, he hallooes to all his people after him, to tear him limb from limb, and one of the pursuers attempts to strike him, but was prevented. This is clearly proved by the evidence offered to your lordship; and this being so, then the question is, whether my lord Anglesea is guilty of an assault upon this gentleman who was thrown into the ditch by his horse, as he was turning him about to defend himself against the pursuers. I submit it to your lordship, whether you won't take the whole case, both words, and facts, and circumstances, into your consideration, and then pronounce what the law is. Why then it appears, that this gentleman, upon the pursuit of him, finding the people come up so close to him, turned his horse to defend himself; and then it appears that the horse fell into the ditch, and upon him, and there he received his hurt. The question then is, Whether or no lord Anglesea is a principal in this assault or not? Whether he was not the cause of the hurt that Mr. Annesley received by the fall of the horse upon him? I believe nobody will deny, but that the persons who actually pursued and gave occasion immediately to this fall, were guilty of an assault, and also of the battery and wounding

received by the fall. There is a difference in point of law between an assault, a wounding and a battery; an assault is in its nature of the least degree of these kind of offences. If this gentleman, who was thus pursued, had happened to be drove into the river Liffy and drowned, there I apprehend, every man that pushed him to the brink of that river was guilty of his murder. The law is clear, that in high treason and trespass they are all principals, and there can be no accessories in those which are the highest and lowest offence; the persons aiding, inciting, in any kind assisting, by language or overt act, are all principals; and if I am present, and encourage or desire a man to break another's head, and he does it, I am guilty of that assault. If the persons then, who have pursued this poor gentleman, had been guilty of murder, in case he had been forced into the river and drowned, I would be glad to be informed by the counsel of the other side, how it comes about, that the law should be more tender in determining a man to be a principal in trespass, than it does in cases of murder; I presume they must allow the contrary, and that there is more indulgence shewn in favour of life. And if the case I put, would have been murder in the pursuers, and also in lord Anglesea, I think the consequence must be, that he is to be looked upon as a principal in the assault, as all cases of murder include a trespass; also there are many mitigations in cases of killing, not allowed in an assault: so that I am at a loss to find how it can be imagined that a man is not guilty of an assault, when, if the person he pursued had been driven into the river and drowned, he would have been guilty of murder. If this be the case of the principal, pray consider, whether any distinction in law, or in point of reason, can put lord Anglesea in a better condition, with regard to the offence, than the persons he prevailed upon to do it. He was the first person that stirred up these men to pursue, who were the occasion of the fall into the ditch; he was the principal agent, who wrought up their spirits to execute that unlawful intention which he had against him, and approved of what was done, when he heard Mr. Annesley was dead. I beg leave to say, that every act they did in pursuance of his directions, is his act in point of law; and the law does not separate any of them, but makes them all principals in trespass. I would suppose, my lord, that instead of a brutish mob, I had got a mere brute, a fierce dog, and hallooed him at a gentleman without provocation, and this gentleman had leaped into a river to escape from the dog, and was drowned; and if it had appeared I had hallooed this dog in order to wound, hurt, or frighten him into this distress, am not I the cause, and guilty of all the distress the dog frightened him into, and guilt of this murder? And, though the dog did not come so near as to bite him, and that he rather chose to leap into the river and be drowned, than be mangled by this dog, I con-

ceive it would be a case of murder, and that it would be so. I put another case: Suppose a man designedly had scared another man's horse with an intention that he should do some mischief to the man that rode him; the rider is thrown upon this, though the man never meddles with him, only scares his horse; if he breaks his neck in the fall, is not that murder? I must humbly insist upon it that it is, because the law will not permit any one, either by himself, or others by his procurement, to do any act, whereby another's property or his life may be in danger or destroyed. Why then, I apprehend, that if my lord Anglesea had ordered the men to pursue in such a manner, that they had affrighted this gentleman's horse, and that he was unruly, and he had broke his neck, I look upon it that that was a determinate murder in lord Anglesea. If in point of reason, what I have mentioned has not the weight that I proposed by it, to prove that this was an assault in consideration of the law, as much as if my lord had with his own hand broke his head; I will put your lordship in mind of a determined case, that comes up to the point in question, and is this: there was a man confined above stairs in a castle; another man below sends armed men up in order to murder him; they get into the door, and run up the castle stairs. As he found them coming up, the man had not resolution to stand; he thought he might have some prospect of escaping, by leaping down from the top of the castle; he leaped down from the battlements, and it so happened that he broke his neck and died: and in that case I recollect, upon the determination of the judges, there was no doubt but that it was clearly murder in the man that commanded them, as well as in those, who by their appearance of violence, occasioned him to leap down. Here, my lord, there was no stroke given, no man came near him, they had not got up to the place where he was; however, the man not being of resolution strong enough to wait their cutting his throat, he chose to leap down, and by that lost his life. Here was no election left to Mr. Annesley, he was thrown down by his horse. If a man lets loose a mad bull, knowing him to be so, with intent only to frighten people, it is murder in him if any body is killed. Now, my lord, as I have mentioned some cases, which I conceive would be held to be murder, if they were to be determined by your lordship; and, as I have mentioned others upon my memory, which have been so determined, and that would make this fact, had this gentleman died, murder in lord Anglesea; I am at a loss in recalling any distinction taken in our law-books, that any fact, which would be murder in case the person died, shall be extenuated, and said not to be an assault in case he survived it. I know the law is quite the contrary, and takes large strides in matters of assault to come at offenders, to protect the public peace, when it will not go so far as to take away the life of a man upon a capital prosecution. I shall only trouble you with this fur-

ther; that there can be no doubt but that lord Anglesea gave the directions I have mentioned; desired them to go and tear him in pieces; it is as certain that people did go and pursue; and it is to be left in the breast of the jury, whether that pursuit was in consequence of my lord's directions, or not; and whether it is so natural to believe that this crowd of people, who don't appear to be any way concerned, or to have any ill will towards Mr. Annesley, would have pursued and galloped after him, who was galloping away to save his life, had it not been in pursuance of my lord's commands, who had such influence on them. This is to be left to the consideration of the jury, and I apprehend you will be pleased, when all the words and circumstances attending this public affray is taken into your consideration, from the beginning to the end, to direct the jury to find my lord guilty of the assault against Mr. Annesley, as he not only directed it, but approved of it, when done; nor can he complain of it as a rigour in the law to charge him with an assault, where his directions amounted to a crime of murder.

Court. Gentlemen of the jury, this case, upon the evidence, stands thus: Mr. Annesley is already gone off the sod by the prudent advice of Mr. Mac Kercher; he goes away after Mr. Mac Kercher had given him this advice, and before the words are uttered, by my lord, which it is insisted upon is a foundation for the jury to find the traversers guilty of the indictment for assaulting Mr. Annesley. You must observe, gentlemen, Mr. Annesley is not driven off the ground; he is prudently gone already: upon which intelligence, lord Anglesea does most improperly, and in a manner that the Court will consider when they come to pronounce their judgment, call aloud and say, Follow him, and knock his brains out. The material evidence to what happened to Mr. Annesley, after he was thus gone off the field, was Mr. Archbold, who was several times asked, I asked him myself no less than three times, Did any of the people that you saw follow, in pursuance of and under the influence of that direction given by my lord Anglesea, strike him? He did not say they did. And when he was asked, if they pursued Mr. Annesley by my lord's directions, or for what other purpose, he could not account for that; he said, some might, and some might not; some might follow him out of curiosity, and others not, so far as he could judge. There does not appear after this any blow given; there does not appear any actual attempt, upon the evidence, or any actual blow by any man to Mr. Annesley in the ditch. Nothing appears, but that several people, some out of curiosity, and some with different intentions, rode after him, who is already gone, and not forced to go. He goes off the field by advice from his friend, he is followed, after he is gone, by these people, he apprehends he is pursued by them with an evil intent, he turns about to face them and defend

himself, and in the turn his horse throws him into the ditch, upon which he lay senseless, and no person whatever attempts to hurt him: this, I say, is the evidence; and I can't persuade myself to direct the jury, that any of the traversers are guilty of assaulting him.—As to the other indictment for the assault of Mr. Mac Kercher, if I err in point of law, I have the assistance of a gentleman, who can and will set me right. Upon the other indictment, in which lord Anglesea, Mr. Francis Annesley, and Mr. Jans, stand indicted for assaulting Mr. Mac Kercher, the jury have already disposed of two of them, my lord Anglesea and Mr. Jans. As to Mr. Francis Annesley, it stands proved by the testimony of Mr. Mac Kercher, Mr. Kennedy, and Mr. Goostry, that he did without any legal provocation strike Mr. Mac Kercher with the butt-end of his whip upon his forehead; upon which blood came, and there has been no evidence given to contradict that; so that I do apprehend Mr. Annesley is guilty of assaulting Mr. Mac Kercher.

Mr. Attorney General. I concur in opinion, as to that point, with Mr. Baron Mounteney; and as to the indictment for the assault on Mr. Annesley, I also think the traversers are not guilty. He gallops off the field, and is accidentally thrown by his horse into a ditch. The accident happened in the flight; the flight was not in consequence of the words that lord Anglesea said, but by the advice of Mr. Mac Kercher; but yet, if in consequence of those words, supposing the parties did pursue, and that there was a fall; yet if it was no more than a hurt by the fall, it does not come within the consideration of the law to be an assault.

The Jury go to find whether Mr. Francis Annesley is guilty of an assault upon Mr. Mac Kercher. Also, the Jury go to find whether lord Anglesea, Mr. Francis Annesley, and Mr. Jans, are guilty of the assault upon James Annesley, esq. and find Mr. Francis Annesley, guilty of the assault on Mr. Mac Kercher. And lord Anglesea, Mr. Francis Annesley, and Mr. Jans, Not Guilty of the assault on James Annesley, esq.

Cl. of the Cr. Neile O'Neile, call your security; you must give bail, or stand committed for a charge of perjury.

Neile O'Neile giving no security, was committed.

Saturday, August 4.

A bill of indictment for perjury is found by the grand jury against Neile O'Neile, which is read by the Clerk of the Crown.

Cl. of the Cr. Do you submit to your traverser or not?—*Neile O'Neile.* Traverse.

Cl. of the Cr. How will you be tried?

Neile O'Neile. I am not ready for my trial at present, for it is too sudden upon me.

Att. Gen. I don't see what defence the man

can make; but however the rule of law must prevail.

Mr. Baron Mounteney comes into Court.

Mr. Mac Manus. I hope your lordship will think that there is a necessity for a speedy execution of justice in crimes of this nature, that a man so dangerous to the public should be removed from the society of mankind as speedily as possible. No man's life or property is, or can be safe but upon the due observation of oaths; when these are violated, a quick execution of the law should follow for the sake of the public. I hope therefore we shall be permitted to go to trial for this perjury, committed in the face of the Court; but if you don't try it this assizes, this man must go unpunished. My lord, captain Livingstone, a material witness, had the honour, about two years ago, to be sent from the province of South Carolina with a petition from that province to his majesty, and, as he thinks his solicitations in regard to that petition are now at an end, he verily believes that he shall be obliged to set out for South Carolina before the next assizes for this county; so that we cannot promise ourselves to have him here at the next assizes, and it would be a hardship to have him bound over to prosecute, when he is obliged to go on his majesty's commands. My lord, this is a recent case, a wilful perjury acted openly last night before your lordship, which ought to be instantly punished: I humbly therefore hope your lordship will bring on this trial at this time, considering the many and great inconveniences that must attend the putting it off, that so flagrant a perjurer may be brought to justice.

Mr. Moreton enforces this with the case of the king against Davis at the assizes at Maryborough some years ago, where Davis was convicted, and a bill of indictment being sent up, and found against the witness (a brogue-maker) for perjury, the Court would not put it off, but pilloried him that very day.

Court. I understand this matter has been ruled already.

Mr. Mac Manus. Here is an affidavit of capt. Livingstone's, which we desire may be read.

Court. I do think when a man is indicted on the last day of the assizes, and desires time, he has a right to traverse.

Mr. Moreton. I hope the Court will make O'Neile give good security.

Court. Indeed he shall.

Court. Mr. Mac Kercher, I desire to be informed whether you design to bring any action to recover damages for this assault?

Mr. Mac Kercher. We do not, my lord; we prosecute for public justice, for the safety of our own and Mr. Annesley's life.

Court. Mr. Kennedy, do you design to bring any action to recover damages for the assault?

Mr. Kennedy. I do not, my lord.

Court. My lord, the concern I am under is very great to see your lordship here as an offender against the law; and it is extremely more so that it falls to my lot to punish your lordship for that offence. Your lordship has been found guilty of an assault, and before I mention the judgment of the Court, it will be necessary to remind your lordship of some circumstances appearing upon the evidence attending this fact, which greatly aggravate it. It appears, to the satisfaction of the Court, that the persons assaulted by you and Mr. Jans gave no provocation, had not struck or attempted to strike; and it appears upon the evidence of one of the witnesses, that not so much as one word had passed between your lordship and them. This circumstance is a great aggravation of the assault. My lord, your quality likewise greatly aggravates the offence; you have the honour to be a peer of England, as well as of this kingdom; and that quality calls upon you to set an example of obedience to the king's laws. The place where this accident happened, is another grand aggravation of the offence; it was done at a public meeting of gentlemen on the Curragh, in the presence of great numbers, to whom such a behaviour in a person of your dignity and station of life, must be of a very bad example; the prevention of which is the thing principally regarded by the law. A number of people there, by your lordship's example, might be led to take part on the one side or the other; and if they had done so, it is to be feared that there might have been more fatal consequences. It is with great concern I mention this, but such was the evidence, and I cannot doubt but that your lordship will be thoroughly persuaded, as I am satisfied every body else will, that the Court exercises their discretion with tenderness, when they pro-

nonnce the judgment, that a fine of 30*l.* only is imposed on your lordship for assaulting Mr. Kennedy, and you are fined accordingly in the sum of 30*l.* for that assault.

Mr. Francis Annesley, you likewise have been found guilty of an assault on Mr. Mac Kercher; great part of what I have mentioned to my lord Anglesea will be applicable in your case; you being a gentleman of fortune and character in your country, the people expect, and will take example from you. It appears, upon evidence, that a gentleman was assaulted by you, who had not assaulted you; and I must say this in justice to the prosecutor, that there was no reason to strike any body for the words which were said by the prosecutor; and though the words did pass in your hearing, yet they were but words; and words the law does not consider as a provocation sufficient for an assault. Besides, they did not pass till after very opprobrious language had been given. It also appears, that this blow given by you, was the first blow given in that action, and that blow occasioned all the rest which were given. That is the aggravating circumstance, which makes it necessary for the Court to lay a pretty smart fine upon you; but they are pleased to mitigate the severity of the law, and go no farther than to fine you in the sum of 20*l.*—Mr. Jans stands guilty of assaulting Mr. Kennedy, for which he is fined in the sum of 10*l.*—This assault of Mr. Mac Kercher, my lord Anglesea has likewise been found guilty of, and a fine of five marks is laid on him for that offence.—And on Mr. Jans, who is likewise guilty of assaulting the same gentleman, one mark.

I think I have disposed of all of them but the first indictment for the assault on Mr. Goostry, for which lord Anglesea is fined sixpence.

506. The Trial of WILLIAM CHETWYND, esq. for the Murder of Mr. Thomas Ricketts, before the Right Hon. Robert Willmot, esq. Lord Mayor of the City of London, the Right Hon. the Lord Chief Justice Lee, the Hon. Mr. Baron Reynolds, Mr. Serjeant Urlin Recorder, and others his Majesty's Justices of Oyer and Terminer for the City of London, and Justices of Gaol Delivery of Newgate, holden at the Old-Bailey for the said City and County of Middlesex, the 12th, 13th, 14th, and 17th of October: 17 GEORGE II. A. D. 1743.

Counsel for the Crown.—Mr. Serj. Wynne; Mr. Moreton, afterwards Recorder of London; Mr. Erskine; and Mr. Purcas.

Counsel for the Prisoner.—Mr. (afterwards sir Richard) Lloyd; Mr. (afterwards Mr. Baron) Legge; Mr. Hume Campbell; Mr. Hatsell; Mr. Stracey, afterwards Recorder of London.

VOL. XVIII.

WILLIAM CHETWYND was indicted at common law for the Murder of Thomas Ricketts.

He was likewise indicted on the statute of stabbing by the name of William Chetwynd, of the parish of St. Ann, Westminster, in the county of Middlesex, gent. for that he not hav-

U

ing God before his eyes, &c. on the 26th day of September, in the 17th year of his majesty's reign, with force and arms, in the said parish, and the said county, in and upon Thomas Ricketts, in the peace of God, and our lord the king, then and there being, feloniously did make an assault; and with a certain knife made of iron and steel, of the value of 6d., which he, the said William Chetwynd, then and there had, and held in his left hand; him, the said Thomas Ricketts, in and upon the right side of the belly of him, the said Thomas, below the navel of him, the said Thomas, then and there feloniously, and in the fury of his mind did strike and stab (he the said Thomas Ricketts then and there not having any weapon drawn, nor the said Thomas Ricketts then and there having first stricken the said William Chetwynd,) and that the said William Chetwynd, with the knife aforesaid, did then and there give to the said Thomas Ricketts in and upon the right side of the belly of him, the said Thomas, below the navel of him, the said Thomas, one mortal wound, of the breadth of half an inch, and of the depth of three inches, of which mortal wound the said Thomas, at the parish aforesaid, and county aforesaid, from the said 26th day of September until the 29th of the said month of September, did languish, and languishing did live; upon which said 29th day of September, the aforesaid Thomas Ricketts, in the said parish, and the said county, of the said mortal wound did die; and so the jurors aforesaid do say, that the aforesaid William Chetwynd the aforesaid Thomas Ricketts feloniously, and in the fury of his mind, did kill and slay, against the peace of our lord the king, his crown and dignity.

He was a third time indicted on the coroner's inquisition, for feloniously slaying the said Thomas Ricketts.

MIDDLESEX JURY.

Allen Evans,	Jonathan Alderton,
Samuel Bowler,	Peter Archambo,
Charles Carleton,	John Archambo,
Francis How,	Benjamin Tickner,
Benjamin Ingram,	John Holmes,
Jacob Lebat,	Thomas Hogg.

The Counsel for the Prisoner desired, that as the prisoner had the misfortune to be extremely deaf, he might have the liberty of standing at the inner bar; which the Court readily granted.

The Counsel for the Prosecution having opened the several indictments, and set forth the circumstances relating to the fact, they proceeded to examine their witnesses.

Master William Hamilton sworn.

Counsel. I think you are one of the young gentlemen who boarded at Mr. Clare's academy in Soho-square?—*Hamilton.* Yes, I am.

Were you boarded there last September?—*Yes.*

Was the prisoner at the bar at board there then?—*Yes.*

Do you remember one Mr. Thomas Ricketts being there?—*Yes,* I was present when the prisoner and Mr. Ricketts were together in the room.

What time was it?—*It was on the 26th of September.*

Who was in the room when you went in?—*There was one Samuel Malcher, Thomas Ricketts, and Mr. Chetwynd; they were the only persons in the room.*

What was the conversation turning upon? What were they talking about, when you came into the room?—*Mr. Chetwynd had got some cake, and Mr. Thomas Ricketts desired Mr. Chetwynd to give him a piece of his cake; Chetwynd denied it him; I asked him for a piece, and he likewise denied it me.*

What happened then?—*Hannah Humphreys came into the room about that time. Mr. Chetwynd took the cake, and cut a piece off, and laid the piece upon the bureau, and locked the other up; with that Mr. Ricketts came and took the piece of cake off the bureau; Mr. Chetwynd asked him for it; and Mr. Ricketts laughing, went up to the maid, and told her, he had taken a piece of Mr. Chetwynd's cake; with that, Mr. Chetwynd came up to him, and demanded it of him again.*

Did Mr. Ricketts deliver it to him again?—*No.*

Did Mr. Ricketts refuse to deliver it?—*Mr. Ricketts did not refuse to deliver it.*

What answer did Mr. Ricketts give Mr. Chetwynd, when he asked him for the cake again?—*He gave him no answer, but continued laughing.*

You mean he was laughing with you, not laughing at the prisoner.

Prisoner's Counsel. That is nice indeed!

Prosecutor's Counsel. What happened next after this?—*Hamilton.* After Mr. Chetwynd demanded the cake, and Mr. Ricketts giving him no answer, he struck him immediately with the knife, which he had in his hand.

Was it back-handed?—*It was back-handed.*

Jury. I desire he may speak a little louder; Was Ricketts behind him when he struck him with the knife?—*Mr. Ricketts's side was to Mr. Chetwynd's. He was standing by his side.*

How near were you to them?—*Not very near.*

Where did you stand?—*I stood a little way before them.*

Where was this blow given?—*Just here—about upon the side (pointing to the right side of the belly.)*

Did you see him pull the knife out?—*I did not see him pull it out.*

How do you know it was a knife that he struck him with?—*Because it was the same knife that he cut the cake with.*

What followed upon that?—*Mr. Ricketts cried out he was afraid he was stabbed.*

Did Mr. Ricketts fall down?—*No; he laid his hand upon his side, and said he was stabbed.*

What sort of a room is it?—It is a pretty large room.

What part of the room did the scrutoire stand in?—It stood in the corner of the room by the window; the window and the scrutoire were on the same side.

What kind of a knife was this?—It was a sort of a French knife.

Was it a penknife? or what knife was it?—It was a pretty large knife.

Was it a clasp knife?—Yes.

Did you see Chetwynd cut the piece of cake?—No.

Court. Did you see the deceased take it away?—Yes.

Did Chetwynd see him take it away?—I cannot tell that.

The counsel for the prosecution having done with this witness, he was examined on behalf of the prisoner.

Prisoner's Counsel. Mr. Hamilton, if I understand you right, the deceased and you asked Mr. Chetwynd for a piece of cake, and Chetwynd refused it?—*Hamilton.* Yes.

So he was not willing to give either of you any?—No, he was not.

I think you said Mr. Chetwynd took the knife out of his pocket?—I said he cut a piece of cake; I did not say he took the knife out of his pocket.

I think it was a cake that they call a simnel; was it not?—Yes, it was.

I think they are very hard, with a crust on the outside, and difficult to be cut?—It was pretty hard.

Then that may possibly require more strength than he had in one hand, to cut it; he cut it down, did not he?—I did not see him cut it.

You said he took his knife and cut it?—Yes he did cut it.

Then tell me whether or no (I am sure I will do fairly, God forbid that I should do otherwise) Mr. Chetwynd did not refuse to give any of the cake to Mr. Ricketts?—Yes, he did refuse it.

Whom did he cut the cake for? was it not for himself?—I believe it was.

Then he did not cut it for any body else; I think you said, he laughingly told the maid he had got it?—Yes.

And upon that Mr. Chetwynd demanded it from him again, and he laughed, but did not deliver it?—He made him no answer, but did not deliver it.

Did he ask him to give it him again before this unhappy accident happened?—Yes, he did.

Pray tell me whether he did not, besides his laughing, endeavour to keep the cake from him?—I did not observe that.

Please to tell me, whether, as you were schoolfellows together, you were not all good friends?—Yes, we were.

Which of the two was biggest?—Ricketts was larger than Chetwynd.

I am obliged to the gentlemen on the other side, for intimating that Mr. Chetwynd gave

Mr. Ricketts a piece of cake before; I would ask you whether Mr. Chetwynd did not give Mr. Ricketts a piece that morning?—I heard he did.

How long was that before this thing happened?—I do not know how long it was. This happened about one o'clock.

When this unfortunate thing happened, what did Mr. Chetwynd say immediately upon it?—Really, I do not know.

I think, Sir, you were telling the Court of a French knife; I own I do not know what they are; but the question I would ask you, is, whether most of you young gentlemen do not carry these knives in your pockets?—I have heard so; it was a knife that he always had.

And I suppose many of you had such knives?—I cannot tell as to that, Sir.

I am obliged to you for the candour you have used in your evidence; I have no more questions to ask you.

Court. Can you recollect, how these young gentlemen lived together, whether there was any ill-will between them, or whether they lived in a friendly manner?

Hamilton. I think they lived as the other scholars did.

Court. Do you apprehend there was any malice between them?

Hamilton. I never knew of any malice between them.

Court. How did the young gentleman behave after he had given that wound?

Hamilton. I did not see him afterwards.

Master Samuel Malcher sworn.

Court. How old are you?

Malcher. I am thirteen next January.

The Court asked Malcher what he thought would become of him, if he did not speak the truth? To which he replied, he should be unhappy everlastingly.

Court. Were you present at this unhappy affair?—*Malcher.* Yes.

Counsel. Then give us an account of what you heard, and what you saw.—Mr. Ricketts asked Mr. Chetwynd for a piece of his cake, and Mr. Chetwynd gave him a piece; he asked him for another piece, and he refused it him.

How long was that after he had given him the first piece?—It was about a quarter of an hour; and after he had refused it him, he went out of the room, with the cake under his arm, and then came into the room again.

What room was it?—It was the room where Mr. Chetwynd lay.

What room did he go into, when he went out of his own room, after his refusing him the cake?—He did not go into any room; he only went out of the room to the head of the staircase, and then came in again.

Did he open the bureau then, or was it open before?—I cannot justly recollect that.

You say he had the cake with him?—Yes.

What did he cut it upon?—He cut it upon the bureau.

You say he cut a piece, what did he do with it?—He laid it down upon the bureau, and Ricketts came and took it—snatched it away.

Did Chetwynd see him take it away?—I cannot tell whether he did or no.

Court. How did Chetwynd stand?

Malcher. He had his back to Ricketts.

Court. Where did the cake lie?

Malcher. The cake was before Chetwynd, and Ricketts put his hand beside him, and took it away, and then he went to the window.

Counsel. Where did he carry it?

Malcher. He went to the second window with it.

How far was that from the bureau?—I believe about a yard.

What did he do after that?—Mr. Chetwynd came and stabbed him.

In how long time was that after he took the cake?—I believe it was a minute.

Was it so long as a minute?—I do not know whether it was quite so long as a minute, or not, it was but a very little time.

Did Chetwynd ask for his cake?—I was not near enough to hear it; I was at my box, at the other end of the room.

Is it a small room?—It is not a very large room.

What happened after that?—Mr. Ricketts told the maid he was stabbed, and then he went down stairs.

Was Hannah Humphreys in the room?—Yes.

What did she say?—She said, he was stabbed.

What was said or done afterwards?—Really I do not know.

Had Ricketts any thing in his hand?—He had nothing in his hand that I saw; nor said any thing to provoke him, as I heard.

[Cross-examination by the Prisoner's Counsel.]

Counsel. You were present at the beginning of this transaction, were you not?

Malcher. Yes.

Were you present before Mr. Hamilton came up?—Yes, Sir.

When Mr. Ricketts had the piece of cake given him, that was before Mr. Hamilton came up, was it not?—Mr. Hamilton did not see him give it him.

They were good friends before this, were they not?—I think so, they used to be so.

When Ricketts asked him for the second piece of cake, was not he teasing of him?—No, he teased him about the first; and then he went out of the room, and Ricketts followed him.

You say, Mr. Chetwynd carried the cake under his arm out of the room, and Ricketts followed him; and then Chetwynd came into the room again, and Ricketts followed him still, did not he?—Yes.

Then he came to his bureau, Ricketts following of him still?—Yes; and then I saw Mr. Ricketts take the piece of cake up, which Mr. Chetwynd had laid upon his bureau.

Then Mr. Chetwynd turned about to ask for his cake again?—I did not hear him ask for it.

He went after him, did not he?—Yes.

Was it not for his cake?—I cannot tell.

Did Ricketts shove him?—Not that I saw.

When Ricketts took the cake from Chetwynd, had Chetwynd his back towards him?—Yes.

Did Ricketts reach over his shoulder, or take it under his arm?—He went under his arm, and took the cake.

Did he touch him?—I cannot tell that.

You say immediately upon that he went to the window, how far was that from the bureau?—About a yard or two.

Pray, now, when Chetwynd went to cut the cake (you were there all the while), did Ricketts offer to assist him in it, did he offer to lend him a knife?—Yes, he did, and had it open.

What did Chetwynd say then?—Chetwynd said, he had a knife of his own.

Pray, had Ricketts a knife in his hand?—Yes, he had a knife, and offered to lend it Mr. Chetwynd.

Prosecutor's Counsel. I should be glad to know whether he did not put that knife into his pocket again?

Malcher. I do not know that he did.

Here is a question misunderstood I believe; did the knife that you speak of belong to Mr. Chetwynd, or to Mr. Ricketts?—The knife belonged to Mr. Ricketts.

Prisoner's Counsel. That is a fair answer to the question.

Court. Ricketts's knife was opened before Chetwynd's; were both the knives open at the time this unhappy accident happened?

Malcher. Mr. Chetwynd's knife was not opened when Mr. Ricketts offered him his knife; but he refused it, and said he had one of his own.

Court. Was Ricketts's knife open then?

Malcher. Yes.

Court. Were they both open when the accident happened?

Malcher. No, Ricketts's was clasped, and put into his pocket, on Mr. Chetwynd's refusing it, and before the cake was cut and put upon the bureau.

Court. Then you saw him clasp his knife when Chetwynd refused it, and put it into his pocket?

Malcher. Yes.

Court. And this was before this wound was given?

Malcher. Yes.

Prosecutor's Counsel. Was it before the cake was cut and laid upon the bureau?

Malcher. Yes, it was.

Hannah Humphreys sworn.

Counsel. Pray give us an account what you know of this unhappy affair.

Humphreys. The young gentlemen were in the dining-room, and I was in the next room; I heard a noise, upon which I went into the dining-room and asked them what they did

there, and what was the matter they were not in their own rooms; Mr. Ricketts made answer, that he wanted a piece of cake of Mr. Chetwynd; I said to Mr. Ricketts, Have not you had a piece? He said No, and smiled. I looked at Mr. Ricketts, and said, I believed he had had some, for he had some crumbs of cake upon his lips; Mr. Ricketts smiled again, and said he wanted another piece, or a bigger piece.

Where was Mr. Chetwynd then?—Mr. Chetwynd at that time was at his own bureau, cutting his cake.

How far was Mr. Ricketts off the bureau?—He was as near as I can guess about two yards from the bureau; Mr. Ricketts went up to the bureau to Mr. Chetwynd, and Mr. Chetwynd lifts up his arms, and says, Don't, Mr. Ricketts; and Mr. Ricketts then took the cake.

Court. Mention in what manner he took it.

Humphreys. I think, to the best of my knowledge, it was over Mr. Chetwynd's shoulder.

Counsel. Where did you stand at that time?

Humphreys. I stood at the corner of the middle window, and Mr. Ricketts almost faced me, not quite, but was a little sideways of me.

Court. Had Mr. Ricketts the cake in his hand?

Humphreys. He had the cake in his hand.

Court. How far were you off the bureau then?

Humphreys. I was then from the bureau about three yards, and Mr. Ricketts came up to me, and said, Hannah, I have got some cake. (I had a stocking in my hand which I was darning.) Upon Mr. Ricketts's saying he had got some cake, Mr. Chetwynd came from his bureau to my right-hand, and in a very short time Mr. Ricketts said, Hannah, Mr. Chetwynd has stabbed me. I looked at him.

Prosecutor's Counsel. Did you see Mr. Chetwynd come from the bureau?

Humphreys. Yes.

Where did Mr. Ricketts stand?—Mr. Ricketts stood just by me.

Now tell us whether you saw this stab given?—I did not see it given.

Did you observe that Mr. Ricketts had any thing in his hand?—He had nothing in his hand but a bit of cake.

Did you observe that Mr. Ricketts had struck Mr. Chetwynd?—No, he had not struck him, and was not seemingly in any anger.

You say that at this time Mr. Chetwynd came up and stabbed Mr. Ricketts?

Prisoner's Counsel. No, that is not right.

Court. She said Mr. Ricketts told her so.

Prisoner's Counsel. I do not doubt your candour, but you are mistaken in the evidence; repeat it again.

Humphreys. I saw Mr. Ricketts come from the scrutoire, and he said, Mr. Chetwynd has stabbed me. Says I, Mr. Ricketts, you joke. Mr. Ricketts had put his hand to his side: I bid him take his hand away, and then I saw a little blood; Mr. Chetwynd, said I, you have done very well. Mr. Chetwynd said, Hannah, if I have hurt him, I am sorry for it.

Prosecutor's Counsel. Did you observe who were in the room?

Humphreys. I saw Mr. Hamilton, Mr. Ricketts, and Mr. Chetwynd.

Court. Did you hear Chetwynd ask Ricketts for his piece of cake?

Humphreys. I did not hear him.

Counsel. What became of Mr. Chetwynd after that? where did he go?

Humphreys. He went out of the room.

How long did he continue in the house?—He continued in the house till Tuesday morning.

That was the next morning; did he give any notice of his going away?—I cannot tell that.

[Counsel for the Prisoner on the cross-examination.]

Counsel. Tell us where this room was, where you heard the noise before you went to them.—Humphreys. It was on the same floor.

Did you hear any rustling of feet, or only their tongues?—It was only their tongues; it is my customary way when I hear any noise among the young gentlemen to go to them, in order to persuade them to be quiet.

Where was Mr. Chetwynd when you came into the room?—Mr. Chetwynd was at his bureau, and Mr. Ricketts was standing in the room, and he said he wanted a piece of cake of Mr. Chetwynd.

Was this Mr. Ricketts's room?—No, Mr. Ricketts had a room up another pair of stairs.

Then he was got into Mr. Chetwynd's room, which was the occasion of your asking him what he did there?—Yes, it was the room where Mr. Chetwynd lay; he had not a room to himself.

Was there any conversation about the cake, or any asking for cake before you went into the room?—I do not know, he only said he wanted another piece of Mr. Chetwynd's cake.

Was Mr. Chetwynd's back toward you?—Yes.

Then consequently it must be to Mr. Ricketts?—Yes, Mr. Chetwynd put out his arms a little to keep Ricketts from the cake. It was but a very little way then, extending his arms a little from his body, and raising them up, and Mr. Chetwynd said, Don't, Mr. Ricketts.

Did you observe Mr. Ricketts then offer to take the cake, or to touch Mr. Chetwynd?—I only observed him to take the cake.

But did you see him touch him?—I did not see him touch him.

That is very odd, because putting out his arm, and saying Don't, shews as if he had done something.—He might touch his clothes, when he took away the cake.

Was not he taller than Mr. Chetwynd?—He was a great deal taller than Mr. Chetwynd, he might for his height reach over Mr. Chetwynd, and take the cake.

Could he take it over his shoulder, or over his head without touching him?—Over his

shoulder he might do it without touching him.

Did he take the cake over his shoulder or over his head?—I think it was over his shoulder.

Did not Mr. Ricketts laugh when he had got the cake?—Mr. Ricketts came away laughing, and said, he had got a bit more cake.

Was there any motion or action between them before this thing happened?—There was not any motion or action at all that I saw before this happened.

Did you stand facing the bureau?—The bureau was behind my back, and Mr. Ricketts stood facing me, as I stood sideways to the window, with my work in my hand, and Mr. Chetwynd was by my right hand, we all three in a manner touched one another.

How could this be done without your seeing it?—I did not see it done.

And then the first thing you heard was, that he was stabbed?—That was what Mr. Ricketts said.

And you at that time did not believe it?—No, I did not believe it; for when Mr. Ricketts said he was stabbed, I lifted my eyes off my work, and said, Mr. Ricketts, you joke.

Was there any blow given?—I believe there was no blow; I did not see any; I did not at first believe that there was a wound.

As you did not believe it, it is plain that Mr. Chetwynd did not believe it; for he said, If I have hurt Mr. Ricketts, I am sorry for it. Did he look to have anger in his countenance?—No; he looked with concern; and said, Hannah, if I have hurt Mr. Ricketts, I am sorry for it.

Mr. Beeston Long sworn.

Prosecutor's Counsel. Pray, Mr. Long, inform the Court what discourse passed between you and the deceased, after he had received the wound.

Mr. Long. I came to town on Monday night, the 26th of September, and found a letter from Mr. Clare; wherein he acquainted me, that Mr. Ricketts had met with an untoward accident, and had received a wound from a young gentleman in the house, but that he thought there was then no danger; this letter having been wrote in the morning, I enquired if there had been any subsequent message from Mr. Clare; I was told there had not: I did not go to Mr. Ricketts that night, not thinking there was any occasion for so doing; but in the morning, I determined to take the advice of Mr. St. Hill, who being a gentleman very eminent in his profession, we always take his opinion, when any accident happens to the young gentlemen under our care: I wrote a letter to him, and desired he would meet me at the academy that day [that was on Tuesday,] which he did; and I found there Mr. Shipton and Mr. Middleton, who had likewise been called in; these three gentlemen, with Mr. Mac Cullock, the surgeon of the house, viewed Mr. Ricketts's wound, and thought him

in very great danger; they continued attending him till Thursday morning the 29th, when he died.

What account did Mr. Ricketts give you of the occasion of this accident?—Mr. Ricketts told me, that on the Monday, about noon, he was sent to call Mr. Chetwynd to supper, and found him in the dining-room, with a cake, of which he asked him for a piece, which he gave him; that he then asked Mr. Chetwynd for another piece, which he refused; and cut a piece of the cake, and laid it upon his bureau, which stood at the end of the room; Mr. Ricketts, to tease Mr. Chetwynd, for having refused him, (but without any intention of eating or keeping it) took up the piece of cake, carried it to the middle window, and said to a maid, who stood there, Hannah, I have got a piece of cake; and he said that Mr. Chetwynd followed him, and immediately stabbed him in the belly.

Prisoner's Counsel. You said, you came to town that Monday, did you see Mr. Ricketts that day?

Mr. Long. I came to town that Monday night, and found a letter from Mr. Clare; I did not see Mr. Ricketts that day; for I did not apprehend there was so much danger, as I afterwards found there was.

How many surgeons had you?—There were four surgeons; three were called in; and there was Mr. Mac Cullock, the surgeon of the house.

I should be glad to know, whether Mr. Ricketts gave any account to you of any passage that happened immediately after the taking of the cake?—He said, that after he had taken the piece of cake, he carried it to the middle window, where the maid stood; and said, Hannah, I have got a piece of cake; and that Mr. Chetwynd came up to him, and stabbed him without speaking a word.

Without whose speaking a word?—Without Mr. Chetwynd's speaking a word.

Did you ask him in what manner he had lived with this young gentleman the prisoner, whether they did not live in friendship?—He said, he never had had any quarrel with him; and I have reason to think it to be true, because Mr. Ricketts was a lad of a remarkably good natured disposition.

Did you ask him any thing farther?—Mr. Ricketts was generally, when I saw him, in such extreme torment, that I did not care to trouble him with too many questions.

Did not he tell you he forgave him?—He did say that he forgave him.

Prosecutor's Counsel. Call Mr. St. Hill.

Prisoner's Counsel. There is no occasion for it.

Prosecutor's Counsel. The jury must have satisfaction, that the wound was the occasion of his death.

* As to dying declarations, see a Note to the Case of Reason and Tranter, vol. 16, p. 24.

Mr. Peter St. Hill sworn.

Prosecutor's Counsel. Pray, Sir, give the Court an account in what condition you found the deceased.

Mr. St. Hill. On Tuesday the 27th of last month I received a letter from Messrs. Drake and Long, desiring me to go to Mr. Clare's academy in Soho-square, to see a young gentleman that they had the care of, who the day before had been accidentally wounded: I met there Mr. Shipton, Mr. Middleton, and Mr. Mac Cullock; and by Mr. Mac Cullock's account of the wound, who first dressed him, and the symptoms that attended it, we had too much reason to fear that it had penetrated into the cavity of the belly, and that some of the viscera were wounded; for his belly was much swelled, and cross the upper part of it so very painful, as to deprive him of all rest, and his pulse was extremely quick, and contracted. The next day we met again—he had had a very unquiet night; his pulse was extremely quick and low; and though his belly was not so much swelled, yet his pain cross the upper part of it was more severe, and attended with a continual hiccup, and frequent bilious vomitings.

Pray, Sir, inform us, whether you think that wound was the occasion of his death? what depth was the wound of?—It is not easy to know the depth of a wound after it has penetrated into the cavity of the belly: But, upon the whole, I think we have given our opinion in such a manner, that nobody will doubt, but that the wound was the occasion of his death.

Then you do think that wound to be the occasion of his death?—I do think it to be the occasion of his death.

In what part was the wound given?—It was on the right side of the belly, two inches obliquely below the navel.

[A piece of the blade of the knife was produced, which was about three inches long, and sharp at the point.]

Counsel to Humphreys. Did you see the knife in Mr. Chetwynd's hand?

Humphreys. Yes.

What kind of a knife was it?—It was a knife with a long handle.

Was it a long blade?—It was such a blade as this; this is but a piece of it.

Counsel. It is a French couteau?

Prisoner's Counsel. It is no such thing, it is only a common French knife.

Mr. Peter Mac Cullock sworn.

Counsel. Mr. Mac Cullock, pray give an account how you found the deceased.

Mac Cullock. I was called at half an hour after one, on the Monday, to go to Mr. Clare's; when I came there, I asked to see the knife, and the knife was produced.

Q. Was it produced broke?

A. Yes, it was produced to me then broke, as it is now. I probed the wound; but did not find at that time, that it had penetrated into the

cavity of the belly; the deceased's pulse was extremely low, but I thought that was owing to the fright: I went the next day; and then upon searching the wound, I found it had penetrated into the cavity of the belly, and found it to be a very bad case; upon that Mr. Middleton was sent for; and after that Mr. St. Hill, and Mr. Shipton.

The Counsel for the Prisoner called no witnesses, admitting that the fact had been fairly laid before the Court by the evidence, and acknowledged the candour of the gentlemen concerned for the prosecution, in representing it to the jury without any aggravation; but insisted, on his behalf, that however his hand might have been unhappy, his heart was innocent; that this fact therefore could not amount to murder at common law, which the lord Coke defines to be an unlawful killing another man with malice afore-thought, either expressed by the party, or implied by the law; that in this case, there was not the least of that ingredient, their own evidence having shewed they were friends, friends to the last hour, friends to the dying hour; when the gentleman said, He forgave him. That it being proved there was a friendship subsisting, it would be talking against the sense of mankind, to say the law could imply any thing contrary to what is plainly proved. That deliberation and a cruelty of disposition makes the difference between manslaughter and murder. For which purpose *Holloway's Case (a)* was cited.

If A be passing the street, and B meeting him, takes the wall of A, and thereupon A kills

(a) N^o. 1. *HOLLOWAY'S CASE*, 4 Charles I.

Holloway was indicted for the Murder of one *Payne*. The indictment was, that he with malice forethought tied the said *Payne* to a horse's tail, and caused the horse to drag him on the ground three furlongs, whereby the shoulder of the said *Payne* was broke, whereof he instantly died. On Not Guilty pleaded, the jury found a special verdict, that the earl of Danby was seized in fee of *Osterley park* in *Middlesex*; and made the said *Holloway* woodward of the said park; and that the said *Payne*, with others unknown, entered the said park, to cut wood there; and that the said *Payne* climbed up a tree, and with an hatchet cut down some boughs thereof, and that *Holloway* came riding into the park, and seeing *Payne* on the tree commanded him to descend, and he descending from thence, *Holloway* struck him two blows upon the back with his cudgel; and *Payne* having a rope tied about his middle, and one end of the rope hanging down, *Holloway* tied the end of that rope to his horse's tail, and struck *Payne* two blows upon his back; whereupon the horse running away with him, drew him upon the ground three furlongs, and by this means brake his shoulder, whereof he instantly died; and *Holloway* took *Payne*, and threw him into a bush, behind the pales of the park. And whether upon all this matter found,

him, this is murder; but if B had jostled A, this jostling had been a provocation, and would have made it manslaughter, 1 Hale's Hist. Pl. Cr. 455.

If I see another's child beat, or wife debauched, it would be murder in me to kill the party, not so in the parent or husband.

A sudden challenge and fighting immediately, the challenge is held to be a sufficient provocation.

The law makes a difference between a person's killing another, when he is doing a lawful act, and when he is doing an unlawful act. If the master designeth moderate correction to his servant, and accordingly useth it, and the servant by some misfortune dieth thereof, this is not murder, but *per infortunium*; because the law alloweth him to use moderate correction, and therefore the deliberate purpose thereof is not *ex malitiâ præcogitatâ*.

But if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof; if it be done hastily, and without deliberation, this would be manslaughter; if done with deliberation and design, it would be murder, L. C. J. Hale in his Hist. Pl. Coron. p. 454.

Shall the young boy at the bar, who was doing a lawful act, be said to be guilty of murder? He was rescuing what was his own; the witnesses have told you, that after he had given the poor boy, Ricketts, a piece of cake, Ricketts went to him for more; he denied it him; he had a right to keep his cake, the other had no right to take it; and he had a right to retake it.

There are cases in the books which make a difference between murder and manslaughter: if a man takes (b) up a bar of iron and throws

the said Holloway be guilty of the murder, they pray the direction of the Court, &c.

This special verdict was removed by Certiorari into the King's-bench, and depended three terms: and the opinion of all the judges and barons was demanded, and they all (except Hutton, who doubted thereof) held clearly, that it was murder. For when the boy, who was cutting on the tree, came down from thence upon his command, and made no resistance, and he then struck him two blows, and tied him to the horse's tail, and then struck him again, whereupon the horse ran away, and he by that means was slain, the law implies malice, and it shall be said in law to be pre-pensed malice, he doing it to one who made no resistance. Whereupon he was adjudged to be hanged, and was hanged accordingly. Croke, Charles, 131. Palmer, 545. W. Jones, 198. *Former Edition*.

(b) N° II. At the Sessions in the Old-Bailey, Oct. 10, 1666.

John Grey being indicted for the murder of William Golding, the jury found a special verdict to this effect, viz. We find, that the day,

at another, it is murder; and the difference in the crime lies between a person's taking it up, and having it in his hand; Chetwynd had the knife in his hand, and upon that a provocation ensues, for he did not take the knife up; if he had, that might have shown an intention to do mischief. It may be doubted, whether or no, when he had this knife in his hand for a lawful purpose, and in an instant struck the other, whether he considered he had the knife in his hand; for if, in his passion, he intended to strike with his hand, and struck with the knife, not thinking it was in his hand, it is not striking with the knife.

That in respect to the statute of the first of James 1, (c) it had always been looked upon as a hard law, and construed therefore constantly very strictly by all the judges in favour

year, and place in the indictment mentioned, John Grey, the prisoner, was a blacksmith; and that William Golding, the person killed, was his servant; and that Grey, his master, commanded him to mend certain stamps, being part belonging to his trade, which he neglected to do; and the said Grey, his master, after coming in, asked him, the said Golding, why he had not done it; and then the said Grey told the said Golding, that if he would not serve him, he should serve in Bridewell; to which the said Golding replied, that he had as good serve in Bridewell, as serve the said Grey, his master; whereupon the said Grey, without any other provocation, struck the said Golding with a bar of iron, which the said Grey then had in his hand, upon which he and Golding were working at the anvil; and with the said blow he broke his skull, of which he died; and if this be murder, &c. This was held to be murder by all the judges of the King's-bench, with the concurrence of the lord chief-justice Bridgman. *Former Edition*.

(c) N° III. 1 Jac. c. 8. An Act to take away the Benefit of Clergy for some kind of Manslaughter.

To the end that stabbing and killing men on the sudden, done and committed by many inhumane and wicked persons, in the time of their rage, drunkenness, hidden displeasure, or other passion of mind, contrary to the commandment of Almighty God, and the common peace and tranquillity of this realm, may from henceforth be restrained through fear of due punishment to be inflicted on such cruel and bloody malefactors, who heretofore have been thereunto emboldened, by presuming on the benefit of clergy:

Be it therefore enacted, &c. That every person which shall stab or thrust any person, that hath not then any weapon drawn, or that hath not then first stricken the party which shall so stab or thrust, so as the person so stabbed or thrust, shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice forethought, yet the party so offending, and

of the prisoner. That when the facts amount only to manslaughter at common law, it has been the custom of the Courts * to acquit upon this statute.

That this act was made for a particular purpose:† On the union of the two kingdoms,

being thereof convicted, &c. shall suffer death, as in case of wilful murder.

Provided always, That this Act, or any thing therein contained, shall not extend to any person or persons which shall kill any person or persons *se defendendo*, or by misfortune, or in any other manner than as aforesaid; nor shall extend to any person or persons, which in keeping and preserving the peace, shall chance to commit manslaughter, so as the said manslaughter be not committed wittingly, willingly and of purpose, under pretext and colour of keeping the peace; nor shall extend to any person or persons, which in chastising or correcting his child or servant, shall besides his or their intent and purpose, chance to commit manslaughter. This act to continue until the end of the first session of the next parliament. 3 Car. c. 4, continued. *Former Edition.*

* At a meeting of all the judges, on Saturday, the 28th of April, 1666, at Serjeants-Inn, to consider of such things as might in point of law fall out in the trial of the lord Morley, who was on Monday to be tried by his peers for a murder; they were all of opinion, that the statute of 1 Jac. for stabbing a man not having first struck, nor having any weapon drawn, was only a declaration of the common-law, and made to prevent the inconveniencies of juries, who were apt to believe that to be a provocation to extenuate a murder, which in law was not. Kelyng, 54.

Mr. Lindon, who had been clerk of the indictments at Hicks's-hall a great many years, on being applied to on Mr. Chetwynd's Case, said that if a man was found guilty of manslaughter, on an indictment for murder at common-law, it was the custom, if he was indicted on the statute of stabbing likewise, to find him Not Guilty on that statute. Yet in December sessions 1700, John Cowland, gent. was tried for the murder of sir Andrew Slanning, bart. at the Rose tavern, in Drury-lane, on three indictments. 1. For murder at common-law. 2. On the statute of stabbing. 3. Upon the coroner's inquest for the murder of sir Andrew, when the jury acquitted him of the first indictment for murder at common law, and on the third for murder on the coroner's inquest, but found him guilty on the statute of stabbing; and he was executed at Tyburn, December 20, 1700. *Old Bailey Trials*, vol. 1, p. 21. *Former Edition.*

† This statute was enacted in the time of king James the 1st, when many animosities arose between the English and the Scotch, who using daggers were accustomed to stab many of the English, *ex improviso*, which could not have been done by a flat sword, the usual weapon of the English; therefore this statute

VOL. XVIII.

there were national factions and jealousies, when wicked persons, to conceal the malice lurking in their hearts, would suddenly stab others, and screen themselves from the law, by having the act looked upon as the result of an immediate quarrel.

That it was to be considered, whether there was not evidence to except this case from the letter of the law: at the beginning of the fray Ricketts had a knife in his hand; and it was one continued act. And another question was, whether there was not a struggle; here was the cake taken, and in endeavouring to get it again this accident happens; on the first taking of the cake, it is in evidence, that Chetwynd was forced to extend his arms to keep the other off; now there was no occasion for him to extend his arms, unless the other was coming to take it from him; and then a struggle is a blow. In Reneer's case, (cited in the king and Keite) Cymbal gave no stroke but in struggling, and yet it was adjudged but manslaughter in Reneer. Lord Raymond, 143.

If a man hath done a trespass, and is not continuing in it, and be that hath received the injury shall thereupon beat him to a degree of killing, this, saith the lord chief justice Holt (Kelyng 132) is murder. But this act of the deceased is a trespass, and the not restoring what he had taken was a continuing in the trespass, and is such a provocation as will make it manslaughter at common law. That this statute is not to be literally interpreted; for taking up a candlestick to throw at another has been judged a weapon drawn.

Mere stabbing is not within the act; when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter. 1 Vent. 158. Raymond, 213. Kelyng 137.

A man must intend to kill to be within the statute; and must intend to stab, for throwing a hammer is not within the act. Williams's case (d) cited in Kelyng 131.

was designed to secure defenceless people from surprize, supposing that whoever struck would be prepared. *Rex v. Keite*. Lord Raymond, 139. *Former Edition.*

(d) N^o IV. At the Sessions in the Old-Bailey, March 22, 1638.

David Williams was indicted specially upon the statute, 1 Jac. for the death of Francis Marbury; on which a special verdict was found, viz. That upon St. David's day the prisoner being a Welshman, had a leek in his hat; and that there was, at the same time, in waggery, a jack-a-lent in the street put up with a leek; and one Nicholas Redman a porter, said, Look at your countryman; and the prisoner being therewith enraged, threw an hammer at Redman, to the intent feloniously to hit him: but missing him, the hammer did hit Francis Marbury, whereof he died; and so the said David the said Francis with the said hammer did stab and thrust, the said

X

That some degree of malice is required in this case, as well as at common law: the act indeed has taken away the necessity of the proof of malice, and laid the negative upon the criminal, and here the negative is proved. The intent of the statute was to take away the benefit of the clergy from cruel and bloody-minded people; 'tis impossible to conceive, that the parliament would, at all events, condemn to death those who had no preconceived malice.

But the case most strongly insisted and relied on in behalf of the prisoner, was Buckner's case (c) on this statute, wherein the

Francis then not having any weapon drawn, nor then having first stricken the said David, it was resolved he was not within that statute, but guilty of manslaughter at common law. *W. Jones, 432. 1 Hale Hist. Pl. Cr. 469.*

This case, I fear, hath been the occasion of some mistake in the decision of questions of this kind: I concur with the judgment, that it is not within the statute of stabbing, for it is not such a weapon, or act, that is within that statute; neither could he be found guilty of murder, but only manslaughter, for the indictment was for no more. But if the indictment had been for murder, I do think that the Welshman ought to have been convicted thereof; for the provocation did not amount to that degree, as to excite him designedly to destroy the person that gave it him. Lord Chief Justice Holt, in *Mawgridge's Case*, vol. 17, p. 57. *Former Edition.*

(c) *N^o V. The PROTECTOR and BUCKNER.*
Mich. 1655. In the Upper Bench. Stiles Rep. 467.

Buckner was indicted upon the statute of 1 Jac. made against stabbing, at the Justice-hall in the Old-Bailey, for killing of Horwood; and upon the evidence given for the Protector, the jury found a special verdict, which was to this effect, viz. That Horwood and another man with him came into the lodging of Buckner, being in Drury-lane; and when they were come into the lodging, that other man took down a sword in the scabbard which hung there, and stood at the door of the chamber with this sword undrawn in his hand, and kept the door to keep Buckner from going out, till they might bring a bailiff to arrest Buckner for a debt which he owed Horwood; whereupon, upon some discourse between Buckner and Horwood, Buckner takes a dagger out of his pocket, and stabs Horwood, and kills him; and whether this was within the statute of stabbing was doubted by the jury. Upon which Buckner was committed to Newgate, and after the body and the cause was removed into this court by Habeas Corpus and Certiorari, and argued divers times at the bar, and at last on the bench:

And first Arthur Harris, of Lincoln's-inn, opened the record, and only put the question; and then, on the behalf of the prisoner it was moved, that he might have a copy of the re-

cord, and counsel assigned him, such as desired, which the Court granted; then it was prayed he might be bailed; but that the Court would not grant, but turned him over to the marshal, and gave a day for the Protector's counsel to be heard.

At which day Twisden, for the Protector, made this question, Whether Buckner was to have his clergy in this case, or were debarred by the statute or not? And he said, this question should not have been made by the jury as they have done upon the special verdict, but the Court ought to have made it; for the jury are only to proceed upon matter of fact, and not upon matter of law; and he argued, that he ought not to have his clergy, for the statute of 1 Jac. doth not create the offence, but leaves it to the common law, and only takes away the clergy from the party that commits it; and to prove this, 1. It is not within the words of the statute, and 2dly, It is not within the meaning of the statute, neither in its preamble, nor in the body, or in the proviso thereof; for Buckner was not first struck, nor had he a weapon drawn against him, although he was kept a prisoner in his chamber, which was not a considerable, but a slight provocation of him to move him to so foul a fact. And within the body of the act, there are no acts expressed, but having a weapon drawn against him or being first struck, and this enumeration of the acts excludes all other, as it is in the statute of fines, and in the statute which takes away clergy. Also the reason of law requires to allow the clergy to one that is first stricken: But here is no such reason, and the party might have had his remedy against Horwood, for coming into his chamber, and imprisoning of him, by an action of trespass; and the having a weapon drawn, was a reason for the other to defend himself.

Finch (Heneage) for the prisoner argued, that the prisoner was only guilty of felony at the common law, and is not within the statute, by which his clergy should be taken away. For first, the statute is to be literally interpreted, because it is made in restraint of the common law, and it was made only to prevent feuds betwixt the English and the Scottish nation, which were then apt to break forth, and the quarrel here was not a drunken and sudden quarrel, but acted upon deliberation, and here is an assault so great used against the prisoner, that it amounts to the striking of him, 45 E. 3, f. 41, 42. E. 3, f. 7. and the imprisonment of him is more than an assault, and here is found a forcible entry into his chamber, and the sending for a bailiff, and the standing at his chamber door with a sword in the party's hand, though not drawn, which is as much in effect as if it had been drawn; and 23 Car. the clergy was allowed to two persons that

The Counsel for the Crown, in reply to the arguments and cases instated upon on behalf of the prisoner, submitted to the Court, whether

aided and assisted a third person in stabbing of a fourth man, and that because the clergy shall not be taken away by intentions.

Glyn (chief-justice). The statute hath not been so favourably construed as hath been argued, for here is no stroke, nor weapon drawn for his present defence, as the statute intends; and stabbing with a tobacco-pipe, and with a halberd, hath been adjudged to be stabbing within the statute, and the statute doth not say being first assaulted, as this case is, but first stricken, and I conceive not that there are any words in the statute that will keep you out of it.—Day was given over to the next term.

At which day the special verdict was again repeated by serjeant Maynard, and by him it was argued for the prisoner, that he was not within the statute 1 Jac. of stabbing, because first, here was an unlawful imprisoning of Buckner in his own chamber, and this could not be without an assault; next this statute is not to be literally interpreted, for if there be acts of terror used against one, although a weapon be not drawn, yet he is not within the statute, although he kill another, for the taking up of a candlestick to strike another hath been adjudged a weapon drawn; and he cited *Patye* and *Horwood's* Case; and all the persons that came into his chamber were trespassers, and one of them taking the sword in his hand, how could it be known what mischief might have been done with it? *Cook's* Case 14 *Caroli*, one may do a lawful act by unlawful means, and although Buckner did ill, yet is he not within the statute.

Arthur Harris on the other side argued, that the act was stabbing within the statute, and ousted the prisoner of his clergy, and that he is within the meaning and words of the statute. The statute intended to prevent the killing of men suddenly, which is the worst of all other killing; for it is, as it were, to destroy not only the body, but even to kill body and soul also, and therefore though the statute be penal, yet it is not to be favourably interpreted, it being made for the peace and quiet of the nation. The killing is the matter aimed at in the statute, and it matters not whether the party be killed with a faulchion or a pistol, as *Williams's* case was, that killed another, by throwing a taylor's goose at him, and he is not within the saving of the statute though he was assaulted, and the other stood with his sword in the scabbard in his hand, 36, 37 *Eliz.* *Hanger* and *Molin's* case in the Exchequer chamber. The words of the statute are, "not being first struck;" but an assault is not a striking, and so he is out of the letter of the statute; and here is no weapon drawn, for the sword was in the scabbard, which is no more than a staff in a man's hand, stat. 5 *E. 6. c. 4*, and it is like a pistol uncocked; and if the sword had been drawn it would not have altered the case, because it was not in *Horwood's* hand, who was

(since the only points insisted upon by way of defence for the prisoner, were questions of law, in which the jury were to be guided by their

slain, but in another's, and you cannot extend the statute further.

Glyn (chief-justice). Will you have it argued any more?—*Finch*. No.

Glyn (chief-justice). I have considered of the verdict, and consulted with the statute, and advised with all the judges, and they are of my opinion. This is a good law, and to be interpreted strictly, yet I hold the prisoner is not within it, for the scope of the statute appears by the preamble, the body, and saving of it, which do all confirm my opinion. My first reason is, because I find that the intent of the statute is against sudden killing; but here was not a sudden killing, and the statute takes not away the clergy from all manner of manslaughter; and here was a trespass and an imprisonment acted against the prisoner before he killed *Horwood*, and so the act was not suddenly done. 2dly, The body of the act seems to mean, that there ought to be malice in the case, and it doth not intend we should stick to the very words of it; and here the party slain might have foreseen the danger, and defended himself. 3dly, The proviso excepts divers particulars out of the law, and the word killing is only in the proviso, so that there is provision made how the statute shall be interpreted, viz. That it must be sudden killing, which is not so here, for there are provocations, and time intervenient betwixt them and the stabbing, and the verdict finds no pre-conceived malice, and the statute extends to no other killing by the proviso. And if one be assaulted by thieves which have no sword drawn, and the party assaulted stabs one of the thieves, he is not within the intent of the statute, although he be within the words of it; or if one be assaulted in his house, and the assaulter hath no weapon drawn, and one of the assaultors be shot, yet the party assaulted is not within the statute. 15 *Car.* in *Davy* and *Williams's* Case, it was adjudged by all the judges, that he that killed another by throwing a hammer at him was not within the statute, because there was a preceding provocation of him. And if two assault a third person, and one of them strike the third person, and the third person kills the other that did not strike him, I do not conceive he is within the statute, for it is the assault of both, and shall be also adjudged the striking of both.

Ask (justice) held he was within the statute, because it was not unlawful to come to arrest him, and here was no weapon drawn, and so it was adjourned to another day.

At which day Buckner was again brought to the bar, *Ask* (justice) repeats the special verdict, and made the question, Whether this fact of Buckner be within the statute of 1 Jac. enacted against stabbing? And he argued that it was, and that Buckner could not have his clergy, because the statute shall be taken beneficially for the commonwealth, and not for

opinion) the facts proved and admitted, did not clearly, in the first place, amount to murder at common-law; and in the second place, whether

the prisoner, who is a particular person, and the intent of the statute is to take away the clergy for some felony; neither by the common-law, nor by the law of God is there clergy given for killing a man, and it was the Popish power that introduced the clergy to be given for manslaughter, and also for murder, in diminution of the common-law, and of regal power, yea, and of the law of God also; and if a woman kill one, she shall not have her clergy, but be hanged; which shews that by the common-law the clergy was not given for manslaughter. And by the law of God I find no difference between murder and manslaughter, for it makes no difference between hot blood and cold blood, as we do now distinguish; and every word in the statute methinks doth take away the clergy by way of argument, even from the title of the act to the very end of it; and here is a great sin to be punished, and great inconveniences would follow to admit of the clergy in such cases as this is, and here was a sudden killing as the act expresseth, for it was done with a dagger which was not seen, but suddenly drawn out of a pocket, and no weapon was drawn against him: for the provocations alleged, they cannot amount to the drawing of a weapon, or such a provocation as the statute intends, for all the acts done by Horwood amounted but to a trespass, and cannot be such a provocation as should cause Buckner to fear his death, for no violence was used to his person by striking, or drawing of a weapon, or otherways, and the sending for bailiffs to arrest him cannot be such a provocation as the statute intends, which is to put the party in fear of his life, and the party knew that Horwood came with an intent only to arrest him, and not to kill him, nor did the party slain do any thing against Buckner to provoke him; and there is by presumption of law a premeditated malice in Buckner to kill Horwood, which is seen by his sudden manner of stabbing him; and *Davy and Williams's Case* urged on the other side, is not like to this case. I grant if one kill a thief suddenly, it is not within the statute, for such killing was never intended to be prevented by it. The worst words one man can give another are not a sufficient provocation within the statute, for speaking of words doth much differ from drawing of a weapon: nor is this a killing *se defendendo*, or by misfortune, but a killing at the common-law, and so the clergy is taken away by the statute, and those of *Serjeant's-inn* in Fleet-street, amongst whom are *Barkly, Foster, and Rolle*, who have been judges, are of my opinion.

Glyn (chief-justice) held it not within the statute. He argued long much to the effect as formerly; but having taken cold, I could not distinctly hear him. Adjourned.

This case was again argued, *Trin. 1656*, to inform justice Warburton, who was called to

there could be the least doubt in point of law, but that this case was within the statute of 1 James 1. c. 8.

Upon the first it was admitted, that to constitute murder there must be malice.

But it was argued, that malice was of two kinds: either express and in fact, or implied by law.

That when one person kills another without provocation it is murder,* because the law presumes and implies malice from the act done.

And therefore, wherever any person kills another it is murder, unless some sufficient provocation appear.

But that it is not every provocation which extenuates the killing of a man from murder to manslaughter.

A slight or trivial provocation is the same as none, and is not allowed by law to be any justification or excuse for the death of another.

And therefore no words of reproach or infamy, whatever provoking circumstances they may be attended with; no affronting gestures or deriding postures, however insolent or malicious, are allowed to be put in the balance with the life of a man, and to extenuate the offence from murder to manslaughter. *Kelyng 130. Croke El. 779. (f.)*

that bench, after the former arguments and opinion of the court delivered much to the same manner as formerly, by *Finch* for the prisoner, and *Baldwyn* for the protector; and thereupon my lord chief-justice *Glyn* and justice *Warburton* were of opinion against justice *Ask*, and so judgment was given for the prisoner, that the stabbing was not within the statute, but was only felony at the common-law, and the prisoner was admitted to his clergy, and burnt in the hand accordingly. *Former Edition.*

* He that doth a cruel act voluntarily, doth it of malice premeditated, 3 Inst. 62.

Some have been led into mistake, by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time before the commission of the fact; which is a mistake arising from the not well distinguishing between hatred and malice. *Envy, hatred, and malice*, are three distinct passions of the mind. Lord chief-justice *Holt* in *Mawgridge's Case*. *Former Edition.* See vol. 17, p. 57.

(f) N°. VI. *WATTS and BRAINS. B. R. 1599.*

Appeal of murder for the death of her husband. The defendant pleaded Not Guilty; and upon evidence at the bar it appeared, that two days before her husband's death, he and the defendant fighting upon a quarrel then betwixt them, the defendant was hurt in that fray; and the third day after, the plaintiff's husband, passing by the defendant's shop, the defendant pursued him suddenly, and the husband's back being towards him, so as he perceived him not, the defendant struck him upon the calf of his leg, whereof he instantly

For the same reason, no sudden quarrel upon a slight provocation shall justify such an act of cruelty as one man's stabbing another, though it is done immediately in the heat of passion. As if two persons, playing at tables, fall out in their game, and the one upon the sudden kills another with a dagger; this was held to be murder by Brounley at Chester assizes.

In like manner, no trespass on lands or goods

died; the defendant, to excuse himself, affirmed, that he, who was slain, when he came by his shop, smiled upon him, and wried his mouth at him, and therefore, for this mocking of him, he pursued him. And it was much enforced by the defendant's counsel, that it was a new cause of quarrel; and so the stroke is not upon any precedent malice, and therefore it is not murder: but all the Court severally delivered their opinions, that if one make a wry or distorted mouth, or the like countenance upon another, and the other immediately pursues, and kills him, it is murder; for it shall be presumed to be malice precedent, and that such a slight provocation was not sufficient ground, or pretence, for a quarrel; and so delivered the law to the jury, that it was murder, although what the defendant pretended had been true; whereupon the jury going from the bar, notwithstanding the evidence was pregnant against the defendant, eight of them agreed to find him not guilty, but the other four withstood them, and would not find it, but to be murder: and on the next day morning, two of the four agreed with the eight, to find him not guilty; and afterwards the other two consented in this manner: that they should bring in, and offer their verdict not guilty; and, if the Court disliked thereof, that then they all should change the verdict, and find him guilty. And, upon this agreement, they came to the bar, and the foreman pronounced the verdict, that the defendant was not guilty; and the Court much disliking thereof, being contrary to their direction, examined every one of them by the poll, whether that was his verdict; and ten of the first part of the pannel, severally affirmed their verdict, that the defendant was not guilty; but the two last affirmed how they agreed, and discovered the whole manner of their agreement; whereupon, they were sent back again, and returned, and found the defendant guilty. And, for this practice, Harris, the foreman, was afterwards fined 100 marks, and the other seven, who agreed with him at the first, every of them was fined 40*l*. and the other two, who agreed with the eight, although they affirmed, that it was, because they could not endure, or hold out any longer; yet for that they did not discover the practice, being examined by poll, but affirmed the verdict, were fined each of them at 30*l*. and all of them imprisoned; but the other two were dismissed, yet blamed, for such a manner of consenting in abuse of the Court. And afterwards the defendant was adjudged to be hanged. *Former Edition.*

shall be allowed by law to be any excuse for one man's attacking another in such a manner as apparently endangers his life, and could not be intended merely as a chastisement for his offence; because no violent acts beyond the proportion of the provocation receive countenance from the law.

And therefore if a man beats another that is trespassing upon his goods or lands, and does not desist, he will be justified by law; because what he does is only in defence of his property, and no more than a chastisement to an offender.

But (says the lord chief justice Holt) if one man be trespassing upon another, breaking his hedges, or the like; and the owner, or his servant, shall upon sight thereof, take up an hedge-stake, and knock him on the head, that will be murder; because it is a violent act, beyond the proportion of the provocation. *Kelyng 132.*

That applying the rules of law to the present case, it was plain, that the violent act done, bore no proportion to the provocation. All the provocation given was taking up a piece of cake, which is not such an offence, as can justify the prisoner's attacking the person, who took it up, with an instrument, that apparently endangered his life, or rather carried certain death along with it.

And lastly, That Grey's case before cited (*Kelyng 64, and 153.*) was much stronger than the present: where a master, who was provoked with the neglect, disobedience, and insolence of his apprentice, and had therefore a right by law to chastise him; immediately upon receiving the provocation, took up a bar of iron, at which he was then working, and struck his apprentice, who afterwards died of the blow. This was by all the judges held to be murder, notwithstanding it was done upon a sudden, and notwithstanding the provocation, and the right which Grey had as a master to correct his servant. For having exceeded measure herein, what he did was malicious.

Upon the second indictment it was said, that the gentlemen who had argued on behalf of the prisoner, had, in order to raise a doubt upon this point, in effect contended that the statute of 1 James 1, should never be allowed to comprehend any one case whatsoever, or extend to any one offender.

For if persons indicted upon that statute, were to be acquitted wherever the case would have been manslaughter at common-law, the statute would be entirely frustrated, and have no kind of effect whatsoever.

Since it was only made in order to exclude such persons as stabbed others upon the sudden, not upon their guard, from the benefit of clergy; and was intended as a sort of correction to the common-law, by restraining such offenders, through fear of due punishment, who were emboldened by presuming on the benefit of clergy, allowed by the common-law.

But if it is to exclude none from their clergy, who at common-law would have been entitled

to it, it can never have any effect, and may as well be repealed.

That whatever the reasons might be which first gave rise to this statute, the legislature thought it of general public benefit, and therefore afterwards continued it by a subsequent law.

And if the statute is to have any force or effect at all, there cannot be a doubt but that it must extend to the present case.

It is expressly within the words; Mr. Ricketts was stabbed, having then no weapon drawn in his hand, and not having before struck the person who stabbed him.

It is plainly within the intention; which is declared in the preamble to have been in order to punish stabbing, or killing upon the sudden, committed in rage, or any other passion of the mind, &c.

And the principal reasons upon which the determination in Buckner's case is founded, conclude strongly against the prisoner:

For it is there argued, that Buckner was not within the statute, because it appeared to have been made to prevent sudden killing, the worst of all killing, of a person not upon his guard.

And secondly, because in that case the party slain might have foreseen the danger, and defended himself.

But the unfortunate person killed in this case, had no opportunity either of foreseeing the danger, or of avoiding it, or making any defence; but was killed on the sudden, before he could apprehend any danger.

And therefore it was submitted to the Court, whether upon the facts proved and not denied, the consequence of law was not clear that the prisoner was guilty within both indictments.

Mr. Baron Reynolds and Mr. Recorder Sergeant Urlin, (being the only gentlemen of the long robe on the bench, when Mr. Chetwynd was tried) taking notice of the points of law that had arisen, the learned arguments of the counsel, and the many cases cited upon this occasion, were of opinion, that it would be proper to have the facts found specially, that they might be put in a way of receiving a more solemn determination. A special verdict was accordingly on all sides agreed on, and drawn up to the following purport, viz.

"The King against William Chetwynd, the same against the same, and the same against the same.

"We find that Thomas Ricketts, on the 26th of September last, being a scholar at Mr. Clare's academy, in Soho-square, was in a room in the said Mr. Clare's house, in which the said Mr. Chetwynd used to lie, (and not Mr. Ricketts) in company with the prisoner William Chetwynd, William Hamilton, Samuel Malcher, and Hannah Humphreys, a maid-servant in the said Mr. Clare's family; that the said Mr. Chetwynd, the prisoner, having his own cake in his hand, which was a hard cake, called a Simnel, and hard to cut, the deceased, Thomas Ricketts, asked the said Mr. Chetwynd to give

him a piece, upon which the said Mr. Chetwynd gave him a piece; that the said Thomas Ricketts afterwards asked him, the said Chetwynd, to give him some more of his cake, which the said Chetwynd refused, and thereupon, the said Chetwynd went out of the said room with his cake under his arm, and the deceased followed him out of the said room; upon which, the said Chetwynd returned again into his said room, and went to his own bureau, and cut another piece of the cake for himself; the said Ricketts offered to lend the said Chetwynd his knife to cut the cake, and at the same time pulled his knife, being a clasped knife, out of his pocket, and opened it; but the said Chetwynd, refusing to make use of the said Ricketts's knife, saying, he had a knife of his own, the said Ricketts put up his knife again; and immediately after this, the said Chetwynd being then at his bureau, cut off a piece of the said cake with his own knife, being a common knife, and such as Mr. Chetwynd and his school-fellows generally used, and laid the same piece of cake upon the top of his bureau for himself; that the said Chetwynd, standing then with his back to the rest of the company, was putting the rest of his cake into his bureau, and, whilst he was so doing, the deceased came up, and put his hand over the said Mr. Chetwynd's shoulder, whereupon, the said Mr. Chetwynd raising his arms, said to the said deceased, Don't, Mr. Ricketts; the said Mr. Ricketts immediately snatched the said piece of cake away, against the consent of the said Mr. Chetwynd, which lay upon the top of the said bureau, and went up to the said maid-servant, who was about two or three yards off, and said, laughing, Hannah, I have got a piece of Mr. Chetwynd's cake, which he shewed to her in his hand; that thereupon immediately the said Mr. Chetwynd followed the deceased, with his knife in his hand, and demanded the said Mr. Ricketts to return him his piece of cake; the deceased, Mr. Ricketts, returned no answer to this, but continued laughing, and did not return the piece of cake; upon which, the said Mr. Chetwynd struck the said Mr. Ricketts back-handed, with the said knife which he had kept in his hand all along, and with which he had cut the said cake, (the said Ricketts being then only in his waistcoat, which was at that time unbuttoned) and gave him a wound upon the right side of the belly below the navel, which penetrated into the cavity of the belly (the deceased not having before struck the prisoner, and not having at that time any weapon in his hand;) that immediately after, the deceased cried out, Hannah, Chetwynd has stabbed me; and then the said Hannah said to the prisoner, What have you done? Upon which the prisoner looked on the said Hannah with concern, and said, If I have hurt Mr. Ricketts, I am sorry for it. We find that there never had been any quarrel or malice between the deceased and the prisoner, but that they constantly had lived in friendship together; and we find likewise, that the deceased was about

the age of nineteen,* and Mr. Chetwynd about the age of fifteen; and that of this wound the deceased died on the 29th of the said September: and whether upon the whole, the prisoner is guilty of all, or any of the several indictments, the jurors submit to the judgment of the Court.—(Signed,) Allen Evans, Samuel

Bowler, Charles Carleton, Francis How, Benjamin Ingram, Jacob Lebat, Jonathan Alderton, Peter Archambo, John Archambo, Benjamin Tickner, John Holmes, Thomas Hogg."

Soon after this Trial, Roger Drake, esq. and other friends of Mr. Ricketts, laid the following Case before sir John Strange:

The KING against CHETWYND.

The defendant was tried the last sessions at the Old Bailey for the murder of Mr. Thomas Ricketts, and the jury brought in the following Special Verdict:

"That Thomas Ricketts, on the 26th of September 1743, being a scholar at Mr. Clare's academy in Soho square, was in a room in the said Mr. Clare's house in which the said Chetwynd used to lie and not Mr. Ricketts, in company with the prisoner William Chetwynd, William Hamilton, Samuel Malcher, and Hannah Humphreys a maid-servant in the said Mr. Clare's family. That the said Mr. Chetwynd the prisoner having his own cake in his hand, which was a hard cake, called a Symnel, and hard to cut, the deceased Thomas Ricketts asked him for a piece of it, which the said Mr. Chetwynd gave him. That the said Thomas Ricketts afterwards asking the said Chetwynd to give him some more of his cake, the said Chetwynd refused, and thereupon the said Chetwynd went out of the said room with his cake under his arm, and the deceased followed him out of the said room; upon which the said Chetwynd returned again into his said room, and went to his own bureau and cut another piece of cake for himself: the said Ricketts offered to lend the said Chetwynd his knife to cut the cake, and at the same time pulled his knife (being a clasp knife) out of his pocket and opened it; but the said Chetwynd refusing to make use of Mr. Ricketts's knife, saying he had one of his own, the said Ricketts put up his knife; and immediately after this the said Chetwynd being then at his bureau, cut off a piece of the said cake with his own knife (being a common knife, and such a one as the said Chetwynd and his school-fellows generally used,) and laid the same piece of cake upon the top of his bureau for himself. That the said Chetwynd, standing then with his back to the company, was putting the rest of the cake into

his bureau; and whilst he was so doing, the deceased came up and put his hand over the said Chetwynd's shoulder, whereupon the said Mr. Chetwynd raising his arms said to the deceased, Don't, Mr. Ricketts; and the said Mr. Ricketts immediately snatched the said piece of cake away against the said Chetwynd's consent, which lay upon the top of the said bureau, and went to the said maid-servant about two or three yards off and said, laughing, Hannah, I have got a piece of Chetwynd's cake, which he shewed to her in his hand; that thereupon immediately the prisoner Mr. Chetwynd followed him with his knife in his hand, and demanded the said Mr. Ricketts to return his piece of cake; the deceased Mr. Ricketts returned no answer to this, but continued laughing, and did not return the piece of cake, upon which the prisoner struck him back-handed with the said knife, which he had kept in his hand all along, and with which he had cut the said cake, the said Ricketts being then only in his waistcoat which was then unbuttoned, and gave him a wound upon the right side of the belly below the navel, which penetrated into the cavity of the belly, the deceased not having before struck the prisoner, and not having at that time any weapon in his hand. That immediately after the deceased cried out, Hannah, Chetwynd has stabbed me; and then the said Hannah said to the prisoner, What have you done? Upon which the prisoner looked on the said Hannah with concern, and said, If I have hurt Mr. Ricketts I am sorry for it. We find that there never had been any quarrel or malice between the deceased and the prisoner, but that they constantly had lived in friendship together. We find likewise the deceased was about the age of nineteen, and Mr. Chetwynd about the age of fifteen, and that of this wound the deceased died upon the 29th of the same September. And whether upon the whole the prisoner is guilty of all or any of the several indictments, the jury submit to the Court."

Mr. Chetwynd is still in Newgate; it is apprehended Mr. Chetwynd will apply to his majesty for a pardon before the special verdict is argued, or if not he will do so afterwards, in case the judges should be of opinion that the facts stated in the special verdict should be murder. To prevent this, and his escaping the justice due for his offence, if the law declares him to be guilty of murder, it is proposed to bring in an appeal of murder, and to that end your opinion is desired.

Q. Whether the offence found by the special verdict is murder or manslaughter?

'I am strongly inclined to think this will be adjudged to be murder.'

The deceased's father and eldest brother are both resident in Jamaica. It is apprehended that an appeal if brought must be brought by the eldest brother, who is the heir at law of the deceased.

Q. Whether such appeal can be brought by Mr. Barham and Messrs. Drake and Long, for

* That Mr. Ricketts was about nineteen years of age was admitted: no evidence being offered as to the age of the prisoner, the jury formed their judgment thereof, on seeing him. Former Edition.

and on his behalf; or must the same be brought by the heir in person?

'The appeal must be commenced by the heir in person if he is of full age, if not by guardian.'

As the heir is resident in Jamaica, and it will be some time before he can be in England, and as a year and a day from the time of the death is allowed for bringing such appeal, so if Mr. Chetwynd should in the mean time obtain his pardon,

Q. Whether he will upon pleading such pardon be discharged out of custody without bail, and if so and he cannot afterwards be apprehended within the year and day, how is the appellant to save the benefit of his appeal?

'If there is no appeal commenced when the pardon is pleaded, I hardly think the Court will require bail upon allowing the pardon; but it will be proper to shew that the heir is expected, and in order to give time for his appearing it may be proper to enter caveats, and desire to be heard, as a means to procure some terms whereby the opportunity of having the appellee forthcoming may be secured: if the appeal is commenced in time, it will not be any objection, that the appellee is not apprehended within the year.'

Q. Whether an appeal may be brought immediately, or must the appellant wait the determination of the special verdict?

'The appeal must be commenced within the year and day, and the appellant is not bound to wait the determination of the special verdict before he commences it. The Court perhaps may give the appellee time to plead upon that account, but this should be opposed.'

Q. Whether the appellant is obliged to enter into any recognizance with sureties to prosecute his appeal with effect; and suppose, upon trying such appeal the jury find the offence only manslaughter; is the appellant or his sureties liable to any damage, fine or punishment for bringing such appeal?

'The giving pledges to prosecute is recited in the writ, and I believe there is some security given to the sheriff before he serves the writ, though in Bambridge's case it was omitted. But it is out of doubt, if the jury find it to be manslaughter, that will be a sufficient prosecuting it with effect, and protect the appellant and his sureties from any damage, fine or imprisonment.'

If the defendant should be found guilty upon the appeal,

Q. Whether the king can reprieve or respite the execution of the judgment, or any otherwise interfere therein?

'I apprehend that upon a conviction of murder on an appeal, the crown cannot interfere.'

Upon the whole, under the circumstances of this case, your opinion is desired,

Q. Whether it is advisable for Mr. Ricketts to appeal in case Mr. Chetwynd should obtain a pardon; or would such a proceeding be considered as severe or vindictive?

'The youth of the offender, the suddenness of the action unattended with any aggravating circumstances, and the friendship which the jury find to have subsisted to the moment of the fatal accident, make me incline to think, that even the appellant, if he should succeed in his suit, would hardly insist upon the rigour of the law; and then considering he is now abroad, I think the gentlemen who have hitherto prosecuted and obtained the present verdict, will be well justified in acquiescing under the pardon, (supposing the king should grant it) after they have laid the state of the case properly before those through whose hands it is to take its progress.'*

J. STRANGE.

31st October, 1745.

After the beforementioned Special Verdict was found, the relations of the prisoner, who were persons of some figure in the world, had a meeting with his counsel, to consult what was most proper to do in this affair, whether to endeavour the bringing on the arguing of the special verdict, or immediately to apply to his majesty for a pardon.—The counsel, considering the youth of the prisoner, and the length of time he might lie in Newgate, before the determination of the special verdict, advised the applying directly to his majesty for a pardon.—Whereupon the following Petition was delivered to the lords justices, (the king being then at Hanover) viz.

To their Excellencies the Lords Justices in Council; The humble PETITION of WILLIAM CHETWYND, an Infant of the age of 15 years,

Most humbly sheweth; That the petitioner was tried at the last sessions of Oyer and Terminer at the Old-Bailey, on three indictments preferred against him in the name of his majesty, for the murder of Thomas Ricketts his school-fellow, on the trial whereof the jury brought in a special verdict in the words following, viz.

"That Thomas Ricketts, on the 20th day of September last, being a scholar at Mr. Clare's academy in Soho-square, was in a room in the said Mr. Clare's house, in which the said Chetwynd used to lie and not Mr. Ricketts, in company with the prisoner William Chetwynd, William Hamilton, Samuel Malcher, and Hannah Humphreys a maid servant in the said

* Concerning appeal for murder, see in vol. 13, p. 1199, the opposite sentiments expressed on the one hand by lord Nottingham, lord chief justice Treby and others, and on the other by lord chief justice Holt: and what occurred in the course of the proceedings in the case of *Bigby v. Kennedy*, as reported by Burrow. See also Mr. Horne's speech in the report of his trial for a libel, A. D. 1777.

N. B. At the end of the first paragraph of the note in p. 1199 of vol. 13, should have been added the words "respecting the merits of the appeal for murder."

Mr. Clare's family. That the said Mr. Chetwynd, the prisoner, having his own cake in his hand, which was a hard cake called a simnel, and hard to cut; the deceased, Thomas Ricketts, asked him for a piece of it, which the said Chetwynd gave him. That the said Thomas Ricketts afterwards asking the said Chetwynd to give him some more of his cake, the said Chetwynd refused; and thereupon the said Chetwynd went out of the said room with his cake under his arm, and the deceased followed him out of the said room; upon which the said Chetwynd returned again into the said room, and went to his own bureau, and cut another piece of the cake for himself; the said Ricketts offered to lend the said Chetwynd his knife to cut the cake, and at the same time pulled his knife (being a clasped knife) out of his pocket and opened it; but the said Chetwynd refusing to make use of Mr. Ricketts's knife, saying, he had a knife of his own, the said Mr. Ricketts put up his knife again; and immediately after this the said Chetwynd, being then at his bureau, cut off a piece of the said cake with his own knife, being a common knife, and such a one as the said Chetwynd and his school-fellows generally used, and laid the same piece of cake upon the top of his bureau for himself. That the said Chetwynd standing there, with his back to the rest of the company, was putting the rest of his cake into his bureau, and whilst he was so doing, the deceased came up and put his hand over the said Chetwynd's shoulder; whereupon the said Mr. Chetwynd, raising his arms, said to the deceased, Don't, Mr. Ricketts; and the said Mr. Ricketts immediately snatched the said piece of cake away, against the said Chetwynd's consent, which lay upon the top of the said bureau, and went to the said maid-servant about two or three yards off, and said, laughing, Hannah, I have got a piece of Chetwynd's cake, which he shewed her in his hand. That thereupon immediately the prisoner, Mr. Chetwynd, followed him with his knife in his hand, and demanded the said Mr. Ricketts to return him his piece of cake; the deceased Mr. Ricketts returned no answer to this, but continued laughing, and did not return the piece of cake; upon which the prisoner struck him back-handed with the said knife which he had kept in his hand all along (and with which he had cut the said cake,) the said Ricketts being then only in his waistcoat, which was then unbuttoned, and gave him a wound upon the right side of the belly, below the navel, which penetrated into the cavity of the belly, the deceased not having before struck the prisoner, and not having at that time any weapon in his hand. That immediately after the deceased cried out, Hannah, Chetwynd has stabbed me; and then the said Hannah said to the prisoner, What have you done? Upon which the said prisoner looked upon the said Hannah with concern, and said, If I have hurt Mr. Ricketts I am sorry for it. We find there never had been any quarrel or malice betwixt the de-

VOL. XVIII.

ceased and the prisoner, but that they constantly had lived in friendship together; we find likewise that the deceased was about the age of nineteen, and Mr. Chetwynd about the age of fifteen; and that of this wound the deceased died the 29th of the same September; and whether upon the whole, the prisoner is guilty of all or any of the several indictments, the jury submit to the Court." That as it is expressly found, by this special verdict, that there never had been any quarrel or malice between the deceased and the petitioner, but that they constantly lived in friendship together; and as the fatal unhappy wound your petitioner gave the deceased was the effect of a sudden and instant provocation, and for which he has ever since been, and still is, under the deepest and most inconsolable affliction, and as the petitioner had not the most remote apprehension of murdering the deceased, and in regard to your petitioner's tender age.

Your petitioner most humbly hopes he may, under all the circumstances of this unfortunate case, be considered as a proper object of the royal mercy; which your petitioner most humbly prays your excellencies will be graciously pleased to extend to him, by granting him the royal pardon for the said offence. And your petitioner, as in the strictest gratitude and duty bound, shall ever pray, &c.

When their lordships were pleased to refer it to the Attorney and Solicitor-General, who made the following report thereupon:

A COPY of the REPORT of his Majesty's ATTORNEY and SOLICITOR-GENERAL, on Mr. Chetwynd's Petition.

"To the King's most excellent Majesty in Council;

"May it please your majesty; In humble obedience to their excellencies the lords justices commands signified to us by Mr. Stone, by his letter of 25th of October last, directing us to take the annexed Petition of William Chetwynd, an infant of the age of fifteen years, into consideration, and report our opinions what may be proper to be done therein; we have taken the same into consideration, after having been attended by the agent and counsel of the petitioner, and also by the agent and counsel for Mr. Roger Drake and Mr. Beeston Long, under whose care Thomas Ricketts the deceased mentioned in the petition had been placed by his father, who now lives at Jamaica; and which said Mr. Drake and Mr. Long opposed before us the prayer of the said petition.

"The petition states, That the petitioner had been tried at the last sessions of Oyer and Terminer at the Old-Bailey, on three indictments, for the murder of the said Thomas Ricketts his school-fellow, on the trial whereof the jury brought in a special verdict, which the petition sets forth particularly, and prays, that as it is expressly found by this special verdict, that there never had been any quarrel or malice between the deceased and the petitioner, but they

Y

constantly lived in friendship together, and as the fatal unhappy wound the petitioner gave the deceased was the effect of a sudden and instant provocation, and for which he hath ever since been, and is still under the deepest and most inconsolable affliction, and as he had not the most remote apprehension of murdering the deceased, and in regard to his tender age, the petitioner most humbly hopes he may, under all the circumstances of his unfortunate case, be considered as a proper object of the royal mercy, which he most humbly prays may be extended to him, by granting the royal pardon for the said offence.

"We have inquired into the case, and find that the petitioner was indicted on three indictments, whereof copies are annexed, for the killing of the said Thomas Ricketts; one of which was on the coroner's inquest, which had found him guilty of manslaughter; another at common law for murder; and the third on the statute of stabbing, of the first year of king James the first, chap. 8th, all which were tried at the last sessions of Oyer and Terminer at the Old Bailey; and the jury found a special verdict, which is not yet drawn up in form, but the minutes thereof signed by the jury are in the following words, viz.

"*Middlesex.*] *The King against WILLIAM CHETWYND, the same against the same, and the same against the same*

"That Thomas Ricketts, on the 26th of September, being a scholar at Mr. Clare's academy in Soho-square, was in a room in the said Mr. Clare's house, in which the said Chetwynd used to lie, and not Mr. Ricketts, in company with the prisoner William Chetwynd, William Hamilton, Samuel Malcher, and Hannah Humphreys, a maid-servant in the said Mr. Clare's family.—That the said Mr. Chetwynd the prisoner having his own cake in his hand, which was a hard cake, called a simnel, and hard to cut, the deceased, Thomas Ricketts, asked him for a piece of it, which the said Chetwynd gave him; that the said Thomas Ricketts afterwards asking the said Chetwynd to give him some more of his cake, the said Chetwynd refused, and thereupon the said Chetwynd went out of the said room, with his cake under his arm, and the deceased followed him out of the said room; upon which the said Chetwynd returned again into his said room, and went to his own bureau, and cut another piece of the cake for himself; the said Ricketts offered to lend the said Chetwynd his knife to cut the cake, and at the same time pulled his knife (being a clasped knife) out of his pocket, and opened it, but the said Chetwynd refusing to make use of Mr. Ricketts's knife, saying, he had a knife of his own, the said Mr. Ricketts put up his knife again; and immediately after this, the said Chetwynd being then at his bureau, cut off a piece of the said cake with his knife, being a common knife, and such a one as the said Chetwynd and his school-fel-

laws generally used, and laid the same piece of cake upon the top of his bureau for himself; that the said Chetwynd standing then with his back to the rest of the company, was putting the rest of his cake into his bureau; and whilst he was so doing, the deceased came up and put his hand over the said Chetwynd's shoulder, whereupon the said Mr. Chetwynd, raising his arms, said to the deceased, Don't, Mr. Ricketts; and the said Mr. Ricketts immediately snatched the said piece of cake away, against the said Chetwynd's consent, which lay upon the top of the said bureau, and went to the said maid-servant about two or three yards off, and said, laughing, Hannah, I have got a piece of Chetwynd's cake, which he shewed her in his hand; that thereupon immediately the prisoner, Mr. Chetwynd, followed him with his knife in his hand, and demanded the said Mr. Ricketts to return him his piece of cake; the deceased Mr. Ricketts returned no answer to this, but continued laughing, and did not return the piece of cake, upon which the prisoner struck him back-handed with the said knife, which he had kept in his hand all along, (and with which he had cut the said cake) the said Ricketts being then only in his waistcoat, which was then unbuttoned, and gave him a wound upon the right side of the belly, below the navel, which penetrated into the cavity of the belly; the deceased not having before struck the prisoner, and not having at that time any weapon in his hand. That immediately after the deceased cried out, Hannah, Chetwynd has stabbed me; and then the said Hannah said to the prisoner, What have you done? Upon which the said prisoner looked on the said Hannah with concern, and said, If I have hurt Mr. Ricketts, I am sorry for it. We find there never had been any quarrel or malice betwixt the deceased and the prisoner, but that they had constantly lived in friendship together. We find likewise, that the deceased was about the age of 19, and Mr. Chetwynd about the age of fifteen; and that of this wound the deceased died the 29th of the same September; and whether upon the whole the prisoner is guilty of all or any of the several indictments, the Jury submit to the Court.*—(Signed)

Allen Evans, Charles Carleton, Benjamin Tickner, Samuel Bowler, Francis Hov, Thomas Hogg, Peter Archambo, Benjamin Ingram, John Holmes, Jacob Lebat, Jonathan Alderton, John Archambo.

"As the minutes of the special verdict have stated the case with all its circumstances so very minutely, no other evidence was offered on either side to mitigate or aggravate the charge. And we beg leave humbly to certify

* As to various circumstances under which homicide shall be murder or not, see *East's Pl. Cr. ch. 5*, and the other writers on *Crown Law*, therein referred to.

your majesty, that it lies entirely in your majesty's royal breast, to pardon the petitioner or not; and if your majesty shall be graciously pleased to extend your royal mercy to him, there can be no objection thereto in point of law.

"All which is humbly submitted to your majesty's great wisdom.

D. RYDER.

"W. MURRAY."

Upon which his majesty (being then returned from Hanover) was pleased to order his most-gracious Pardon, for the said William Chetwynd, to be made out. As soon as this came to be known, a caveat was entered against passing the same at (lord Gower's) the lord privy-seal's office; whereupon the lord privy-seal sent to sir Thomas Abney, knt. one of the judges of the Court of Common Pleas, to assist him at the hearing the same; sir Thomas in a very genteel letter begged to be excused, on account of his former intimacy with Walter Chetwynd, of Grendon in Warwickshire, esq. the young gentleman's late father; upon which the Lord Privy-seal sent to the Lord Chief Baron, to desire his assistance at the hearing of counsel (at Whitehall) for and against passing the said Pardon; when after hearing the arguments, (serjeant Wynne and Mr. Moreton for the caveat, and Mr. Lloyd and Mr. Legge against it) the Lord Privy-seal declared he had heard no reasons sufficient given against allowing the same, and put the privy-seal to the said pardon. After which the friends and relations of the deceased entered a caveat against passing the same at the Lord Chancellor's; when the right honourable the earl of Hardwicke ordered the counsel on both sides to attend him at his house in Ormond-street; when after hearing the arguments on both sides, his lordship said, he had no doubt with him about passing the said Pardon, and ordered the great seal to be put to it. When the prisoner came to Westminster-hall in Hilary Term to plead this Pardon, it was strongly opposed by counsel; but after hearing the arguments on both sides, lord chief justice Lee declared, he had heard no sufficient reasons offered against the prisoner's taking the benefit of his majesty's pardon; which he did directly by pleading it on his knees, and was immediately discharged.

Hilary Term, 17 George 3.

DOMINUS REX *ver.* CHETWYND.

"A special verdict, on an indictment for murder, was found at the Old Bailey, and removed into the King's-bench; but before argument the defendant obtained his majesty's pardon,* which he pleaded upon his knees; and it was allowed. Then the counsel for the prosecutor insisted, that by virtue of 3 H. 7, c. 1. the Court ought to require bail for his appearance to answer an appeal; there being an affidavit produced, that the bro-

ther and heir was beyond sea, but expected in time; and it was also insisted, that by virtue of 5 and 6 W. and M. c. 13, the Court should take security for the good-behaviour.

"The statute 3 H. 7, c. 1, runs: 'That if any person charged as principal or accessory, be acquitted at the king's suit, within the year and day, the justices, before whom he is acquitted, shall not suffer him to go at large; but either remit him again to the prison, or else let him to bail, after their discretion, till the year and day be past.'

"Upon this clause it was argued, that the case of pleading a pardon after a special verdict, was stronger than the case of an acquittal by a jury, which took away all the presumption of guilt; and that this was an actual acquittal, and is called so in the pardon. The judgment is 'Quod eat inde sine Die,' and if he is again indicted, he may plead *Autre fois acquitte*, 11 H. 4. 41 Bro. 20. Coron. 29. 133. Fitz. N. B. 251. G. and the record being moved into the King's-bench, this Court are the justices before whom he is acquitted; * and it is

* Slaughterford was acquitted before Holt, at Surrey assizes; and he took bail to answer an appeal; which was afterwards tried at bar, and the party convicted and hanged. *Strange*, vol. 2, p. 1204. Slaughterford's case was this:

Christopher Slaughterford (son of a miller, himself a maltster of some substance, near Guildford in Surrey) courted one Jane Young, who thereupon left her service in order to be married to him; was seen in his company October 5, 1708, but never heard of afterwards; whereupon he was suspected of murdering her, taken up, and committed to the Marshalsea; and at the Lent assizes following, was tried at Kingston in Surrey, for the said murder, and acquitted. However, he was ordered to remain in gaol, many people thinking him guilty. The father and friends of the deceased being poor, a subscription was set on foot and money raised, and an appeal was brought against the said Slaughterford by Henry Young, brother of the deceased. He was brought to the Queen's-bench bar at Westminster, the second day of the term following, and tried before the lord chief justice Holt, on the said appeal, and convicted on very strong circumstances, and ordered for execution on Saturday July 9th. Slaughterford being led to the gibbet from Guildford (to which place he was carried from the Marshalsea), the only request he had to make to the executioner was, That he might throw himself off: and they were almost the only words he uttered there; for being tied up, before the executioner could descend to do the rest of his office, in turning him off the ladder, he had swung himself off. He seemed to die with a resolute obstinacy, but delivered the following paper to the sheriff.

"Guildford, July 9, 1709.

"I being brought here to die, according to the sentence passed upon me at the Queen's-

* *Strange's Reports*, vol. 2, p. 1203, 4, 5.

not discretionary only as to the point between bail and imprisonment, the latter of which the prosecutor did not insist upon.

"But as to this point, the Court were of opinion, that the present case was not such as the act of parliament meant; and this being to subject the prisoner to a second trial, which before he was not, he not being indictable (*Kelynge* 25.) till the time to appeal was elapsed, till this act gave such a prosecution; it was therefore to be construed strictly, and confined literally to an acquittal by verdict (*Kelynge* 104.) upon an arraignment at the king's suit; and it was material, that no instance could be shewn of requiring such bail upon pleading a pardon; on the contrary, *Bowen in Mich. 8 Ann.* was discharged without bail. Acquittal, they said, must be understood in a course of law, and not an interposition of the crown's mercy.

"The other point, as to sureties for the good behaviour, depended on the 5 and 6 W. and M. c. 13, which enacts, 'That the justices before whom any pardon for felony shall be pleaded, may, at their discretion, remand or commit the person pleading it to prison, till he shall enter into a recognizance with two sureties, for his good behaviour, for any time not exceeding

bench bar, for a crime of which I am wholly innocent, thought myself obliged to let the world know (that they do not reflect on my friends and relations whom I have left behind me much troubled for my fatal end), that I know nothing of the death of Mrs. Jane Young; nor how she came by her death directly or indirectly; though some have been pleased to cast reflections on my aunt. However, I freely forgive all my enemies, and pray to God to give them a due sense of their errors, and in his due time to bring the truth to light. In the mean time, I beg every one to forbear reflecting on my dear mother, or any of my relations, for my unjust and unhappy fall, since what I have here set down is the truth and nothing but the truth, as I expect salvation at the hands of Almighty God; but I am heartily sorry that I should be the cause of persuading her to leave her dame; which is all that troubles me, as witness my hand this 9th day of July.—*C. SLAUGHTERFORD.*" *Former Edition.*

seven years; and if the party be an infant (which was the present case) then he is not to be bound, but must find sureties.* Upon this clause, therefore, the prosecutor insisted upon sureties for the good behaviour, and instanced 2 H. P. C. 394, where it is said, that at common law, without the aid of 18 Eliz. c. 7, a party acquitted may be bound to his good behaviour, if of ill fame.

"The counsel for the prisoner did not much oppose giving sureties, and said, they had them ready; and Mr. J. Wright and Mr. J. Dennison were inclined to take them; but as there had yet been no instance since the act, and this was merely discretionary, the chief justice (sir William Lee,) was unwilling to make the precedent in the case of an infant, where some favourable circumstances were stated in the verdict. And the case *Hale* cites out of *Rastal's* entries, was, where (as the record says) 'testatum fuit cur' per fide dignos,' that the defendant was of ill fame; and at last the others came in to discharge him without security."

"N. B." I [sir John Strange] "on behalf of the prosecutor, (the heir being beyond sea) desired it might be taken notice of, that we did not waive our demand; and upon that the Court said, it should be their own act, upon the discretion of the Court."

The whole expence attending this prosecution, at consultations, fees to counsel at the trial, at the Attorney General's, at Lord Privy Seal's, at the Lord Chancellor's, and at the King's bench on pleading his pardon, and imprisonment in Newgate from October to February, amounted to above 1,300*l.*

This William Chetwynd, esq. was the last heir-male of the Chetwynds of Grendon in Warwickshire, and Rudgley in Staffordshire. For though (on the death of his elder brother, Walter Chetwynd, esq. who caught a fever by attending captain Clark's trial at the Old Bailey, April 1749, of which he died) he came into a good estate, as heir at law (his brother Walter's will being in part set aside on a trial in B. R.,) he enjoyed it but a few years.

* See *Leach's Hawkins's Pleas of the Crown*, book 2, c. 37, § 70. *East's Pl. Cr. c.* 5, § 185.

507. The Trial of FRANCIS TOWNLEY,* esq. for High-Treason, (in levying War against his most Sacred Majesty King George the Second) at the Court-House at St. Margaret's-Hill, Southwark, before the Right Hon. the Lord Chief-Justice Lee, the Right Hon. the Lord Chief-Justice Willes, Mr. Justice Wright, Mr. Justice Dennison, Mr. Justice Foster, Mr. Justice Abney, Mr. Baron Reynolds, and Mr. Baron Clive; with Sir Thomas De Veil, knt. and Peter Theobalds, esq. (both Justices of the Peace for the County of Surry, and Gentlemen named in the Special Commission) July 15: 20 GEORGE II. A. D. 1746.

Mr. Justice Foster has given the following Report of

PREPARATORY STEPS TO THE TRIAL
OF THE REBELS.

"Vacation after Trinity Term, 1746.

"DURING the rebellion, which began in Scotland in the summer 1745, an act [19 Geo. 2. c. 9.] passed empowering his majesty to issue commissions for trying the rebels in any county of the kingdom, in the same manner as if the treasons had been committed in that county.

"Pursuant to this act, a commission of oyer and terminer, and gaol-delivery, for the county of Surry,† passed the great seal about the latter end of Trinity term. It was directed to every privy-counsellor by name, to all the judges, and to some private gentlemen, empowering them, or any three of them, (*quorum un' &c.*) to execute the commission.

"The precept was signed by the three chiefs and the three senior judges, and was returnable the 23d day of June 1746; which made fifteen days exclusive between the teste and return.

"This was ordered on great deliberation and search of precedents.

"On that day most of the judges met at

* Though there were no trials of the rebel commoners in 1715, printed in the collection of State Trials; yet we shall insert here a short account of a few of the trials of the principal commoners concerned in the rebellion in 1745-6, as printed at that time, (with additions) to shew they were persons of no consequence or estate, concerned in that unnatural rebellion; being either men of small fortunes, or who had run out what they had, or tradesmen, who took part in that desperate undertaking. *Former Edition.*

† "Another commission of the like kind issued at the same time for Middlesex; but there were no proceedings on it." Foster.

Serjeants-Inn; and from thence proceeded in order of seniority to the court-house at Saint Margaret's Hill in the borough of Southwark.

"Lord Chief Justice Lee gave the charge; and the grand jury found bills against the earls of Kilmarnock and Cromartie, and the lord Balmerino: which bills were soon afterwards removed by Certiorari into parliament.

"On the two following days bills of indictment were found against thirty-six of the principal rebels taken at Carlisle; and against one David Morgan, a barrister at law, who was taken in Staffordshire.

"The prisoners were then brought to the bar and informed that bills were found against them, of which they should soon have copies; and the Court adjourned to that day se'nnight: and copies of the indictments with the caption were delivered the same day to the prisoners after the Court rose.

"By this measure the prisoners had copies of their indictments five days before their arraignment, exclusive of that day and of the day copies were delivered, and also exclusive of the intervening Sunday. This was done *ex majori cautela*, and in favour of life, Sunday not being a day on which the prisoners may be presumed to be advising with counsel and preparing for their defence. It was so done upon the commission which sat the same summer in the north; and had been done upon a like commission in the north after the rebellion of 1715. But the statute doth not require this caution with regard to Sunday, nor is it of absolute necessity; though in cases of life it is best to follow precedents, if the time will allow of it.

"July 3. Upon the adjournment-day the prisoners were severally arraigned. Three pleaded guilty. The rest pleaded not guilty; and each of them produced an affidavit, to which they were sworn in court, setting forth that a material witness or witnesses (naming the witnesses and the places of their abode) would be wanted for their defence; and their counsel, who had before been assigned them, moved

that their trials might be put off for a reasonable time for bringing up their witnesses.

"The attorney-general (sir Dudley Ryder) prayed time to consider of the motion; and thereupon the Court adjourned to the next day.

"In the evening all the judges in town met at lord chief justice Lee's chambers, and agreed that the case of these prisoners differs greatly from the common cases of trials in the circuits, where affidavits of this kind ought very sparingly to be admitted. For in circuit-trials the prisoners from the time of their commitment may and ought to be preparing for their defence. The place where they are to be tried is in most cases well known, and they have likewise a reasonable certainty of the time long before the circuits begin.

"But in the present case the prisoners are to be tried at a great distance from the places where the treasons were committed; and neither time nor place for their trial can be said to have been certainly fixed till bills of indictment were found against them, and copies delivered to them; from which time it was incumbent on them to be preparing for their defence and getting their witnesses to town.

"And in regard that the affidavits mentioned the witnesses to reside at different distances from town, some in England, and others in Scotland, it was thought reasonable, that, in fixing the times of trial, regard should be had to the several distances.

"Accordingly it was agreed, that with regard to those prisoners whose witnesses reside in England, their trials should be^a put off to the 15th of July; and that the Court would from thence proceed *de die in diem* till those trials should be dispatched; and with regard to those whose witnesses reside in Scotland, their trials should be put off to the 25th. And on the next day the Court ordered accordingly, and adjourned to the 15th of July.

"N. B. The act of the 19th of the king, c. 1, directing that no judge shall, during the time therein mentioned,† try or bail any prisoner committed for high treason without a warrant signed by six of the privy-council, it was thought proper, *ex majori cautela*, to have such warrant directing the commissioners to proceed to the trial of those prisoners: and such warrant was procured before the trials came on.

"The like caution had been before used with regard to the trial of Christopher Lyster,‡ while a like act was in force."

* "Upon the like commissions in Middlesex and Surry, anno 1716, the prisoners had three weeks from their arraignment." Foster.

† "That act was made to continue only till April 19, 1746, but by 19 Geo. 2, c. 17, & 20 Geo. 2, c. 1, was farther continued till the 30th of February following." Foster.

‡ See his Case, vol. 16, p. 94.

THE whole pannel (108) being first called over in the prisoner's presence, after he had made several challenges, the following jury-men were sworn.

1. Daniel Ponton of Lambeth, starch-maker.
2. John Haywood of Chesham, gent.
3. Michael Cuffe of Battersea, gardener.
4. Francis Bartholomew of Egham, gent.
5. Robert Wood of Epsom, baker.
6. W. Brooker of Walton on Thames, brewer.
7. Edmond Browne of Croydon, brewer.
8. Thomas Belch of Coulsdon, gent.
9. Thomas Dawson of St. George in Southwark, brazier.
10. William Taylor of St. Saviour in Southwark, brewer.
11. T. Lintall of the same, cloth-worker.
12. James Paice of Seal, yeoman.

Then the Clerk of the Arraigns (after silence commanded) read over his indictment to him, which was as follows:

Surry. Be it remembered, that at a special session of Oyer and Terminer, and gaol-delivery of our sovereign lord the king, of and for the county of Surry, holden at the borough of Southwark in the said county, on Monday the 23d day of June, in the 30th year of the reign of our said present sovereign lord George the 2d, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, before sir William Lee, knight, chief-justice of our said present sovereign lord the king, appointed to hold pleas before the king himself, sir John Willes, knight, &c. (naming the rest of the judges and commissioners present) and others their fellow-justices and commissioners of our said present sovereign lord the king, assigned by letters patent of our said present sovereign lord the king under his great seal of Great Britain, made by virtue of the statute made in this present parliament, intituled, An Act for the more easy and speedy trial of such persons as have levied or shall levy war against his majesty, and for the better ascertaining the qualifications of jurors in trials for high-treason, or misprision of treason, in that part of Great Britain called Scotland, to the said justices and commissioners above-named and others, and to any three or more of them (of whom our said present sovereign lord the king willed that any of them the said sir William Lee, (naming some others of the judges) and others in the same letters patent named and appointed shall be one,) to deliver the gaol of the said county of the prisoners therein being, or such as shall or may be detained in the same, on or before the 1st day of January, in the year of our Lord 1746, for or on account of the high-treason mentioned in the said statute in levying war against our said present sovereign lord the king within this realm, and to enquire by the oath of good and lawful men of the same county of all such high-treasons in levying war against our said present sovereign lord the king within this realm by the said prisoners, or any of them, or

by any other person or persons who are now in actual custody for or on account of the same, or who are or shall be guilty of high-treason in levying war against our said present sovereign lord the king within this realm, and shall be apprehended and imprisoned for the same on or before the said 1st day of January, in the said year of our Lord 1746, and the same high-treasons to hear and determine according to the form of the said statute, by the oath of sir William Richardson of Bermondsey, knt. sir Abraham Shard of Kennington, knt. sir Thomas Hankey, of Clapham, knt. sir Peter Thompson of Bermondsey, knt. Josias Wordsworth of Adcombe, esq. Percival Lewis of Putney, esq. Samuel Atkinson of Croydon, esq. John Copeland of Camberwell, esq. Charles Hoskins of Croydon, esq. Joseph Creswick of Stretham, esq. William Clarke of Southwark, esq. Joseph Willoughby of Croydon, esq. Thomas Bevois of Bermondsey, esq. Elias Bird of Rotherhith, esq. Thomas Tarrant of Southwark, esq. Edward Steavens of Southwark, esq. Henry Robinson of Wandsworth, esq. John Heathfield of Croydon, esq. Nathaniel Green of Southwark, esq. Isaac Keles of Lambeth, esq. John Smith of Lambeth, esq. Hammett Richardson of Bermondsey, esq. Samuel Nicholson of Croydon, esq. good and lawful men of the said county, being then and there sworn and charged to enquire for our said present sovereign lord the king, touching and concerning the premises in the said letters patent mentioned, it is presented, that the bill of indictment to this schedule annexed is a true bill.

“ The jurors for our present sovereign lord the king upon their oath present, that Francis Townley, late of the city of Carlisle, in the county of Cumberland, esq. otherwise called Francis Townley, late of the same place, gentleman, John Hamilton, late of the city of Carlisle, in the county of Cumberland, esq. otherwise called John Hamilton, late of the same place, gentleman, Alexander Abernethy, late of the same place, gentleman, otherwise called Alexander Abernethy, late of the same place, surgeon, and George Abernethy, late of the same place, gentleman, &c. being subjects of our said present most serene sovereign lord George the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, not having the fear of God in their hearts, nor having any regard for the duty of their allegiance, but being moved and seduced by the instigation of the devil, as false traitors and rebels against our said present sovereign lord the king, their supreme, true, natural, lawful, and undoubted sovereign lord, entirely withdrawing that cordial love, and that true and due obedience, fidelity and allegiance, which every subject of our said present sovereign lord the king should and of right ought to bear towards our said present sovereign lord the king; and also devising, and (as much as in them lay) most wickedly and traitorously intending to change and subvert

the rule and government of this kingdom, duly and happily established under our said present sovereign lord the king, and also to depose and deprive our said present sovereign lord the king of his title, honour, and royal state, and of his imperial rule and government of this kingdom, and also to put and bring our said present sovereign lord the king to death and final destruction, and to raise and exalt the person pretended to be prince of Wales during the life of James the second, late king of England, and so forth, and since the decease of the said late king, pretending to be, and taking upon himself the stile and title of king of England, by the name of James the third, to the crown and to the royal state and dignity of king, and to the imperial rule and government of this kingdom, upon the tenth day of October, in the nineteenth year of the reign of our said present sovereign lord the king, at the city of Carlisle aforesaid, in the county of Cumberland aforesaid, with a great multitude of traitors and rebels, against our said present sovereign lord the king (to wit) to the number of three thousand persons (whose names are as yet unknown to the said jurors), being armed and arrayed in a warlike and hostile manner (to wit), with colours displayed, drums beating, pipes playing, and with swords, clubs, guns, pistols, and divers other weapons, as well offensive as defensive, with force and arms, did falsely and traitorously assemble and join themselves against our said present sovereign lord the king, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner array and dispose themselves against our said present sovereign lord the king, and then and there with force and arms, in pursuance and execution of such their wicked traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage, and levy, a public and cruel war against our said present sovereign lord the king, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful subjects of our said present sovereign lord the king, and also then and there during the said war with force and arms did with the said traitors and rebels so assembled, armed and arrayed as aforesaid, falsely and traitorously against the will of our said present sovereign lord the king, enter into and take possession of the said city of Carlisle, and the castle thereto belonging within the same city, (the said city and castle being a city and castle of our said present sovereign lord the king) and the said city and castle with force and arms then and there did falsely and traitorously possess, hold, keep, maintain, and defend, against our said present sovereign lord the king, against the duty of their allegiance, against the peace of our said present sovereign lord the king, his crown and dignity, and also against the form of the statute in such case made and provided.”

To this Indictment the prisoner pleaded, Not Guilty.

N. B. This indictment and caption were made use of against all the rebels who were tried in Surrey, except *Æneas Macdonald*; save that the overt-acts were laid in different counties of England or Scotland, as the cases respectively required; and also save that the overt-act of taking and possessing the city and castle of Carlisle was not charged on those who were not concerned in that part of the rebellion.

Clerk of Arraignment. Gentlemen, upon this indictment the prisoner at the bar has been arraigned, and thereunto has pleaded Not Guilty, and for his trial hath put himself upon God and his country, which country you are: your charge is to enquire, whether he be guilty of the high-treason whereof he stands indicted, or not guilty. If you find him guilty, you are to enquire what goods and chattels, lands or tenements, he had at the time of the high-treason committed, or at any time since: If you find him not guilty, you are to enquire whether he fled for it; and if you find he fled for it, you are to enquire of his goods and chattels, as if you had found him guilty: if you find him not guilty, nor that he did fly for it, you are to say so, and no more, and hear your evidence.

The Counsel for the king were Mr. Attorney General, sir John Strange, Mr. Solicitor General, sir Richard Lloyd, and the honourable Mr. York; and for the Prisoner, Mr. serjeant Wynne, and Mr. Clayton.

Mr. York, counsel for the king. May it please your lordship, and you, gentlemen of the jury; This is an indictment against Francis Townley, the prisoner at the bar, and sets forth, &c. (as is before mentioned.) To this indictment he hath pleaded, Not Guilty; we shall produce our witnesses to make good the charge against the prisoner, which if we do, we doubt not that you will find him guilty of the indictment.

Att. Gen. (Sir Dudley Ryder). My lords, and you, gentlemen of the jury; the prisoner at the bar, having been deeply engaged in the late unnatural and wicked rebellion begun in Scotland, and carried into the heart of this kingdom, in order to upset our present happy constitution in church and state, hath made it necessary for this prosecution against him: I do not doubt but in the course of our evidence we shall make it appear to your satisfaction, that the prisoner with two others, whose names are Blood and Fletcher, and others their confederates, did assemble in a warlike manner, and procured arms, ammunition, and other instruments of war; and composed a regiment for the service of the Pretender to these realms, to wage war against his present most sacred majesty; and did march through and invade several parts of this kingdom, and unlawfully did seize his majesty's treasure in many places for the service of their villainous cause, and took away the horses and other goods, merchandize, and chattels of many of his majesty's peaceable subjects. And that during the said march the prisoner, with other rebels, in open

defiance of his majesty's undoubted right and title to the crown of these realms, frequently caused the Pretender's son to be proclaimed in a public and solemn manner as regent of these realms; and himself marched at the head of a pretended regiment, which they called the Manchester regiment.

My lords, I shall not take up the time of the court in saying a great deal, for all that the prisoner is charged with will appear so full and plain from the evidence we shall produce for the king, that there will not be the least doubt with the jury, to find him guilty.

Sir John Strange then spoke to the following effect: My lords, and you gentlemen of the jury, I am of counsel in this case likewise for the crown; I am very far from aggravating this case against the prisoner at the bar, but I cannot help observing, that the engagements which the prisoner had embarked in, would have upset one of the most glorious and free constitutions that ever was framed, and I believe I may venture to say, is the only one in the whole world.

If an attempt to subvert the government, to destroy the king, and set up a popish Pretender; if marching in an hostile manner, carrying on a bloody and destructive war in this nation, can move compassion, or be extenuated, any rebellion may be palliated over and excused, since scarce any circumstance can be added in aggravation of that which hath lately been raised and carried on in this kingdom.

Every body knows the rebellion broke out in Scotland with a small number of people, and made a very great progress, till at last the rebels had the audaciousness, with the Pretender's son at their head, to fight his majesty's forces at Preston Pans, and then the rebellion burrowed into England, and the prisoner at the bar was with them in Lancashire, particularly at Preston, and several other places, and then they proceeded to Manchester, where the prisoner formed a regiment, and accepted a commission to be colonel of the said regiment from the eldest son of the Pretender, and wore a white cockade, and a plaid sash, as a mark of his authority, and the party he aided with; and then advanced from Manchester to Derby with his regiment, where the rebel army halted some few days; but being apprehensive of the duke of Cumberland's attacking them, it so alarmed them, that they marched back with great precipitation till they came to Carlisle, where he acted as commandant of the city, and gave out orders to the garrison, amongst which he ordered the houses of some of his majesty's faithful subjects to be set on fire, but was afterwards obliged by the duke to surrender to the king's pleasure; and though humanity may induce you to have compassion towards the prisoner, yet if it is proved he is guilty of the crimes laid to him, the justice of this nation calls aloud for his punishment.

For no less was to be a sacrifice than his majesty and his royal family (a succession of

princes, appointed by Divine Providence to be not only the preservers of our rights and liberties, but to be the guardians of the Protestant interest in Europe), to appease the fury of a set of unsatisfied people, who have associated in this most wicked and unnatural rebellion, and who envied us, the faithful subjects of his majesty, the blessings we enjoyed uninterrupted, of our religious and civil rights and privileges.

These people, in order to divert themselves, and amuse the ignorant, had on their standards or colours, mottoes that they imagined would be grateful, viz.

LIBERTY and PROPERTY—CHURCH and KING.

But your lordship and the gentlemen of the jury, as well as the unfortunate person who stands before you at the bar, will excuse me if I take upon me to interpret the meaning of their famous motto or inscription on their colours, which, not to take up too much of the time of the Court, I shall do in few words.

The Liberty they designed, was nothing less than Slavery; their intended Property was Plunder, which too many of the good people of this kingdom hath found; their Church was Popery, and the meaning of their King, was only to make these free kingdoms a province to France.—We shall now call our witnesses, who will give such proofs against the prisoner, that I doubt not, gentlemen of the jury, you will find him guilty.

Sol. Gen. (Hon. W. Murray, afterwards lord Mansfield, L. C. J. of K. B.) Call Roger Mac Donald.

Roger Mac Donald being sworn, said, that he knew colonel Townley the prisoner, that he saw him at Derby, and on the retreat of the rebel army from thence, he marched at the head of the Manchester regiment, as colonel of the same.

This witness also said, that he saw him with a white cockade in his hat, a brace of pistols, and was accounted as principal officer between Lancaster and Preston, and he appeared at the head of the regiment, with colours flying, and drums beating, and that he had on a plaid sash.

This witness was then asked, What number at that time the rebel army might consist of? and he said, to the best of his knowledge, he believed 5,600 men, but not all armed.

This witness farther deposed, That the prisoner at the bar was always looked upon by both officers and soldiers, as colonel of the regiment called the Manchester regiment; and that he gave command to all the officers under him, who obeyed his command as their principal officer. That the regiment had a flag with these words on one side, viz. Liberty and Property; and on the other, Church and King. That they had some artillery with them, and the prisoner always appeared at the head of his regiment.

[Cross-examination.]

Prisoner's Counsel. (Mr. Serjeant Wynne) Pray have you had no promise of pardon?

VOL. XVIII.

Witness. I have had no certain promise of pardon. I was first examined at Inverness, by the judge advocate of Scotland, but he did not assure me of a pardon.

Prisoner's Counsel. Did not you expect it?

Witness. I cannot say but I did expect to be pardoned, for I was only a servant. I was brought ashore very poor, and without any thing to subsist on.

King's Counsel. You say you saw the prisoner, in the retreat from Derby, command his regiment: was not he looked upon as colonel?

Witness. Yes, I saw him on horseback very often, and he always rode at the head of the regiment on a bay horse.

Sir Richard Lloyd. Call Samuel Maddox; who appeared, and was sworn.

Maddox said, The first time he saw the prisoner, colonel Townley, was at Manchester, about the sixth, seventh, or eighth day of December last, but the day he could not particularly remember; and said the prisoner was made colonel of the Manchester regiment by the Pretender's son; and one reason why he was certain he was colonel of the regiment, was, that a guard from the said regiment was mounted every day, and centinels placed at the prisoner's quarters; that he, the said Maddox, marched out with him in the station of an ensign, but never had any commission, though he carried the colours as such; that the prisoner wore a sword and a brace of pistols, with a white cockade in his hat; and that the prisoner gave command as colonel of the regiment, and that he ordered the said Manchester regiment to be drawn up in the church-yard in Manchester, where the Pretender's son reviewed them, and that he marched at the head of the regiment as colonel to Derby. Their first day's march from Manchester was to Winslow, where the prisoner appeared also at the head of the regiment, and had a white cockade in his hat, a plaid sash, a brace of pistols, and a sword; that their next day's march was to Macclesfield, where he, this witness, signified, he had an inclination to leave the regiment, and return home to his master at Manchester, but was intimidated from so doing, by being threatened, and told, that if he did he would have his brains knocked out.

This witness farther deposed, That when they were at Derby with the rebel army, they beat up for volunteers for the Manchester regiment, commanded by the hon. colonel Francis Townley; and the same was done by the particular order and direction of the prisoner.

That when the rebel army retreated from Derby, colonel Townley, the prisoner, and some of his regiment, took out of a house between Derby and Ashborn, a sack full of arms, which were concealed under some old writings; that the said arms were taken with them to Ashborn, and lodged all night in the prisoner's own room, and disposed of afterwards among his men; that the prisoner had two centinels always at his door all night, for fear the

Z

duke of Cumberland was nearer to them than they imagined; that the prisoner marched as colonel of the Manchester regiment, in their retreat from Derby to Carlisle; sometimes at the head of the regiment; that when they came to Carlisle, the prisoner was made by the Pretender's son commandant of Carlisle, and had another commission given him by the Pretender's son to raise a regiment of horse; that so soon as the main body of the rebel army were gone from Carlisle for Scotland, he, the prisoner, took on him the command of the whole rebel forces left there; and that he gave orders for the guns to be mounted, and also ordered a house to be burnt; which was accordingly done, alleging that several of the king's forces had fired from it, and annoyed the Pretender's army; and that he particularly directed and caused several chevaux de frise to be made, and fixed at the gates and entrance to the city, to prevent his majesty's horse and dragoons from approaching it; that the prisoner ordered some of the rebel army then in Carlisle, to make a sally out to bring in some sheep, and that the prisoner mounted the walls, with a pistol in his hand, to give notice if the king's forces were near where the men were to go; that the prisoner paid the men of his own company himself, as all the captains of companies did theirs; and that he had heard the prisoner when in Carlisle, in company with other officers, complain that he was fourscore pounds out of pocket in paying his men; that before the capitulation, this witness heard the prisoner have some words, and was seemingly in a great passion with colonel Hamilton, who was governor of the castle or citadel of Carlisle, for surrendering the place, and not making a defence to the last; and that he heard the prisoner declare, that it was better to die by the sword, than to fall into the hands of those damned Hanoverians.

This witness being particularly asked by the king's counsel, if he had at any time seen the prisoner in Carlisle act as an officer, said, That he had particularly seen him encouraging the rebel soldiers to make sallies out on the king's forces.

[Cross-examination.]

Serj. Wynne. Mr. Maddox, after the surrender of the town and citadel of Carlisle, did not you all expect mercy?

Maddox. We were all put prisoners into the church.

Serj. Wynne. Did you all expect to be hanged?

Maddox. I cannot say that, for we were in expectation of being at liberty again soon.

Serj. Wynne. Pray do not you expect a pardon, or have you had any promise of a reward for what you have done in this affair?

Maddox. I cannot say I have ever had any promise of a reward.

Serj. Wynne. I find you are a very smart young man, and I desire to be answered to this question; pray, have you had any pro-

mise of a reward or pardon, or do you expect any reward or pardon, after having given your evidence against the prisoner at the bar, or the other prisoners that are in custody?

Maddox. My brother came to me when I was in New-Prison, and he did advise me to do the best I could for myself, and serve my country. Soon after, one of his majesty's messengers took me away; and I have been at his house ever since, only at those times I went to be examined; nobody ever told me that I should be pardoned, but my friends advised me to do what I have done. If I could have a free pardon, I should be very thankful for it.

Mr. Clayton (afterwards Lord Chief Justice of C. B. in Ireland, Prisoner's Counsel.) Mr. Maddox, did not his royal highness when you surrendered prisoners promise you mercy?

Maddox. All the terms his royal highness said we were to expect, were, we should not be put to the sword, but that we should be left to his majesty's pleasure; which two Scots officers who went to the duke, and whose names were Abernethy and Forbes, told us; and that the people in Carlisle were to deliver up all their arms at the gate, and the officers were to go into the church.

King's Counsel. Call Austin Coleman, who appeared and was sworn, and said, He saw the prisoner at the bar in Carlisle, who was called colonel Townley, and commanded the Manchester regiment, and was made commandant of the said city by the Pretender's son; and if any of the soldiers wanted arms, they applied to him, and he furnished them with firelocks, pistols, and bayonets; and that he often had seen the prisoner order the guard to mount, and always acted as their chief officer, and all the other officers took their orders from him as their superior.

[Cross-examination.]

Serj. Wynne. Pray, Sir, inform me what time you saw the gentleman at the bar at Carlisle, was it in the month of November?

Coleman. I cannot tell what month it was, I know I saw him at Carlisle when it was in possession of the rebels, and he had a commission from the Pretender's son.

Serj. Wynne. Did you ever hear him say he had a commission?

Coleman. No, I never did.

Serj. Wynne. Then what you say signifies nothing.

King's Counsel. Call capt. Carey of the foot-guards, who appeared.

King's Counsel. Pray swear the captain; which being done, capt. Carey said, That he received orders by lord George Beauchamp, from his royal highness duke William, to take care of the governor of Carlisle, and had his royal highness's orders to examine all the rebel prisoners papers, amongst whom he applied to the prisoner at the bar, who said he had delivered his commission before to major Adams. He further said, That the prisoner had some guineas in his pockets, and his watch, which

he did not take from him; for his royal highness's orders were, not to take any money out of the pockets of any of the officers, only to seize all public money that they had collected; for that what money they had in their pockets might be of service to them in their confinement. That this evidence indorsed all the papers that he found on such of the officers as he searched, and said, the capitulation was signed by the duke of Richmond, lieutenant-general in the army; wherein the rebels in Carlisle were to be at the king's pleasure.

Counsel for the King. Sir, are you sure that in the capitulation that was signed by the duke of Richmond, it was mentioned that the prisoners should be reserved for the king's pleasure?

Capt. Carey. I cannot take upon me to be certain of that; but I think so.

King's Counsel. Do you know the duke of Richmond's hand-writing?

Capt. Carey. No, I never saw his grace write.

Then a Paper was shewn him, which he said was the Capitulation, and was read as follows:

"All the terms his royal highness will or can grant to the rebel garrison of Carlisle, are, That they shall not be put to the sword, but be reserved for the king's pleasure.

"If they consent to these conditions, the governor and principal officers are to deliver themselves up immediately, and the castle, citadel, and all the gates of the town are to be taken possession of forthwith by the king's troops. All the small arms are to be lodged in the town guard-room; and the rest of the garrison are to retire to the cathedral, where a guard is to be placed over them. No damage is to be done to the artillery, arms, or ammunition.—Head Quarters at Blackall, 30 Dec. half an hour past two in the afternoon. By his royal highness's command,—(Signed,) RICHMOND, LENOX, and AUBIGNEY, Lieutenant-general of his majesty's forces."

* As some people may be willing to know what the rebels called, The Capitulation on the surrender of Carlisle; and as several of those unhappy persons in their dying speeches asserted, That their lives were taken away contrary to the laws of nations and of arms, as appears by the capitulation granted them at the surrender of that city; to contradict so false an assertion, we shall here insert all the messages, &c. that passed on that occasion, whereby it will appear, that nothing was granted them but, "that they should not be put to the sword, but reserved for the king's pleasure;" which terms they consented to accept, as appears by colonel Hamilton's, and the other officers' answer to the terms offered by his royal highness, viz. On the first platoon of the old battery firing, (December 30, 1745) the rebels hung out the white flag; whereupon the battery ceased, and they called

King's Counsel. Call captain Nevet of the 3d regiment of foot guards; who appearing, and being sworn, said, He went by order of his royal highness the duke to visit and examine

over the walls, That they had two hostages ready to be delivered at the English gate, on the opposite side of the town; his royal highness the duke of Cumberland then ordered col. Conway and lord Bury to deliver two messages marked in writing, to be signed by colonel Conway; the second message being designed as an answer to a person's letter who called himself a Frenchman.

In about two hours they returned and brought a paper signed John Hamilton; whereupon they were sent back with the terms signed by the duke of Richmond, by order of his royal highness; and about four they brought a paper signed also by the said John Hamilton; on which brigadier Bligh took possession of the city.

Copy of his Royal Highness's MESSAGE to the REBELS at Carlisle, upon their hanging out a White-flag, Monday morning, the 30th of December, 1745, sent by col. Conway.

"His royal highness will make no exchange of hostages with rebels, and desires they will let him know by me, what they meant by hanging out the white flag.

"To let the French officer know, if there is one in the town, that there are no Dutch troops here, but enough of the king's to chastise the rebels, and those who dare to give them any assistance.—(Signed,) Col. CONWAY, aid de camp to his royal highness the duke."

John Hamilton's ANSWER to his Royal Highness the Duke's MESSAGE to the Rebels in Carlisle, December 30, 1745.

"In answer to the short note sent by his royal highness prince William, duke of Cumberland; the governor, in name of himself, and all the officers and soldiers, gunners and others, belonging to the garrison, desires to know what terms his royal highness will be pleased to give them, upon the surrender of the city and castle of Carlisle; and which known, his royal highness shall be duly acquainted with the governor and garrison's last or ultimate resolution, the white flag being hung out on purpose to obtain a cessation of arms for concluding such a capitulation. This to be given to his royal highness's aid de camp.—(Signed,) JOHN HAMILTON."

His Royal Highness's DECLARATION to the REBELS, sent by the Colonels Conway and lord Bury, aid de camps to his royal highness, after receiving John Hamilton's letter, December 30, 1745.

"All the terms his royal highness will or can grant to the rebel garrison of Carlisle, are, That they shall not be put to the sword, but be reserved for the king's pleasure,

the rebel officers in Carlisle; and that the prisoner was one of them, and went by the name of col. Townley, and commandant of Carlisle.

King's Counsel. Swear captain Vere, which was done.

King's Counsel. Sir, will you be pleased to tell my lords, and the gentlemen of the jury, what you know of the prisoner at the bar being in the late unnatural rebellion?

Capt. Vere. I saw the prisoner on the 20th of November at Carlisle, for I was taken prisoner a little before by the rebel army; he was called colonel Townley, colonel of the Manchester regiment, and commandant of the town. On the 25th of December he appeared with a white cockade; I went up to colonel Hamilton's room, where we talked of a capitulation, and Mr. Hamilton was willing to agree to it: we then wrote a letter to his royal highness the duke, and the messenger who carried it was made a prisoner; and Mr. Hamilton desired me to go to captain Abernethy, and the Scotch officers, and they all agreed to what was done, and the next day they hung out the white flag.

Sir John Strange. Did not Townley appear as the commanding officer?

Capt. Vere. Yes, I saw his commission in the guard-room.

Sir John Strange. Did you see it in his own hands?—*Capt. Vere.* I cannot say I did.

Serj. Wynne. Pray, Sir, what are you?

"If they consent to these conditions, the governor and principal officers are to deliver themselves up immediately, and the castle, citadel, and all the gates of the town, are to be taken possession of forthwith by the king's troops. All the small arms are to be lodged in the town guard-room, and the rest of the garrison are to retire to the cathedral, where a guard is to be placed over them. No damage is to be done to the artillery, arms, or ammunition. Head quarters at Blackall, 30 December, half an hour past two in the afternoon. By his royal highness's command.—(Signed.) RICHMOND, LENOX, and AUBIGNEY, lieutenant-general of his majesty's forces."

The REBELS ANSWER to the Terms offered them by his Royal Highness, December 30, 1745.

"The governor of Carlisle, and all the officers composing the garrison, agree to the terms of capitulation given in by his grace the duke of Richmond, Lenox, and Aubigny, lieutenant-general of his majesty's forces, recommending themselves to his royal highness's clemency, and that his royal highness will be pleased to interpose for them with his majesty; and that the officers' clothes and baggage may be safe, with a competent time to be allowed the citizens of Carlisle to remove their beds, bed-clothes, and other household furniture impressed from them for the use of the garrison in the castle. The 30th of December, at three in the afternoon." *Former Edit.*

Capt. Vere. I am an officer, and was sent by

his grace the duke of Newcastle upon the public service, and was taken prisoner before by the rebel army.

Mr. Davidson, a grocer of Carlisle, was the next witness, who being called and sworn, deposed, that he had seen the prisoner at Carlisle, where he acted as colonel of the Manchester regiment, and commandant of the city of Carlisle; he was present when he ordered a house to be set on fire at Carlisle; and on this deponent's asking him the reason for it, he replied, That several of the elector of Hanover's men had fired from it, and annoyed his men.

Here the king's counsel rested it.

The *Counsel for the Prisoner* proceeded now to his defence, and pleaded, that Mr. Townley was a gentleman of a good family, and that his education was suitable to his birth; but by some misfortunes in his family was obliged to retire to France, which happened in the year 1728. Being a man of spirit, he was soon taken notice of by the French court, and being recommended to his most Christian majesty, as a person capable of a post in his army, the king gave him a commission; in consequence of which he served at the siege of Philipburgh, under the marshal duke of Berwick, who lost his life before the walls of that place. He there behaved with such courage and conduct as gained him the respect and esteem of all the officers in the army. He executed all the orders of his superiors with the greatest intrepidity, and exposed himself on every occasion in such a manner, as if life was of no significance, when honour and the service of his master stood in competition with it. He was likewise in several other sieges and engagements, where his behaviour was always such as became a man of honour; and as he received the pay of his most Christian majesty, he thought it his duty to serve him with all the fidelity he was capable of. Thus he continued in that service from the year 1728, till a few years since that he came into England, where he privately resided till about the time of the breaking out of the rebellion. And the French king imagining he might be of service in promoting his views, in the invasion which he had meditated against these kingdoms, sent him a colonel's commission, to enable him to raise forces, and to assist his ally, the Pretender, in his expedition to Scotland. Thus it appears, that he has been sixteen years in the service of France; that he has had the French king's commission during all that time; and consequently was as much in the service of France as any officer in the French army; and therefore they were humbly of opinion, that colonel Townley had as just a right to the cartel, as any French officer that has been taken by the English, during the progress of the war between the two kingdoms.

We must acknowledge that the king's counsel have opened the nature of the indictment with all the candour that could be expected, and have not exaggerated the charge against

the prisoner beyond the bounds of humanity and good-nature; and we humbly hope they will be of opinion with us, that though the prisoner at the bar should unhappily be found acting in this unnatural rebellion, yet as he acted under a commission from the French king, he has a right to the cartel for settling the exchange of prisoners that may be taken on either side, in the war now carried on between the two kingdoms.

The evidence we have to produce in behalf of the prisoner, are only three. The first is captain Carpentier, who will prove, we hope, to your lordships' satisfaction, that colonel Townley was many years in the French service, under a commission from the French king; and since his being taken at Carlisle has been constantly supplied from France; the other two, who are John Hayward and Thomas Dickinson, we shall bring to invalidate the evidence of Maddox, by shewing the badness of his character, and that he is such a man whose testimony is not to be credited.

And the prisoner's counsel farther observed, that the indictment was insufficient, for that they had not mentioned the day in the indictment when the treason was done, and that the glorious statute of the 7th of king William 3, which was justly esteemed the bulwark of English liberty, directed, that nothing shall be given in evidence but what is inserted in the indictment; and that the time not being mentioned in the indictment when the treason was acted, is sufficient to quash it, because it might be so long past as to entitle the prisoner to the benefit of the limitation enacted in the said king's reign; and that act says, That no person shall be convicted, or suffer for high or petit treason, unless a prosecution is begun against the person who committed such treason, in three years after the commission of such treason.

Counsel. Pray call Mr. Carpentier; who appeared, and was sworn.

King's Counsel. Pray, what would you ask this gentleman to?

Prisoner's Counsel. To prove that the prisoner had a commission from the French king, and that he was at the siege of Philipburgh.

Court. That will be against you; for no man that is a liege subject of his majesty can justify taking up arms, and acting in the service of a prince that is actually in war against his majesty.

On which Carpentier was set aside, without being examined.

Serj. Wynne. Pray call John Hayward; who appeared, and was sworn.

Serj. Wynne. Pray, Sir, do you know Samuel Maddox, and how long have you known him?

Hayward. Yes, Sir, about two years.

Serj. Wynne. Pray, what character doth he bear?

Hayward. He bears such a very bad character, that I would not believe him upon his oath,

[Cross-examined.]

Sir John Strange. I hope you believe that every person that joined with the rebels are bad men?—*Hayward.* Yes, Sir.

Sir R. Lloyd. What business are you of?—*Hayward.* I am a glover and leather-seller at Manchester. [After being examined, he went out of court, but was recalled.]

Sol. Gen. Mr. Hayward, Pray, did you see the prisoner at the bar in Manchester?

Hayward. No, I never saw the prisoner before.

Couns. Clayton. Pray call Thomas Dickinson; who appeared, and was sworn.

Sir, do you know Samuel Maddox?

Dickinson. Yes, Sir; he was bound apprentice to an apothecary at Manchester.

Couns. Clayton. Pray, what character does he bear?—*Dickinson.* A very bad one.

Couns. Clayton. Would you believe him upon his oath?

Dickinson. No, I would not, especially upon life and death.

Sir John Strange. For what reason do you take upon you to swear he is not to be believed upon his oath?

Dickinson. I do not know particularly; but I have heard he was a very bad apprentice, and that he had wronged his master.

Sir John Strange. Do you know his master?

Dickinson. Yes; his master is in London now.

Sir John Strange. So, for no other reason, than because you have heard he was not a good apprentice, you take upon you to swear he is not to be believed on his oath. I suppose you have other bad apprentices in Manchester?

Dickinson. Yes, there are.

Att. Gen. Dickinson, Did you ever see the prisoner at Manchester at the time the rebel army was there?—*Dickinson.* Yes.

Att. Gen. What was he doing there?

Dickinson. He was colonel of the Manchester regiment.

Att. Gen. What, in the Pretender's service?

Dickinson. Yes, in the rebel army.

The evidence for the prisoner being all gone through, Mr. Solicitor General replied to what had been objected by the Prisoner's Counsel to the indictment.

Mr. Solicitor General stood up, and made a reply to the prisoner's counsel, wherein he observed, "The first overt-act of high treason charged against the prisoner, is compassing and imagining the death of the king; the next is adhering to the king's enemies, and levying of war against his majesty's person and government; and this is founded on the statute of the 25th of Edward the third. And levying of war by one or more persons, is treason. That this war has been levied, and that acts of hostilities have been committed by the prisoner, I do not doubt but that it has been sufficiently proved to you, gentlemen of the jury; there is no occasion to prove explicitly all that is laid in the indictment; but that war has been levied against his

majesty, has been sufficiently proved and admitted by the learned counsel for the prisoner; it has been proved, likewise, that the prisoner, with a tumultuous number of rebels and traitors, did assemble in several parts of his majesty's dominions, and levied a cruel and destructive war. The counsel on the other side would insinuate, that the crime was committed before the day laid in the indictment, therefore the day of the commission in the indictment should be inserted. But admitting it was so, this indictment is good; for in the case of *sir Harry Gray*, [qu. *Vane*. See vol. 6, p. 119], it was the opinion of all the judges, that *sir Harry* was guilty, notwithstanding that the fact was committed twelve years before the indictment; and it is recent in the memory of many gentlemen of the law, that this was the case of *Chandler*, *Layer*, and *Bradshaw*; and so it was allowed in constructive treason, in the case of *Dammaree* and others,* in the reign of the late queen *Anne*, for pulling down of meeting-houses, and many cases of the like nature in *sir Matthew Hale's Pleas of the Crown*; for which several reasons, and what has been mentioned before, I humbly conceive your lordships will over-rule this exception, as having no weight." (Upon which the said motion was over-ruled by the Court.)

Then my lord chief justice *Lee* summed up the evidence very impartially to the jury.

After which the Jury consulted together in court, but not agreeing in their verdict withdrew about ten minutes, and when they returned into court, were called over by the Clerk of the Arraigns, and answered to their names.

Cl. of Arr. Gentlemen of the jury, are you agreed on your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall say for you?

Jury. Our foreman.

Cl. of Arr. Francis Townley, hold up your hand. (Which he did.)

How say you? Is Francis Townley Guilty of the high-treason whereof he stands indicted, or Not Guilty?—*Foreman.* Guilty.

Cl. of Arr. What goods and chattels, lands and tenements, had he at the time of the said high-treason committed, and at any time since, to your knowledge?—None.

Cl. of Arr. Harken to your verdict, as the Court has recorded it; you say that Francis Townley is guilty of the high-treason whereof he stands indicted, and you say he had no goods, nor chattels, lands or tenements, at the time of the said high-treason committed, or at any time since to your knowledge, and so you say all?—*Jury.* Yes.

Then Mr. Jones, keeper of the county gaol of Surrey, was ordered to take care of the prisoner.

The following is Foster's Report:

"Mr. TOWNLEY'S CASE, July 15, 1746.

"His counsel moved that before any juryman be brought to the book, the whole pan-

* See it, in vol. 15, p. 532.

nel might be called over once in the prisoner's hearing, that he might take notice who did and who did not appear; which they said would be a considerable help to him in taking his challenges.* This was done by order of the Court, and the Attorney-general did not oppose it.

"Every juryman as he came to the book was asked, whether he was a freeholder or no. Those who answered that they had no freehold in the county, were examined upon a *Voire Dire* to that matter;† and on their answering that they had no freehold, were set aside. Those who answered that they had both freehold and copyhold were asked, whether both put together did amount to 10*l.* a-year; and if they did, that was admitted to be a good qualification, though the freehold alone was under 10*l.*

"The Court grounded this rule on the Bill of Rights, 1 W. M. st. 2, c. 2, 4, 5. W. M. c. 24, s. 15, and the 4th and 5th W. M. compared.

"The prisoner's counsel offered to call a witness to shew that he was at the time of the rebellion in the service and pay of the French king, and so intitled, as they insisted, to the benefit of the cartel for exchange of prisoners: but the Court declared that such proof is not to be admitted. It is no defence in a court of law, nor is it so much as an excuse, that he had entered into the service of an open enemy. See the Case of *Æneas Macdonald*.‡

"They then insisted on what they (very improperly) called the Capitulation at the surrender of Carlisle. In this likewise the Court over-ruled them. It is no sort of defence in a court of law. But to prevent misconstructions, colonel Carey was examined touching the terms upon which the surrender was made. And he swore, that the duke expressly reserved the rebels in Carlisle to be dealt with as his majesty should please.

"The Court then observed, that the prisoners had received the whole benefit of the terms offered by the duke, in that they were not immediately put to the sword, [See lord Winton's trial, vol. 15, p. 806] but were reserved for his majesty's pleasure; which now appears to be, that they shall have a fair trial, and liberty to make their defence according to law.

"They then insisted that the overt-acts are charged in the indictment to be committed on the 10th of October, and that all the evidence is of overt-acts subsequent to that time; and said, that however the resolutions with regard to this point may have been before the 7th W. 3, yet now, by that act, no evidence is to be given but of overt-acts laid in the indictment; and consequently the overt-acts must be proved in

* N. B. This was done in *Layer's Case*, after a much longer debate than the matter deserved. Foster.

See in this Collection, vol. 16, p. 94.

† As to these, see *Francis Francia's Case*, vol. 15, p. 898.

‡ In this volume. See also *East's Pleas of the Crown*, c. 2, s. 3.

such manner as they are laid : that in this case especially the king's counsel are not at liberty to vary in their proofs from the day laid since they have confined themselves in the indictment to one day, and have not charged (as they said in most of the precedents it is charged) that the defendant did commit the treason charged on him on the day laid, and at divers days and times, as well before as after.

"To this Mr. Murray, the solicitor general, answered, That the 7th W. S. makes no alteration with regard to this point, so as to make either time or place more material than they were before the act. The act indeed saith, That no evidence shall be given of any overt-acts not laid in the indictment : but what is or is not evidence of such overt-acts, is left upon just the same foot in this respect as it was before the act ; what was evidence at common law is in this respect evidence still ; and as to the charging the overt-acts at divers days and times as well before as after the day particularly mentioned, he said, that the greatest part of the precedents he had seen of indictments for levying war, which is the present case, do charge the overt acts on one day only.

"Sir Richard Lloyd offered to speak on the same side; but the Court told him, he need not give himself the trouble of speaking to the point, on which there could be no doubt, and over-ruled the objection."

The following Warrant was soon after sent to the Sheriff, viz.

"*Surrey.* At a special session of Oyer and Terminer and gaol delivery of our present sovereign lord the king of and for the county of Surrey holden at the borough of Southwark in the said county on Monday the 23d day of June in the 20th year of the reign of our said present sovereign lord George the second by the grace of God of Great-Britain France and Ireland king defender of the faith and so forth before sir William Lee knt. chief justice of our said present sovereign lord the king appointed to hold pleas before the king himself sir John Willes knt. chief justice of the Court of Common Pleas sir Martin Wright knt. one of the justices appointed to hold pleas before the king himself sir James Reynolds knt.

* The lord Balmerino, who had neither counsel nor witness at his trial, insisted on the same point. And the House out of their extreme tenderness in case of life, (after my lord chancellor had delivered his opinion clearly that the time is not material, provided the treason be committed before the bill found) put the question to the judges. Lord chief justice Lee delivered the unanimous opinion of the judges, that the day is not material, provided the treason be proved to have been committed before the finding of the bill. Foster. See lord Balmerino's Case in this volume ; Charnock's Case, vol. 12, pp. 1397 *et seq.* ; East's Pleas of the Crown; c. 2, s. 60.

one of the barons of the Court of Exchequer sir Thomas Abney knt. one of the justices of the said Court of Common Pleas sir Thomas Burnett knt. one other of the justices of the said Court of Common Pleas Charles Clarke esq. one of the barons of the said Court of Exchequer Edward Clive esq. one of the barons of the Court of Exchequer sir Thomas De Veil knt. and Peter Theobalds esq. and from thence continued by several meane adjournments until Tuesday the 22nd day of July then next following and then held before the said sir William Lee sir James Reynolds sir Thomas Abney sir Michael Foster one of the justices appointed to hold pleas before the king himself and the said Edward Clive and sir Thomas De Veil and others their fellow justices and commissioners of our present sovereign lord the king assigned by letters patent of our said present sovereign lord the king under his great seal of Great-Britain made by virtue of the statute made in this present parliament intituled An Act for the more easy and speedy trial of such persons as have levied or shall levy war against his majesty and for the better ascertaining the qualification of jurors in trials for high treason misprision of treason in that part of Great-Britain called Scotland to the said justices and commissioners above-named and others and to any three or more of them (of whom our said present sovereign lord the king willed that any of them the said sir William Lee sir John Willes sir Martin Wright sir James Reynolds sir Thomas Abney sir Thomas Burnett Charles Clark sir Michael Foster Edward Clive and sir Thomas De Veil and others in the said letters patent named and appointed should be one) to deliver the gaol of the said county of the prisoners therein being or such as shall or may be detained in the same on or before the first day of January in the year of our Lord 1746 for or on account of the high-treason mentioned in the said statute in levying war against our said present sovereign lord the king within this realm and to enquire by the oath of good and lawful men of the same county of all such high treasons in levying war against our said present sovereign lord the king within this realm by the said prisoners or any of them or by any other person or persons who are now in actual custody for or on account of the same or who are or shall be guilty of high treason in levying war against our said present sovereign lord the king within this realm and shall be apprehended and imprisoned for the same on or before the first day of January in the year of our Lord 1746 and the same high treasons to hear and determine according to the form of the said statute."

Alexander Abernethy, James Gadd, otherwise Gad, Thomas Furnivall, Christopher Taylor, Andrew Blood otherwise Blyde, are attainted on their own confession of high treason in levying war against our sovereign lord the king within this realm.

Francis Townley, George Fletcher, William

Brettaugh otherwise Bratter otherwise Bretter, Thomas Chadwick otherwise Chaddock, Thomas Deacon, James Dawson, John Berwick, John Saunderson, Thomas Syddall, Charles Deacon, James Wilding otherwise Wheeling, David Morgan, are attainted on verdict of high treason of levying war against our sovereign lord the king within this realm.

"Let the several prisoners above-named return to the gaol of the county of Surrey from whence they came and from thence they must be drawn to the place of execution and when they come there they must be severally hanged by the neck but not till they be dead for they must be cut down alive then their bowels must be taken out and burnt before their faces then their heads must be severed from their bodies and their bodies severally divided into four quarters and these must be at the king's disposal.

"John Hunter is acquitted by verdict of high-treason in levying war against our sovereign lord the king within this realm and must be discharged.

"Let execution be done on Wednesday the 30th day of July instant.

"W. LEE,	T. ARNEY,
M. WRIGHT,	M. FOSTER,
J.A. RYNOLDS,	E. CLIVE."

Of the above seventeen, Abernethy, Gadd, Furnivall, Taylor, Brettaugh, Saunderson, Charles Deacon, and Wilding were reprieved, and the other nine executed July 30.

The prisoner Townley was executed according to his sentence on Kennington-Common, on Wednesday the 30th of July 1746.

After he had hung six minutes, he was cut down, and having life in him, as he lay upon the block to be quartered, the executioner gave him several blows on his breast, which not having the effect designed, he immediately cut his throat; after which he took his head off; then ripped him open, and took out his bowels and heart, and threw them into a fire, which consumed them; then he slashed his four quarters; and put them with the head into a coffin, and they were carried to the new gaol in Southwark, where they were deposited till Saturday August 2, when his head was put on Temple-bar, and his body and limbs suffered to be buried.

This unfortunate person was about 38 years

of age, born near Wigan in Lancashire, of a very good family. His uncle Mr. Townley, of Townley-hall, in Lancashire, was tried in Southwark, before judge Powis, for being in the rebellion in 1715; and though acquitted by his jury, yet not thought innocent by the public; for many of his men who were tried at other places, for going into the rebellion with him, were convicted and executed.

In 1727, he went over to France, and entered himself a volunteer in the French king's service; and in 1728 obtained a commission from the king of France, and continued abroad about 15 years. He was at the siege of Philipsburg, when the duke of Berwick's head was shot off, and was near the duké at that time. He was also in the French army, when the Germans made such a sudden attack upon that quarter of the army where marshal Broglie commanded, as obliged the marshal in a terrible fright to run away without his breeches. He was likewise in several other actions and sieges, and, as was said by his friends, he always behaved well and with honour.

The reason of his leaving the French service, about five years since, and coming to England, was to live some time in his own country with his friends; and when the rebel army came into England, he went and met them between Lancaster and Preston; and came with them to Manchester, where the Pretender's son gave him a commission to raise a regiment of foot, which was immediately done; and the young Pretender, on leaving him at Carlisle, gave him another commission to raise a regiment of horse.

His behaviour from the first of his being taken prisoner at Carlisle, to the time of his trial, was of a piece; he frequently saying that he could not be hurt, for that he had a commission from the king of France, and so must be exchanged upon the cartel; but when he was convicted, he seemed a little more serious, and often said, he expected no mercy.

He was much more reserved than many of his fellow-sufferers; and would not talk a great deal to any body but his particular friends and brother-prisoners.

The morning of his execution, and even at the fatal place, he shewed no manner of signs of dread, but said he hoped he should be happy in the next world.

508. The Trial of GEORGE FLETCHER, for High-Treason, at the Court-house, St. Margaret's-Hill, Southwark, Wednesday, July 16: 20 GEORGE II. A. D. 1746.

THIS day the Court, according to adjournment, met at ten in the morning, where there were present, the lord chief-justice Lee, Mr. justice Wright, and Mr. baron Reynolds.

And also the other officers, that attended the Court the preceding day, took their seats; and proclamation being made by the cryer, he proceeded to call the jury, and ordered the keeper of the county gaol to set George Fletcher to the bar; which being done accordingly, the following gentlemen (after the prisoner had made ten challenges) were sworn in for the jury.

JURY.

1. Daniel Ponton of Lambeth, starch-maker.
2. Michael Cusse of Battersea, gardener.
3. Michael Constable of Dorking, yeoman.
4. W. Brooker of Walton on Thames, brewer.
5. Edmund Brown of Croydon, brewer.
6. Thomas Belch of Coulsdon, gent.
7. C. Stoakes of Bermondsey, fell-monger.
8. William Taylor of St. Saviour, brewer.
9. Thomas Lintall, of ditto, cloth-worker.
10. Fra. Simmonds of Puttenham, yeoman.
11. James Paine of Seal, yeoman.
12. Richard Sparkes of Womersh, yeoman.

And they being all sworn, took their seats in the jury-box; and proclamation was again made for silence, whilst the indictment was reading to the prisoner.

Note, The indictment was the same as that of Townley (convicted the day before), the treason being laid to be committed the same time, at the same place, and in the same manner.

After the King's Counsel had opened the Charge, the following evidence was called against the prisoner.

Ormsby Mac Cormack sworn.

King's Counsel. Mr. Mac-Cormack, pray look upon the prisoner, and then tell the Court, and the gentlemen of the jury, what you know of him; and speak out loud, that you may be heard.

Mac Cormack. The first time that I saw him, was before the rebels marched from Manchester to Derby.

King's Counsel. What appearance did the prisoner make at Manchester? Did you look upon him to be an officer?

Mac Cormack. He had a white cockade in his hat, and marched as captain in the Manchester regiment. I saw the flag that belonged to the regiment flying, and the motto was, Liberty and Property, Church and King.

King's Counsel. Did he march with all the rebel army? Were there any pipes playing?

Mac Cormack. There were pipes playing

before the highland rebels, but none in the Manchester regiment.—I saw him also at Derby.

Prisoner's Counsel. Pray, friend, how came you to know him so particularly?

Mac Cormack. They called him capt. Dawson.

[Here the counsel for the prisoner interrupted the witness, because there is one Dawson now in custody, who was an officer in the said regiment, and the prisoner's name is Fletcher.]

King's Counsel. Look at the prisoner again.

Mac Cormack. (Looking earnestly at him.) Though I may mistake his name, I am sure he is the person that I saw at Derby, though I cannot positively say he gave any command there as an officer. I saw him at Preston, and other places along the road, till we came to Carlisle.

King's Counsel. Were you with him at Carlisle?

Mac Cormack. I was at Carlisle; but he was there before I came, and there I saw him act as a captain; and when the soldiers were drawn up in the castle-yard, I saw him there, and saw arms distributed to some of the soldiers who had none.

Prisoner's Counsel. Did you see him distribute any arms to any of the soldiers?

Mac Cormack. I cannot say that I did.

Prisoner's Counsel. Then who distributed those arms?

Mac Cormack. It was a Scotch officer, who I am informed is since killed.—I heard so.

King's Counsel. Was not the prisoner at the bar at Carlisle when the duke was before the town?

Mac Cormack. Yes, I am sure he was, and commanded as an officer; he had a white cockade in his hat, an highland plaid sash, lined with white silk, and all military accoutrements that officers have.

King's Counsel. Then you are certain as to his person?

Mac Cormack. I am certain this is the gentleman, for he mounted the very first captain's guard that was mounted at Carlisle. I saw him at the surrender, and he was carried into the church, and made prisoner with the rest of the officers.

Serj. Wynne. Are you sure he is the very man?

Mac Cormack. I am very sure of it, though he has been long out of my sight.

L. C. J. Consider you are upon your oath, and what you say affects his life.

Mac Cormack. I am sure he is the very same, I know his person perfectly well.

Serj. Wynne. How can you be so positive to him, did you ever see him before you came to Manchester?

Mac Cormack. Not to my knowledge.

Serj. Wynne. Where did you come from, what countryman are you?

Mac Cormack. I am an Irishman, I came from Ireland.

Serj. Wynne. What brought you to Manchester?

Mac Cormack. I am a weaver by trade, and I came to Manchester last May was twelve-month to seek for business, and I continued there, and worked till the 30th of June; then business falling short, I went into Warwickshire, and worked as a haymaker for my living.

[Cross-examination.]

Prisoner's Counsel. It is a little extraordinary, that you should take such particular notice of the prisoner; were you in the rebel army; was he your commander?

Mac Cormack. No, he was not; capt. Peter Moss* was my commander.

Serj. Wynne. Had you any command in the rebel army, were you either a captain, or a lieutenant?

Mac Cormack. I had no command at all.

Counsel. How came you hither to give your evidence?

Mac Cormack. I was taken into custody by Mr. Carrington, one of the king's messengers, at West-Chester, and I did not know I was to come to London to be an evidence.

Counsel. Have you had any promise of a pardon?

Mac Cormack. I have not, nor never had to my knowledge.

Sir John Strange. Pray call Samuel Maddox, who appeared, and was sworn.

King's Counsel. Mr. Maddox, do you know Mr. Fletcher, the prisoner at the bar?

Maddox. I know him very well; and in the month of last November, but I cannot particularly remember the day, I saw him at the Dog Inn in Manchester, where there were several persons assembled, and his name was put down as an officer in a new-raised regiment, called the Manchester regiment; he marched as a captain from Manchester to Winslow, and from thence on to Macclesfield, where the said regiment was drawn up in the church-yard; and all the soldiers who were unarmed had arms delivered unto them; the prisoner, Mr. Fletcher, had there a sword by his side, and appeared in his regimentals, as captain, with a white cockade, and a plaid sash.

The rebels at Macclesfield were in general in confusion for want of men, and very much

* Peter Moss escaped out of Newgate the night before the rebel prisoners were removed to Bakers Copse, and hath not been heard of in France. Former Edition.

dreaded the king's forces. I was determined to return to Manchester, and communicated my thoughts and intentions to several of my comrades; the prisoner, Mr. Fletcher, heard of my resolution at a place called Blackersey, and then he came to me, and told me it would be a scandalous thing to make a dishonourable retreat; and putting his hand in his pocket pulled out a great parcel of gold, and told me I should never want while that lasted. I marched with him to Derby, and back to Carlisle afterwards.

[Cross-examination.]

Prisoner's Counsel. How came you to be at the Black-Dog at Manchester?

Maddox. I went there accidentally; I was with the regiment three days before it marched, and I was never sober all the time.

Prisoner's Counsel. What, not sober all that time?

Maddox. I mean not all the time I was at Manchester.

Prisoner's Counsel. Where did you see the prisoner besides at Manchester?

Maddox. I saw him at Penrith, and I saw him at Carlisle, with other officers, and with the Pretender's son; at both which places he acted in the capacity of a captain: and when Carlisle was surrendered, he went into the church with other officers.

Prisoner's Counsel. Have you had no promise of a pardon?

Maddox. I have had none; I told you so, Sir, several times before.

Prisoner's Counsel. What, did none of your friends advise you, or persuade you to do what you have done?

Maddox. I cannot say, but one of my relations persuaded me to do what I could to save my own life.

Prisoner's Counsel. Could not Mr. Fletcher have escaped to save his life, if he would?

Maddox. I cannot tell but what he might; for capt. Bradshaw got away, but he soon joined the army again.

Prisoner's Counsel. Pray what character does the prisoner bear at Manchester?

Maddox. I do not know much of his general character; I have seen him at the assembly with the ladies: he was a chapman, and dealt in linen before this affair.

King's Counsel. Pray call Thomas Bradbury, who appeared and was sworn.

King's Counsel. Mr. Bradbury, pray what do you know, or what have you to say against the prisoner at the bar.

Bradbury. I lived at Manchester when the rebels were in that town; and one morning when a serjeant and drum were beating up for volunteers at the Exchange for the Pretender's Manchester regiment, I happened to be there, where I believe there were more than 1,000 people assembled: and when the serjeant had done his speech, and concluded with saying God bless king J——s and prince C——les! the prisoner pulled off his hat and hallooed.

[Cross-examination.]

Prisoner's Counsel. As you live at Manchester, pray what character does the prisoner bear at that town?

Bradbury. A good character for aught I know, for I only came here to speak the truth.

King's Counsel. Pray call Austin Coleman, who being sworn, was asked if he had ever seen the prisoner act as an officer?

Coleman. Yes, I have seen him act as a captain at Preston, Penrith, and at Carlisle, when it was surrendered to the duke of Cumberland.

Prisoner's Counsel. What countryman are you?

Coleman. I am an Irishman, and I came to Manchester about twelve months ago.

Thomas Craig was then called by the king's counsel, and being sworn, was asked what he knew of the prisoner?

Craig. I saw him march from Manchester; I saw the colours of the Manchester regiment flying, and the drums beating; and I saw him act on the march as captain, and I saw him surrender at Carlisle to his royal highness the duke of Cumberland's troops.

King's Counsel. Pray call capt. Nevet, who appeared and was sworn.

King's Counsel. Pray, Sir, give the Court and the jury an account of what you know of the prisoner at the bar.

Capt. Nevet. I was at Carlisle when the rebels surrendered the town to his royal highness the duke of Cumberland. When the officers of the garrison surrendered themselves prisoners, and were in custody, I had a particular order from his royal highness to go to the place of their confinement, to take the names, ranks, and qualities of all those that were there. When I called on the prisoner at the bar, he told me he was a captain; and when I had taken the names of all the rest, and what commissions they had under the Pretender's son, I went and made a report that evening to the duke, and his royal highness commanded me the next day to go to the same place; and I called over their names, and he answered by the name of captain Fletcher.

THE PRISONER'S DEFENCE.

Prisoner's Counsel. Call Anne Acton, who was sworn. Do you know the prisoner?

Acton. Yes, Sir, I have known him ever since he was born, for I have lived in the family 27 years; he managed the trade for his mother at Salford, just over the bridge at Manchester, and he had a very good share of business for a young man. The rebels came the 29th of November to Manchester, and we had a great many of them quartered upon us; Mr. Fletcher's mother was very uneasy at the sight of them, and went away, because she could not bear to see them eat and drink, and make free with every thing in the house. They tarried at Manchester three days, and upon the 8th of December, they returned again to Manchester, and captain Robinson, who commanded the

soldiers who were at our house before, came a second time, and asked for our master; he went out, and there were half a dozen of soldiers at the door, and swore they would have him; and I never saw him after. I do not know he ever did a bad thing in his life; he always behaved well and dutiful to king George, and all the royal family. I never saw the least willingness in him to join with the Pretender; all the family were of the Church of England, and when they dragged him away, he went away with tears in his eyes.

She was cross-examined by sir John Strange; and prevaricated so much in her answers in most questions that were asked of her, that no credit was given to her evidence.

Charles Worrall was produced and sworn, who said, he knew the prisoner an apprentice, and had sold him goods, and that the prisoner paid him honestly; but as to his principles, he knew nothing of them.

Then John Hayward* was called and sworn, and being asked what business he followed, he said he was a dealer in leather.

Prisoner's Counsel. What do you know of the prisoner?

Witness. I cannot say that I know much of his notions one way or other.

Prisoner's Counsel. I think, Sir, you live at Manchester?—*Witness.* Yes, I do, Sir.

Prisoner's Counsel. Then pray inform the Court and the gentlemen of the jury, so far as you know, what past at Manchester relating to the prisoner, during the time the rebels were there.

Witness. I cannot say any thing particularly.

Prisoner's Counsel. Pray do you know that at the time the Pretender's party were beating up for volunteers, at the Exchange in Manchester, the prisoner was present, and took off his hat and hallooed?

Witness. I was not out of doors at that time; I had a relation lay dead in my house at the same time.

The prisoner's counsel not having any thing more to say in his defence, and the testimony of Mrs. Ann Acton having very little weight with the Court and jury, after my Lord Chief Justice had summed up the evidence, the jury, without going out of Court, found the prisoner, Guilty.

N. B. The prisoner desired his fetters might be taken off whilst he was on his trial, which the Court granted; but after his conviction, the Court gave the gaoler direction to iron him again, and take an especial care of his prisoner, for that he was convicted of high-treason.

This prisoner was executed the same day, viz. the 30th of July 1746, in the same manner as Townley, and his head with Townley's

* This is the same person that was evidence the day before for colonel Townley. *Former Edition.*

was put up on Temple-Bar, on Saturday the 24 of August, the Saturday following their execution.

He was about 28 years of age, and was bred up in Salford, adjoining to Manchester, where his parents lived, who were very substantial people. His father had been some time dead, but his mother was then living, whose business he managed. He was reckoned before he took on in the rebel army, to be a young man of a good character; but being unhappily prejudiced against the present royal family, he was very ready to join the Pretender's forces as soon as they came to Manchester; and he gave Murray, the Pretender's secretary, 50*l.* for his captain's commission.

There is one thing pretty singular in the story of Mr. Fletcher, which must not be omitted, because it shewed the heartiness of the man in the cause he endeavoured to support. At his trial, Mr. Maddox, who was a principal evidence against him, swore, that when the rebels were at Macclesfield, they were in great confusion for want of men, and mightily disheartened at the approach of the king's forces; upon which he (Maddox) determined to leave them, and return to Manchester, and communicated such his intention to several of his comrades; which being told to Fletcher, he came to Maddox, and expostulated with him about it; telling him, what a scandal it would reflect upon him to leave his friends at a juncture,

when they had the greatest occasion for his assistance; that if he wanted money, he need but speak, and he should have whatever he had occasion for; and at the same time, putting his hand in his pocket, shewed him a handful of gold.

Fletcher's behaviour during the time of his confinement in Newgate, was, as the rest of his fellow rebel prisoners', very cheerful; and he continued so during the time he was under sentence of death, even from the gaol to the place of execution, and was the same to the last. He was a young man of very good parts, and very often acknowledged, that he had brought this misfortune upon himself by his obstinacy; for that his mother had begged and intreated of him, even on her knees, that he would keep himself out of the rebellion; and when no persuasions could prevail upon him, she offered him a thousand pounds to do with as he pleased, if he would hearken to her advice: but all to no purpose; and therefore that he had nobody to thank but himself for the consequences that had happened.

At the place of execution he delivered papers to the populace, as the rest of them did, the contents of which papers were, that they died in a good cause; that they did no way relent at what they had done, and doubted not but their deaths would in time be revenged; and many treasonable and other vile expressions not fit to be here mentioned.

509. The Trials of THOMAS CHADWICK and WILLIAM BATTRAGH,
for High Treason, at the Court-house, Southwark, July 16 :
20 GEORGE II. A. D. 1746.

THOMAS CHADWICK, and William Bat-tree, otherwise Battro, otherwise Battragh, otherwise Bretah, were both brought to the bar, and both agreed in their challenges of the Jury; but before Mr. Chadwick was tried, he desired his irons might be taken off, which was done directly: and after having challenged thirteen jurymen, the twelve following gentlemen were sworn to try them.

- 1 Francis Bartholomew of Egham, gent.
- 2 Thomas Dawson of St. George's, brazier.
- 3 William Shurlock of Shere, yeoman.
- 4 Richard Toy of Richmond, grocer.
- 5 John Fielder of Esher, yeoman.
- 6 James Vinal of Esher, wheelwright.
- 7 John Otway of Ashted, yeoman.
- 8 Thomas Puplett of Banstead, yeoman.
- 9 John Start, of Epsom, chandler.
- 10 George Hart of Croydon, callico-printer.
- 11 William Bridgestock of Croydon, farmer.
- 12 John Rowles of Croydon, wheelwright.

Att. Gen. Call Samuel Maddox; who appearing in court, was sworn.

King's Counsel. Mr. Maddox, Pray relate to my lord and the gentlemen of the jury, what

you know concerning the prisoners at the bar, or either of them.

Maddox. (Looking on the prisoners at the bar.) I know both of them; Mr. Chadwick was a lieutenant, and Mr. Battragh served as an ensign in the Manchester regiment, in the rebel army.

King's Counsel. Pray how did Mr. Chadwick appear; did he appear as an officer?

Maddox. Chadwick wore a laced hat, with a white cockade in it, and I saw both of them march from Manchester; and when they marched, Mr. Battragh had on a Scotch plaid sash, lined with a white ribband; I was with them when they marched from Manchester to Winslow; there were a great many men listed as we went on the road.

King's Counsel. Can you take upon you to say that either of the prisoners at the bar insisted any?

Maddox. I cannot be positive to that; but there were a great many men enlisted by captain Deacon upon our march from Manchester. Both the prisoners appeared on horseback as officers; and I myself carried the colours out of Mauchester. And as we were upon the

road on our march, I saw the prisoner, Bat-tragh, carry the colours once or twice, whereon was the motto, "Liberty and Property, Church and King."

King's Counsel. Did any thing remarkable happen at Winslow, relating to the prisoners? Did they act as officers?

Maddox. I know nothing at all particular there.

King's Counsel. What route did you take when you left Winslow?

Maddox. We marched on for Derby.

King's Counsel. Did the prisoners all along appear as officers and act as such?

Maddox. Yes, they did, Chadwick as a lieutenant, and Battragh as an ensign: I saw them at Penrith, and at Preston; Battragh belonged to captain James Dawson's company, but I do not know what company the other prisoner belonged to; and I saw both of them reviewed by the young Pretender.

King's Counsel. And what further happened? Tell my lord and the gentlemen of the jury every thing you know relating to this matter.

Maddox. I cannot say any thing more that is very material, only that from Manchester all the way they acted as officers.

King's Counsel. Do you remember any thing that was remarkable when you came to Lancaster?

Maddox. I remember that all the officers were very merry there, and Mr. Chadwick proposed to entertain them with a tune; and myself, and most of the rebel officers went into Lancaster church, and went up into the organ gallery, and Mr. Chadwick played a tune on the organ.

King's Counsel. What tune did he play?

Maddox. He played, "The king shall enjoy his own again;" and we were all very merry.

King's Counsel. Pray inform the Court, if you saw any of the prisoners at Carlisle.

Maddox. Yes, I saw both the prisoners at Carlisle, in the room with the young Pretender.

King's Counsel. How came they in particular to be in the room with the young Pretender?

Maddox. We were all drawn up together to take leave of him, before he left Carlisle.

King's Counsel. Was the town of Carlisle put in a posture of defence against the king's forces?

Maddox. Yes; we opposed his majesty's forces, and I saw both the prisoners mount guard in the town hall, where a guard was placed a day or two after the Pretender left the town.

King's Counsel. Were you present when the town was surrendered to his royal highness the duke of Cumberland?

Maddox. I was; and both the prisoners were put into the aisles of the church, amongst the other rebel officers.

[Cross-examination.]

Prisoner's Counsel. How long have you known Battragh, or Battelagh as they call him?

Maddox. I have known him two years and upwards, he was an attorney's clerk, and came and persuaded me to join with the young Pretender's army, before I had an inclination so to do: this we talked of privately in his bed-chamber; he told me he had new linen made on purpose, and was going to the sadler's to bespeak bags to carry his linen and other things in.

Prisoner's Counsel. Had not you and the prisoner a quarrel at Carlisle? I think you had a trial of skill there.

Maddox. That I confess, and I will tell you what it was about; it was about a very foolish affair. Provisions being a little scarce at Carlisle, I had some sausages, and the prisoner would have them from me, and I not caring to part from them, caused a quarrel, and we fought together.

Prisoner's Counsel. Did not you tell him you would do for him, or be revenged on him, or some words to that purpose?

Maddox. No, never as I remember; I would not swear any man's life away for a sausage.

Prisoner's Counsel. Do not you swear in expectation of saving your life?

Att. Gen. It is not a proper question;—that has been answered already.

Sir J. Strange. Do you expect to save your life by false swearing?

Maddox. No, I do not indeed; I will swear nothing but the truth; and what I have sworn in this honourable court, is all matter of fact.

King's Counsel. Pray call Thomas Craig; who appeared, and was sworn.

King's Counsel. Well, Sir, what have you to say to either of the prisoners that stand by you?

Craig. I know Mr. Chadwick very well; but I cannot say that I have so much knowledge of Battragh. I remember seeing Mr. Chadwick at Manchester, with a cockade in his hat: then I afterwards saw him march from Manchester to Winslow, as a lieutenant: I saw him at several other places on the road, and also at Penrith, where he still appeared as a lieutenant.

King's Counsel. Then you are sure he was a lieutenant in the rebel army?

Craig. Yes; he marched from Manchester to Penrith Moor as such, then I saw him at Carlisle, and there he mounted guard as a lieutenant. I am sure that I saw him once mount guard.

[Cross-examination.]

Prisoner's Counsel. Do not you expect to have a free pardon?

Craig. As to that I must trust to his majesty's mercy.

Prisoner's Counsel. How came you to know Mr. Chadwick so well; do you know him so very well that you can be positive to him?

Craig. I have known him many years, and I belonged to the Manchester regiment.

King's Counsel. Call Austin Coleman; who was produced and sworn.

King's Counsel. Give an account, Mr. Cole-

man, to my lords and the jury, what you know of the prisoners at the bar.

Coleman being sworn, and looking on them, and then pointing to Battragh.

That gentleman's name is Battragh, and I have seen him at Derby; and the other is Chadwick, and him I have seen at Manchester; there he appeared as an officer with a plaid sash, and a laced hat, with a white cockade in it; I did not see Battragh have any. They both appeared as officers in marching along; they were sometimes on foot, and sometimes on horseback.

King's Counsel. Do you know any thing of their being at Carlisle?

Coleman. I saw them both in the guard-room with captain Fletcher.

King's Counsel. Did they wear their sashes there, as other officers did?

Coleman. I cannot remember that; but when the town was surrendered to the duke of Cumberland, they were put into the church with other rebel officers.—I am sure of that.

Ormsby Mac Cormack was next produced and sworn.

King's Counsel. Do you know either of the prisoners?

Mac Cormack. Yes, I have seen both of them in the Manchester regiment; I saw Battragh with the rebel army, and he carried the colours from Penrith to Carlisle.

King's Counsel. And did you see him at Carlisle?

Mac Cormack. Yes, I saw him there when the town was besieged by the duke of Cumberland.

King's Counsel. Did he ever mount guard at Carlisle?

Mac Cormack. Not to my knowledge; but I have seen him in the guard room, with a sword, a sash, and a cockade.

King's Counsel. And you always took him to be an officer there, did you not?

Mac Cormack. Yes, for I very well remember that he was walking up and down the castle yard, as an officer, when the arms were distributing to the rebel soldiers there, and Mr. Chadwick was with them.

John Collins, a boy of 13 years of age, was called and sworn.

Prisoner's Counsel. Do you know the nature of an oath, child?

Collins. Yes, I do; I know I am sworn to speak the truth, and I shall never be happy if I do not.

King's Counsel. Do you know either of the prisoners? were you among the rebels at Carlisle?

Collins. Yes, I was, and was a servant to captain Lowther, and we were taken prisoners by the duke at Carlisle, where on my knees I begged my life of his royal highness, which he generously granted, and God bless him for it. I saw both the prisoners at Carlisle, and there

they always acted as officers in the Manchester regiment; Chadwick as a lieutenant, and Battragh as an ensign: I know them both perfectly well.

King's Counsel. Pray call captain Nevet, who was sworn.

King's Counsel. I think when Carlisle surrendered to his royal highness the duke, you had a command from his royal highness to go to the church where the officers were prisoners, and to take their names.

Capt. Nevet. Yes, I had, Sir.

King's Counsel. Do you remember to have seen either of the prisoners at the bar at Carlisle?

Capt. Nevet. Perfectly well: The first time that I saw them, Mr. Chadwick gave in his name as a lieutenant in Townley's Manchester regiment; and the other prisoner, Battragh, told me he was an ensign in the same regiment; I noted it so in my paper: and on making a report to his royal highness the duke, and giving in a list of their names and qualities, I was ordered to go the next morning, and I went accordingly, and called all the prisoners over by their names, and they answered, Chadwick as a lieutenant, and Battragh as ensign.

The king's witnesses being all gone through, and neither of the prisoners making any defence, or calling any witnesses to their characters, the jury, without going out of court, found both the prisoners guilty of high treason; and the Court ordered the irons to be put on Mr. Chadwick again.

The prisoner Chadwick was executed on Kennington Common, on Wednesday the 30th of July, 1746, according to his sentence; and his head was preserved in spirits, and sent down to Carlisle or Manchester, to be put up as those of Townley and Fletcher's had been on Temple Bar; but his body was delivered to his friends to be buried.

He was about 32 years of age, of very honest and creditable parents in Manchester, and whose father then lived there, and followed the trade of a tallow-chandler and soap-boiler. This unfortunate man was bred up to the same trade; but he playing pretty well on several instruments, kept some of the most polite company of the place, and never followed any trade.

He was a person of great resolution, and could, as he used to say, look death in the face with as much pleasure as he could a friend who came to visit him, and could meet it with as much good-will. His behaviour, during the whole time of his confinement, was always cheerful and merry, taking all manner of pleasures the gaols afforded; and frequently declaring, that what he had done he was not sorry for, for if it was to do again, he would act in the same manner.

The morning of his execution, whilst they were at breakfast, Mr. Chadwick said to Mr. Berwick, Ah! Duke (for this is the name that Berwick went by in the rebel army) our time

draws very near; though as to my part, I am as hearty as ever I was in my life. Mr. Berwick replied, As to my part, I think we all look pretty well, and I declare death don't shock me in the least. I hope God will be merciful to us all; for I can lay my hand on my heart, and say, the greatest injury I ever did was to myself and relations; and though I

have brought them and myself to disgrace, they have been so kind as to forgive me, and would have saved my life had it been in their power.

The other prisoner Battragh received his majesty's most gracious reprieve.

510. The Trial of THOMAS THEODORUS DEACON, for High Treason, at the Court-house, St. Margaret's-hill, Southwark, July 17: 20 GEORGE II. A. D. 1746.

THE Court being sat, the following judges being present, viz. lord chief justice Willes, Mr. justice Abney, and Mr. justice Foster, Thomas Deacon was put to the bar.

King's Counsel. Call Mr. Samuel Maddox; who appeared and was sworn.

King's Counsel. Mr. Maddox, give an account to the Court and jury what you know of the prisoner that stands by you.

Maddox. I saw him at the Bull Head at Manchester, where he sat at a table, writing down the names of such as enlisted in the Pretender's service; for which he was paid for every name enlisted, one shilling. There were several blue and white ribbands lying before him, which, when he was not writing, he made up into favours, and gave them to the men enlisted. I saw him march from Manchester to Winslow as an officer, wearing a plaid waistcoat, with laced loops, a broad sword by his side, a brace of pistols stuck in his girdle, and a cockade in his hat. When he beat up for volunteers at several places, he made a very long speech, inviting all gentlemen volunteers to come and serve Charles, Prince Regent, and they should have good quarters, be well used by the officers and enter into present pay, and when they came to London, they should receive five guineas to bear their expences home, if they thought proper to leave the service, and should receive thanks, and have a protection. At Winslow he was ordered by the Pretender to march to Derby as a guide, with ammunition, &c. that had been seized; and at Leake he went with Thomas Syddall and James Bradshaw to raise recruits, and joined the rebel army again at Manchester. That at Preston he commanded his company, and gave directions to the officers under him, who obeyed him; and that at Carlisle he mounted guard in the town-hall during the siege.

Thomas Bradbury, another witness, swore, That the prisoner was a captain in the rebel army, and was dressed as above. That he, the witness, being a servant to a printer at Manchester, the prisoner, with other rebels, came to him, in the absence of his master, and compelled him to print a treasonable paper, which they called a Manifesto, and likewise an

advertisement; both which were delivered into court and read. The advertisement, or hand bills, were distributed by the rebels, offering all fitting encouragement to such as would enlist with them; and that he the said Deacon was in a great hurry, and came several times to the printing-office, and threatened Mr. Bradbury, if he did not get the papers ready, he should be severely punished; and that he the said Deacon brought with him, when he came for the said papers, a great number of horse belonging to the rebel army, who threatened to pull down the house.

Thomas Craig, another witness, swore, That he saw the prisoner mount guard at Manchester, Preston, and Carlisle; that he was lieutenant colonel, and promoted for his great diligence in raising recruits.

Captain Nevet swore, that the prisoner said, his name was Thomas Deacon, and that he was a captain in the Manchester regiment.—*Capt. Carey* confirmed *capt. Nevet's* testimony.

The prisoner had no witnesses to produce, so the jury found him guilty of the indictment, Death.

MR. DEACON'S CASE, July 17, 1746.

(*J. Foster's Reports*, p. 9.)

"In Mr. Deacon's Case, his counsel objected to the receiving the evidence of a printer touching the prisoner's obliging him to print the Pretender's Manifesto at Manchester, and his publishing of it there, while the rebel army was in the town; and also to the reading the Manifesto. They insisted that this ought not to be given in evidence, because it is an overt act not laid in the indictment; and also because the orders were given and the Manifesto printed and published in Manchester, and all the overt acts are laid in Cumberland.*

"But it was answered by the Court (lord chief justice Willes, justice Abney, and justice Foster), that an overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid.

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 46, § 184. East's Pleas of the Crown, c. 2, § 57, 61, 65.

"One of the overt acts charged in this indictment is the assembling and marching *modo gucrino*, in order to depose the king, and to set the Pretender on the throne. It is proved that the prisoner with the rest of the rebel army was at Manchester, and appeared in an hostile manner there. Now what stronger proof can there be that the prisoner joined this army for the purpose mentioned in the indictment, than his causing to be printed and dispersed among the people the Pretender's Manifesto? It never was doubted that the being present with rebels and joining in proclaiming the Pretender, might be given in evidence on such an indictment as this; and yet that circumstance was never expressly laid in any indictment. But it is sufficient that it proves *quo animo* the rebel army was raised, and *quo animo* the prisoner joined it.

"As to the objection that this fact was not committed in Cumberland where all the overt acts are laid, Mr. justice Abney and Mr. justice Foster held, that it is indeed necessary on this indictment that some overt act laid be proved on the prisoner in Cumberland; but that being done, acts of treason tending to prove the overt acts laid* though done in a foreign county, may be given in evidence.†

"And the Manifesto was read.

"Lord Chief Justice Willes declined giving any opinion on the second point. But no objection was made during the whole course of

* This expression seems to be preferable to the former, viz. "if it be a direct proof of any of the overt acts that are laid." That the prisoner at Manchester in Lancashire caused to be printed and dispersed among the people the Pretender's Manifesto, cannot, I think, without some violence to language, be denominated a direct proof that the prisoner and others being armed and arrayed, &c. did falsely and traitorously assemble, and join themselves, &c. in Cumberland (see the indictment in Townley's Case, p. 333, of this volume) though it certainly tended to prove that overt act in as much as when the arming arraying and assembling had been established by other evidence, the prisoner's causing to be printed, &c. was a direct proof of his purpose.

† See the fourth Resolution in sir Henry Vane's Case, and the note thereto, *ante*, vol. 6, p. 183.

the trials to the giving evidence of overt acts in a county different from that where the fact was laid, an overt act having been first proved in the proper county. And that sort of evidence was given in almost all the trials.*

This unfortunate young man, who was about 22 years of age, was the son of Dr. Deacon of Manchester, who gave him a liberal education, and designed to have brought him up to his own profession; but he was unhappily prejudiced in favour of the Pretender against the present royal family, by the company he frequently conversed with; and by their persuasion, took on in the rebel army as soon as it came into Manchester, and he had often declared before the rebels came to the town, that he would join them as soon as they did; and was one of the most strenuous zealots for the cause amongst them.

It was very unfortunate for his family his taking a commission in the Pretender's service, for by his example his two other brothers did the same, one of whom died in the Pretender's service, and Charles the younger was condemned, but reprieved on account of his youth.

His great activity in the service made him so far taken notice of by the young Pretender, that he was made lieutenant-colonel of the regiment, and was to have been colonel of the same, as soon as colonel Townley had raised his new regiment of horse.

His taking leave of his brother, Charles Deacon, in the county gaol, was very moving; his brother declaring he had rather have suffered with him, than to survive him; and that was the only time any particular alteration could be discerned in him, and then he was in great agonies, and wept.

He was executed with Townley and the rest, on Kennington-common, on Wednesday the 30th of July 1746, in the same manner as Townley. His body was delivered to his friends to be buried, and his head was preserved in spirits, and sent down to Carlisle, or Manchester, to be put on one of the gates.

* The like evidence was given in most of the trials after the rebellion of 1715, and admitted by the judges upon the commission in the north this summer. *Former Edition.*

See the Cases of Layer, vol. 16, p. 94, and sir Wm. Perkins, vol. 13, p. 63, of this Collection.

511. The Trial of JOHN BERWICK,* for High Treason, at St. Margaret's-hill, Southwark, July 17: 20 GEORGE II. A. D. 1746.

JOHN BERWICK was then brought to the bar, and being arraigned on the same indictment with the other Manchester officers, the jury were sworn to try him. The treason, and

overt-acts of treason, were laid to be committed on the 10th of November.

The first witness for the king that was called and sworn, was Samuel Maddox; and he deposed, That he had often seen the prisoner, particularly at Manchester, and other places, and

* See East's Pleas of the Crown, c. 2. s. 66.

that he always appeared as an officer, and gave his command; that he saw him at Carlisle; and that he was there when the town surrendered. —Mr. Bowker, the Manchester constable, said, That he saw him in the town, and he appeared in the same garb as the other officers belonging to the regiment which they called the Manchester regiment.

The Counsel for the Prisoner insisted, that the charge was not proved, for that in all cases of high-treason, there must be two positive witnesses to prove the fact, and, as they apprehended, that was not done sufficiently by the two witnesses that had been examined; on which the king's counsel called capt. Nevet and capt. Carey, who both appearing, and being sworn, deposed, That when they went into Carlisle by the duke's order, to take an account of what rank all the officers were, the prisoner gave in his name to them as a lieutenant in the Manchester regiment.

The Prisoner calling no witnesses, the jury found him Guilty.

JOHN BERWICK'S CASE, July 17, 1746.

(Foster's Reports, p. 10.)

"In the case of John Berwick, there was only one witness that proved him to have been in arms with the rebels. This witness proved that he was inrolled and reviewed as a lieutenant in the regiment called the Manchester regiment, and did duty as such at Penrith and Carlisle.

"Two other witnesses (officers in the duke's army) swore, that after the surrender of Carlisle, they were ordered by the duke to take an account of the names of the officers and of their respective ranks in the rebel garrison; that accordingly they went to the prison where the officers were confined apart from the common men, and took such account of them; that the prisoner Berwick appeared among the officers, and gave in his name to them as lieutenant in the Manchester regiment.

"Lord Chief Justice Willes and Mr. Justice Abney were of opinion, that this declaration of the prisoner is not to be considered as a bare confession after the fact, but as an evidence of the fact itself, viz. That the prisoner did appear and take the rank of a lieutenant in the rebel garrison. They thought too, that a confession after the fact proved by two witnesses, was sufficient to convict within the 7 W. 8.

"Mr. Justice Foster doubted whether this declaration, being made after the surrender, can be considered in any other light than as a confession after the fact.* And with regard to a

* Upon further consideration I doubt there was too much refinement in this distinction. See Foster, 1 Disc. c. 3, s. 8, p. 232.

confession after the fact, he said he never doubted whether it might be given in evidence as a corroborating proof. His doubt was, whether it being proved by two witnesses is a conclusive evidence, or an evidence sufficient of itself to convict without other proof, since the 7 W. 8, seems to require two witnesses to overt-acts, or a confession in open court.* And he says further, p. 243, "I would not in any thing I have said, be understood to arraign the proceeding in the case of Berwick, before-mentioned; he was found in a prison assigned by the duke (of Cumberland), after the surrender, to the officers in the rebel garrison, and to none but officers, whither he went with the rest of them. He appeared among them, and took the rank of an officer. These facts, together with his declaration, all proved by two witnesses, were, I think, properly considered by two learned judges, not as a bare confession after the fact, but as an evidence upon the spot, and in the very scene of action." See more relating to confessions in Foster's Reports, p. 241, 242, 243, 244. East's Pleas of the Crown, c. 2. s. 66.

Berwick was convicted upon the evidence of the officers and of the other witness.

This prisoner was about 32 years of age, and was a housekeeper in Manchester, and a considerable dealer in chequed linnen, where he kept a shop, and had a good trade; but not being so diligent as young tradesmen should be, and loving his pleasure too well, it is thought he was running behind-hand in the world; and that not being able to settle his accounts with his creditors, was the principal reason that induced him to take on with the rebels.

The commission he bore was a lieutenancy in the Manchester regiment, given him by the Pretender; to whom he had been well recommended as a man of undaunted courage and resolution, firm to his party, staunch in his principles, and of a bold, enterprising disposition, of which he discovered manifest tokens on every opportunity that offered.

He was executed also on Kennington-Common, with Townley and the rest, according to the sentence, on Wednesday the 30th of July, 1746, and his head was put into spirits, and sent to Manchester or Carlisle, to be put up in one of those places; his body being delivered to his friends to be buried.

* The like evidence was held sufficient upon the commission in the north this summer; upon the authority of the judges opinions previous to the Trials of Gregg and Francia. [Vol. 14, p. 1371, vol. 15, p. 898.] See Foster's discourses on high-treason, chap. 3, s. 8.

512. The Trial of DAVID MORGAN, of Monmouth, but late of Derby, esq. for High-Treason, at St. Margaret's-hill, Southwark, July 18: 20 GEORGE II. A. D. 1746.

JURY.

James Glover,
Joseph Brookes,
John Mason,
Joakin Faulk,
Ralph Godfrey,
William Barnard.

John Voice,
Thomas Clement,
Thomas Symonds,
John Jefferies,
Henry Rowed,
John Clement

THE king's counsel opened the indictment (which was the same as against all the rest), and proceeded, and called the following witnesses to support the same against the prisoner.

Solicitor General. Call Edward Tew (which was done accordingly) who appeared in court, and was sworn.—Pray, Mr. Tew, inform my lord and the jury what you know relating to the prisoner at the bar.

Tew. I live at Preston next door to the sign of the Joiners Arms, and when the rebel army was there, I assisted my neighbour to wait on some company that were at that house, most of whom were officers belonging to the rebels.

King's Counsel. Can you recollect ever having seen the prisoner there?

Tew. I remember him very well, for I waited on him at dinner, when lord Elcho and he dined there together.

King's Counsel. Do you remember any discourse that passed?

Tew. The prisoner asked lord Elcho what number of men the young Pretender [which the prisoner called Prince] had landed with him.

King's Counsel. And what answer did he make?

Tew. He said, not above half a dozen; but the number soon increased when the clans heard he was landed; and also that they had 17 pieces of cannon.

King's Counsel. And what further discourse passed between them?

Tew. The prisoner asked lord Elcho what religion the Pretender professed?

King's Counsel. And what was the reply?

Tew. My lord Elcho shook his head, and said he could not very well tell; but he believed his religion was to seek.

King's Counsel. And what passed then?

Tew. The prisoner asked if they had ever beat up for volunteers in England, and lord Elcho said they had not; and the prisoner advised him to beat up for volunteers, and said it would be an easy matter to march forwards for London, for that there was not above 3,000 soldiers between there and London, and most of them were dragoons, besides a few undisciplined troops that were raised by lord Gower and lord

Cholmondeley, who would make but little opposition.

King's Counsel. Well, Sir, go on.

Tew. I know nothing more that is particular that passed at that time; but the next morning the prisoner came, and asked for lord Elcho.

King's Counsel. What appearance did he make then?

Tew. He was in a white cockade, and had a sword by his side; and I saw him several times walking up and down the town with the rebel officers.

King's Counsel. Did you see the young Pretender?

Tew. He marched at the head of the regiment, and did not lodge (as I have heard) but two or three doors from the house where the prisoner at the bar lodged.

King's Counsel. What number of people do you think the young Pretender's army consisted of?

Tew. The talk in town was, that they were 6,000 strong: there was a great many, but as to the number I cannot be positive.

King's Counsel. Do you imagine he was forced into the rebels' service?

Tew. He was under no force that I saw, for he appeared all along to be one of the heads of them, and all of them seemed to have a great regard to what he proposed, particularly about the proposal he made for beating up for volunteers.

King's Counsel. Will you ask this witness any questions?

Prisoner to Tew. I desire, Sir, that you would give the Court an account how you came to know that my name is Morgan.

Tew. I cannot say now that your name is Morgan, but I am very positive to your person. I know your face very well, and if I was not well assured that you are the very same man, I would not swear it.

King's Counsel. Was the young Pretender at that house?

Tew. I do not know; but they said that he lodged a few doors farther.

John Barry sworn.

King's Counsel. John Barry, I desire you would inform the Court and jury what you know relating to Mr. Morgan, the prisoner at the bar.

Barry. I came out of Monmouthshire with my master and the prisoner at the bar, in the month of November last, and at the town of Preston we joined the rebel army. About a mile on this side of Preston, my master and the prisoner left their horses, and walked to Preston on foot, to avoid any suspicion of what their design was.

King's Counsel. And what part did the prisoner at the bar act; and how did he behave during the time you were with the rebel army?

Barry. I saw him ride with the rebel army, from Preston to Manchester, and he was very active in encouraging the rebel officers and soldiers. After that I saw the prisoner at Ash-born, and he said there that he would not leave the army as long as he lived.—I cannot say that he bore any commission as an officer: if he did, it is more than I know.

Benjamin Bowker called and sworn.

King's Counsel. Mr. Bowker, acquaint my lord and the gentlemen of the jury, what you know of Mr. Morgan the prisoner.

Bowker. Upon the 29th of last November, I had this paper delivered to me (holding a paper in his hand, and looking at it). It is a paper ordering me to search for arms.

King's Counsel. What are you, Sir?

Bowker. I am a deputy-constable of Manchester.

King's Counsel. Who gave you that paper?

Bowker. The prisoner at the bar and Mr. Wallis, who was one of the head-constables.

King's Counsel. Then the prisoner was with Mr. Wallis, when you had that paper delivered to you?—*Bowker.* Yes, he was.

King's Counsel. What were the contents of the paper?

Bowker. It was a warrant signed by Murray the Pretender's secretary, to search for all the arms I could find; and if any body refused to deliver up and surrender their arms, they were to suffer military execution against their goods and effects.

[Then this Paper was delivered by Mr. Bowker to the Clerk of the Arraignment, and was read in court; but it is so very treasonable, that it is improper to insert it. The preamble called the Pretender's son Regent of England, Scotland, and Ireland, and required all whom it may concern, to pay due obedience to that order.]

King's Counsel. What, did you get any arms of the town's people of Manchester?

Bowker. I did, and carried them to the prisoner's lodgings, and left them there, though I did not see him, but I asked for esquire Morgan; and one of the servants belonging to the house told me he would be there presently.

King's Counsel. Do you know any thing farther?

Bowker. I do not: I have spoken all that I can recollect.

King's Counsel. Call Samuel Maddox next, and swear him.

Samuel Maddox sworn.

King's Counsel. Mr. Maddox, inform the Court where you first saw the prisoner at the bar.

Maddox. I saw Mr. Morgan, the prisoner at the bar, at Manchester, when he was joined with the rebel army; he had a white cockade

in his hat, and a sword by his side, and publicly declared that he was of the Pretender's party.

King's Counsel. Did he march away from Manchester with the rebels?

Maddox. He marched with them to Derby; and there being an information given that some arms were secreted from the rebels, he gave orders for a party of the rebel army to go and search for them.

King's Counsel. Did he go with that party?

Maddox. Not to my knowledge. I saw captain James Dawson* deliver him a pair of pistols.

King's Counsel. Whilst the rebels were at Manchester, was not there some talk of the

* Dawson was the day before convicted of high-treason, being one of the rebel captains. *Former Edition.*

In the "Complete History of the Trials of the Rebel Lords in Westminster-hall, and the Rebel Officers and others concerned in the Rebellion in the year 1745, at St. Margaret's-hill, Southwark, and at Carlisle and York; with the Lives, Behaviours, and dying Speeches, of those executed pursuant to their sentences," is given the following article:

"THE TRIAL AND DYING SPEECH OF JAMES DAWSON.

"James Dawson was indicted for high-treason, in levying war against the king, and adhering to his majesty's enemies, &c. And the indictment charged the prisoner with committing the treason on the 10th of November.

"*King's Counsel.* Call Samuel Maddox; who appeared and was sworn; and deposed, That Mr. Dawson was a captain in the Manchester regiment, and was drawn up as captain at the review before the young Pretender at Macclesfield. That he saw him at Penrith, at Carlisle, and other places along the road, at the head of his company. Mr. Maddox also deposed, That Dawson the prisoner beat up for volunteers at Derby, and made the same speech that Deacon made when he beat up for volunteers for the young Pretender, and pulled his hat off and hallooed.

"*Thomas Joy* deposed, That he saw him at Carlisle, and saw him mount guard there; and said, he walked with the officers; and that he was called captain.

"*James Warren* deposed, That the first time he ever saw Mr. Dawson was at Lancaster; and that he afterwards saw him at Carlisle; and that he was there when the town surrendered, and always appeared as a captain.

"Then captain *Nevet*, and captain *Carey* proved, That he was at Carlisle when the town surrendered, and acknowledged himself an officer in the Manchester regiment in the service of the Pretender.

"HIS DEFENCE.

"*Prisoner.* I had a promise of mercy from his royal highness the duke of Cumberland,

prisoner's being made colonel of the Manchester regiment, as it was called?

Maddox. I was in the room at Mr. Cookson's, at the Dog at Manchester, when the

upon the capitulation of Carlisle; and I hope the Court will consider my case.

"The jury found him Guilty.

"This prisoner James Dawson was about 38 years of age, born of very reputable parents in Lancashire. After he had gone through the exercises of the school and the classics, his parents put him as a student in St. John's college, Cambridge; and after he had left college, he went to Manchester, and there lived on the fortune he had of his own, and what else he was supported with by his friends. He was always a mighty gay gentleman, and frequented much the company of the ladies, and was well respected by all his acquaintance of either sex, for his genteel deportment. He was as strenuous for their vile cause as any one in the rebel army.

"When he was brought to the gaol, after his being condemned and double fettered, he said, He did not care if they were to put on a ton weight of iron on him, it would not in the least daunt his resolution.

"He was executed according to his sentence on Kennington common, on Wednesday, July 30, 1746, with Townley and others; but his head and body were delivered to his friends to be buried."

The following article I have extracted from the "True Copies of the Papers wrote by Arthur lord Balmerino and others, published in the year 1746:

"AN EXTRACT of a LETTER dated at London, July 31, 1746, concerning Mr. James Dawson, an accomplished polite young Gentleman of a reputed Family in Lancashire, and liberal Education.

"The following account, the truth of which may be depended upon, is an undeniable, though melancholy proof, that constancy and tenderness have not yet altogether forsook the bosoms of the fair.

"A young lady, of a good family and handsome fortune, had, for some time, extremely loved, and been equally beloved by Mr. James Dawson, one of those unhappy gentlemen, who suffered yesterday at Kennington Common for high-treason; and had he been either acquitted, or, after condemnation, found the royal mercy, the day of his enlargement was to have been that of their marriage.

"I will not prolong the narrative, by any repetition of what she suffered on sentence being passed upon him. None, excepting those utterly incapable of feeling any soft or generous emotions, but may easily conceive her agonies. Besides, the sad catastrophe will be sufficient to convince you of their sincerity.

"Not all the persuasions of her kindred could prevent her from going to the place of execu-

proposal was made for the prisoner to be colonel of the regiment; but he refused it, and said, Mr. Townley was much fitter than he for such an office; and then it was agreed amongst

tion; she was determined to see the last of a person so dear to her; and accordingly followed the sledges in a hackney-coach, accompanied by a gentleman nearly related to her, and one female friend. She got near enough to see the fire kindled, which was to consume that heart she knew so much devoted to her, and all the other dreadful preparations for his fate, without being guilty of any of those extravagancies her friends had apprehended. But when all was over, and that she found he was no more, she drew her head back into the coach, and, crying out, "My dear, I follow thee—I follow thee;—Sweet Jesus, receive both our souls together!" fell on the neck of her companion, and expired in the very moment she was speaking.*

"That excess of grief, which the force of her resolution had kept smothered within her breast, it is thought, put a stop to the vital motion, and suffocated, at once, all the animal spirits; but I leave the physicians to account for that. I shall only say, the story very much affected me, as I doubt not but it will you, and all who hear it."

"A BRIEF DESCRIPTION of several of their friends attending for to take their last farewell of them, the morning before their execution, and a short detail, how they were treated in gaol; and their courageous and undaunted behaviour at the place of execution; expressing with tears, their extreme concern for their approaching fate.

"In the morning of their execution, Charles Deacon, who had been relieved, went into his brother's room, to take his last farewell of him. But though he went up with all the courage imaginable, yet the sight of his brother, and reflecting, at the same instant, that he should immediately be for ever torn from him was such a shock upon him, that he had much ado to keep upon his legs, and was forced to be supported in coming down stairs.

"The same morning, whilst they were at breakfast, Mr. Chadwick said to Mr. Berwick, Ah! Duke, (for this is the name that Berwick went by in the royal army,) our time draws very near; though as to my part, I am as hearty as ever I was in my life. Mr. Berwick replied, As to my part, I think we all look pretty well, and I declare death don't shock me in the least. I hope God Almighty will be merciful to us all: for I can lay my hand on my heart, and say, that the greatest injury I ever did, was to myself and relations; and though I have brought them and myself to

* This melancholy catastrophe Shenstone has commemorated in his plaintive ballad 'Jemmy Dawson.'

those that were present, that Mr. Townley should be colonel; and he was declared so, and had the Pretender's son's commission.

disgrace, they have been so kind to forgive me, and would have saved my life, had it been in their power.

"The warrant for their execution was not sent from the secretary's office till two o'clock in the afternoon, preceding the day of their execution. And when they were informed they must die the next day, they seemed not at all shocked, but rather cheerful, only saying, God's will be done. They went to rest at the usual hour, and slept soundly; but first took leave of all their friends.

"The next morning they were called up about six o'clock, and unloosed from the floor, to which they had been chained down ever since sentence of death was passed upon them. They then ordered coffee to be got ready for their breakfast, as soon as they were brought down into the yard. And after breakfast they had their irons knocked off, in the following order, 1. Townley, 2. Morgan, 3. Deacon, 4. Dawson, 5. Berwick, 6. Fletcher, 7. Chadwick, 8. Syddall, 9. Blood.

"When the halter was put about Syddall, he was observed to tremble very much; though he endeavoured to conceal his disorder from the spectators, by taking a pinch of snuff. As the executioner was fastening his hands, he lifted up his eyes and said, O Lord, help me.

"Being thus pinioned, the keeper put them into a room backward for a short time, till the sledges were made ready. They were then put into three sledges, each drawn by three horses, and were carried from the gaol, about ten o'clock, to Kennington-common, in the following order, viz. First, a party of dragoons; next, a large party of the foot-guards; then the three sledges; (in the first of which were Townley, Blood, Berwick, and the executioner with a drawn scymeter; in the second, Morgan, Deacon, and Syddall; and in the third, Dawson, Fletcher, and Chadwick.) surrounded by the foot-guards; who also brought up the rear. A pile of faggots and a block were placed near the gallows; and while the prisoners were removing from the sledges into a cart drawn under the tree for that purpose, the faggots were set on fire, and the guards formed a circle round the place of execution. The prisoners were not attended by any clergyman either Protestant or Roman Catholic: But Mr. Morgan, with his spectacles on, read prayers and other meditations to them, out of a book of devotion; to which the rest seemed very attentive, and joined devoutly in all the prayers and ejaculations with a great deal of seriousness. They continued thus above half an hour and behaved with great resolution in a manner suitable to their unhappy circumstances, all of them seeming calm and composed, though none shed tears. After they had finished their devotions, every one of them took some written papers out of the book which

King's Counsel. You say you saw him march from Manchester to Derby?

Maddox. Yes, I did; he marched as a gan-

he held in his hand, and threw them and their prayer-books, among the spectators. The contents of the papers were, That they died in a just cause; that they did not repent of what they had done; that they doubted not but their deaths would be revenged; and several other treasonable expressions. They likewise delivered papers severally to the sheriff; and then flung away their hats, six of which were laced with gold, all them having been genteelly dressed. Immediately after, the executioner pulled their caps out of their pockets, put them on, and drew them over their eyes, and then they were turned off. When they had hung about three minutes, the soldiers pulled off their shoes, white stockings, and breeches, and the executioner pulled off the rest of their clothes. He then cut down the body of Mr. Townley, and laid it on the block. But observing some signs of life in it, he struck it several violent blows on the breast; then taking out the bowels and heart, he threw them into the fire, and afterwards, with a cleaver, severed the head from the body, and put both into a coffin. He next cut down Mr. Morgan, and afterwards all the rest, unbawling and beheading them one by one, in the same manner as he did Mr. Townley. When the executioner put the last heart, which was Mr. Dawson's, into the fire, he cried, God save King George; and the multitude of spectators gave a great shout. The heads and bodies in coffins were conveyed back on the sledges to the new gaol, Southwark, from whence they came, there to remain till the King's pleasure should be known.--- There was present the greatest number of spectators ever seen together in the memory of man, some thousands of whom had waited in the rain several hours, to see the execution of these unhappy men. But it was observed, that the mob offered no insults to any of the prisoners this day, though they had behaved very rudely to them in passing to and from their trials.

"Charles Deacon was carried from the gaol in a coach, guarded by a party of soldiers, to see the executions."

"ABSTRACT of a LETTER from ARCHIBALD LAUDER, cadet in captain Burnet's company of Artillery (and youngest son to Robert Lauder of Bielmouth, another captain of the said Artillery) who died in his confinement at London, Sunday 3d of August 1746, and wrote this Letter upon the Tuesday preceding.

"London, July 29, 1746.

"I received yours yesterday, and it was the only account I had from any of my friends since I unluckily lost the opportunity of leaving Cardale with my father, who went off the

Uleman volunteer, and was very active, and did all in his power to promote the interest of the rebels.

Mr. Maddox was cross-examined by the Prisoner.

Prisoner. You talk so very exactly, I desire to know if you ever made any memorandums of what passed?

30th of December, and we were taken the 30th; I had almost all my body-clothes, and the whole of my linens, and money, taken from me; and with several hundreds was many nights confined in the church, without any other covering than what clothes were left me.

"Afterwards I, with several more, were sent fattered to York-castle, where in an unwholesome cell, I continued in irons about six weeks, and then was sent after the same manner to Lincoln, and used much after the same method, till I, by writing to ——— at L———n: He procured me a room of good air, free from the crowd of the common men, some clothes and daily sustenance, God reward him with his great and infinite mercies; he also ordered a physician to attend me; for before he bestowed his friendship on me, I was naked, sickly, and desolate of support and necessities, any one of which, evil enough for a man of modern philosophy to struggle with; I was brought here about a month ago, and tampered with, to purchase my life by infamy, but I will choose the severest death first. I am tolerably well taken care of at present, my good ——— at B———h has ordered relief for me, but alas! neither Mr. C———s nor several more can get access to me, and I am exceeding weak, troubled with a short cough and white flux, that I fear I will not live to write again. I never sent any word to Mrs. Whitehead, or heard from her, I wonder she says so, God forgive her; if ever you see my papa, give my humble duty to him, and give my kind service to ———, to ———, to ——— and to ———; and God Almighty be with you all, and send you temporal and spiritual comfort, and peace to my poor soul, who is ARCH. LAUDER."

"N. B. The above was a very promising youth, he was but turned 15 years of age, when he joined the prince, the day of the battle of Preston, 21st September 1745, and though wounded in the left hand, during the siege of Carlisle, yet he marched on foot to Derby, and back to Carlisle, and this wound not being then fully cured when taken, and thereafter neglected, with the hardships he met with while a prisoner, cut him off when just 16 years old, after an imprisonment of six months; but many hundreds died in the several prisons through all Britain, by unheard of hardships, and many were transported."

"On the 19th of September 1746, captain Crosby, who deserted from the British army in

Maddox. I did, but I have not got those memorandums, for I delivered them to that gentleman (pointing to the Solicitor of the Treasury's clerk.)

Prisoner. Are you sure they have never been altered?

Maddox. I am very sure they never were by my direction; since they have been out of my custody I have never seen them. I have made

Flanders, and came to Scotland with the French troops, was hanged, and two deserters shot at Perth: The hangman of Perth was, on this occasion, secured in the prison of Perth, but on the hangman of Stirling being brought up, the Perth hangman was liberated from jail; and immediately fled the place; and a little before the time for executing Mr. Crosby, the hangman of Stirling dropt down dead; so after long attendance at the place of execution, the guard upon Mr. Crosby was returning with him to the prison of Perth, when an infamous criminal in that jail undertook to hang Mr. Crosby, for a reward of ten guineas and his pardon; both which he got, and Mr. Crosby was a second time, that same day, brought to the place of execution, and suffered both Christian and heroically.

"Captain Crosby was genteelly drest in dead flannels, and buried by the benevolence of the well disposed.

"The Scripture tells us, See the blind fatality of the Jews, in saving Barrabas, the robber, and crucifying our blessed Redeemer; sure the criminal, or new hangman, deserved death as well as Mr. Crosby.

"On the said 31st, James Nicolson, master of a coffee-house at Leith, aged about forty-four years, a lieutenant in Perth's regiment, (who broke the capitulation at Carlisle, by endeavouring to escape over the walls,) was first brought to the bar; and then Donald Macdonald, of Inverness-shire, aged about twenty-five years, a captain in Keppoch's regiment, and said to be his nephew. Both retracted their former plea, pleading guilty, and begged to be recommended to the king's mercy; Nicolson entreating the judges to pity him, on account of his wife and five young children.

"James Stratton, surgeon of the garrison of Carlisle, was brought to the bar on the 3d of August. But none of the witnesses proving that he bore arms, and it appearing that he was forced into the service, he was acquitted.——— Walter Ogilvie of Banff-shire, aged about twenty-five years, a lieutenant in lord Lewis Gordon's regiment, was next brought to the bar, and pleaded guilty.——Then the lord chief justice Willes, having made a pathetic speech, pronounced sentence on James Nicolson, Donald Macdonald, Alexander Macgrouther senior, and Walter Ogilvie—Alexander Macgrouther, when brought to the bar to receive sentence, still affirmed, that he was forced into the king's service, and therefore could not be guilty of the indictment: as the keeper was taking him away from the bar, he said, By

no use of them to refresh my memory, for I can remember the particulars very well without them.

King's Counsel. Call captain Vere, and swear him. (Which being done, he stood up.)—Pray, captain, inform us what you know of the prisoner.

Vere. On the 3d of November I saw the prisoner at sir Peter Davenport's at Macclesfield, with several of the rebel officers; and I have seen him at several other places march with the Pretender's people. I knew him very well, for he abused me, and called me a great scoundrel, because he said I had prevented a gentleman from getting a commission under sir Daniel O'Carrol.

King's Counsel. Are you positive the pri-

my faith, this is a very infamous verdict they have brought in against me. But he got a reprieve for three weeks on the 21st.

"The other three were executed on Kennington-common, in the same manner as the other nine formerly executed: Macdonald and Nicolson in highland, and Ogilvie in lowland dress. They spent near an hour in their devotions at the place of execution, (without any clergyman,) behaving with decency and composure. Ogilvie read, from Kettlewell, a prayer for a person who is condemned for the testimony of God's truth and righteousness. He likewise delivered a paper to the officer of the guards. None of them spoke to the populace; but referred to accounts by them delivered. After the halters were fixed to the gallows, they prayed a few minutes before they were turned off. Their heads and bodies, having been taken back to the new gaol, were delivered to their friends, and on the evening of the 26th, carried in three hearses, attended by mourning coaches, and interred in one grave in Bloomsbury new burying ground.

"Before the middle of October, an order was sent to Carlisle for the execution of thirty of the gentlemen condemned there, ten at Carlisle on the 18th, ten at Brampton on the 21st, and ten at Penrith on the 28th. Accordingly, Mr. Thomas Coppock the bishop, Edward Roper, Francis Buchanan of Arnprior, Donald Macdonald of Kinlochmoidart, Major Donald Macdonald of Tyendrish, John Henderson, John Macnaughton, James Brand, and Hugh Cameron, were executed at Carlisle; and James Ancrum, the tenth, was reprieved; James Innes, Patrick Lindsay, Ronald Macdonald, Thomas Park, Peter Taylor, and Michael Defard, were executed at Brampton; Stephen Fitzgerald died in the prison, and James Forbes, Richard Morison, and Alexander Hutchinson, the remaining three, were reprieved; and Mr. Robert Lyon, David Hume, Andrew Swan, James Harvie, and Valentine Holt, were executed at Penrith; and Alexander Anderson, Robert Randle, and James Campbell, alias Macgregor, the other three, were reprieved.—Richard Morison was carried off for London on the morning of the 21st, by

soner is the same person you saw at Macclesfield, and in the Pretender's army?

Vere. I am sure he is the very same; I saw him at several places; particularly I remember to have seen him about a mile out of Derby, riding with the Pretender on a bay horse.

King's Counsel. When were you at Macclesfield?

Vere. I saw him there on the 3d of November, and on the 5th I saw him at Derby; and I am sure he is the very same man, because I know him very well.

Mr. How called and sworn.

King's Counsel. Mr. How, do you know Mr. Morgan?

one of the king's messengers, in order to view a head brought from the highlands, by order of the duke, supposed to be the Prince's; but [it] was that of a gallant youth, of the name of M'Kenzie, who threw himself in the way a sacrifice to the bloody hunters of royalty.

"Mr. Coppock made a long treasonable sermon or speech at the place of execution, prayed for the king and his son Charles, and all the rest of the Stewart family, called George an Usurper, &c. and then gave the sermon to the sheriff.—It is observed, that he behaved very insolent on his trial; that when he was going from the bar, after having been found guilty, he said openly to the other gentlemen prisoners, Never mind it my boys; for if our Saviour was here, these fellows would condemn him; and that, seeing Brand drop tears, when he received sentence, he said, What the devil are you afraid of? we shan't be tried by a Cumberland jury in the other world.

"The clergymen were highly charmed with the behaviour of Francis Buchanan of Arnprior, esq.; he discovered a sweetness of temper, and undisturbed calmness, firmness and presence of mind, beyond expression; his sentiments about religion and dying were just, and the whole of his carriage, from his sentence to his last moment, uniformly good; and, after the rope was about his neck, he said, If I have offended any, I earnestly beg they will forgive me, for I am sure I forgive all the world. This is related by a gentleman, who was present at his execution.

"They all died with great resolution, but persisted in justifying what they had done.

"N. B. The most part of the gentlemen prisoners executed on Kennington-common, and other places, were first strangled by the neck, and in a few minutes were cut down, their members cut off before their face by the executioner, and thrown into a large fire, their bellies ript open, their hearts taken out; and each of them held up by the hangman; at the same time he repeated the following words, Behold the heart of a traitor. They were also put into the fire; then their bodies were cleaved in quarters, &c."

How. Yes, I know him very well: This gentleman (pointing to the prisoner) who stands by me, is Mr. Morgan.

King's Counsel. What do you know of him?

How. He lodged at my house, and was accounted a principal man amongst the rebels, and they called him the Pretender's counsellor.

King's Counsel. How do you know that he was a principal man?

How. Because he seemed more active than any of them. He paid me the reckonings when he used to dine with the rebel officers. He paid me a guinea and three shillings, and gave all directions about every thing.

King's Counsel. Had you any discourse with him?

How. Yes, I had; when the rebels were at Derby, he asked me if I was surprized at their being there so soon? I told him, that I had expected them as that night.

King's Counsel. What did he say then?

How. He said it was more than they expected themselves; and if I had heard such news, he was sure that the devil had brought it me.

King's Counsel. And what do you know farther?

How. I have seen the prisoner since he has been taken up.

King's Counsel. Where have you seen him?

How. In Newgate.

King's Counsel. Had you any discourse with him there?—*How.* Yes, I had.

King's Counsel. Then relate it to the Court and jury; speak all that you can remember.

How. I came to town on business, and being informed that Mr. Morgan was in Newgate, I went there out of curiosity to see him; when I came there I spoke to him, and he seemed glad to see me, and asked me kindly how I did; and we drank together, and had some discourse.

King's Counsel. What did that discourse relate to?

How. I said I was very sorry to see him a prisoner in such a place.

King's Counsel. And what did he say to that?

How. He said he should soon be at Derby in spite of king George, or any body else.

THE PRISONER'S DEFENCE.

Prisoner's Counsel. My lord, and gentlemen of the jury, I cannot speak so exactly to the evidence that has been given against this unhappy gentleman, as I could wish, because I have not had my brief above half an hour. If my instructions be right, I will take upon me to say, that we shall produce evidence of good credit and reputation, who will prove, that this gentleman, the prisoner, was forced into the service of the rebels, and at several times, and several places, endeavoured to make his escape from them; which he at last effected, and was seized, after he had made his escape, by a magistrate, and committed prisoner. And to prove that the prisoner did make his escape, I

shall call Mr. Chatterton, who is the master of the house where the prisoner lodged at Ashborn in Derbyshire.

Mr. Chatterton being called and sworn.

Prisoner's Counsel. Sir, do you know any thing of the prisoner's endeavouring to make his escape from the rebel army?

Chatterton. Yes.

Prisoner's Counsel. And how did he propose to make it?

Chatterton. He was to go out of town one morning about one or two o'clock, and ordered me to call him at that time.

Prisoner's Counsel. And did you call him?

Chatterton. I did; but he did not care to rise then, for fear he should be stopt (in endeavouring to get away) by the rebel guard, who were posted all about the town. He said that about five in the morning would be the most proper time, for then the rebel pipes would begin playing, and they would be all busy, and that was his only time to make his escape from them.

Prisoner's Counsel. And did he go away from your house, and out of Ashborn town?

Chatterton. Yes, he went away, and asked me to go with him as a guide to shew him some bye-way to Stone; and said, it would be very proper for us to get to some farm-house, and hide ourselves, lest the rebels should send in search of him, and if we should be taken after he had got away, and brought again to the rebel army, he did not know what might be the consequence.

Prisoner's Counsel. Did you go with him as a guide, Sir?

Chatterton. When he proposed it to me, I said, Mr. Morgan, it is impossible for me to leave my house, for we are all in a hurry, and therefore you cannot expect I should go; but I will send a man with you that will do as well.

Prisoner's Counsel. And you did send a man with him?

Chatterton. I spoke to a man who worked labouring-work with me, who I knew was well acquainted with the country, and he agreed to go; and they both set out of Ashborn, and the first news that I heard afterwards, was, that the prisoner and my man were both seized on suspicion of being of the rebel army. And what I heard was very true; so I went to the gentleman by whose order they were apprehended, and enquired about the matter, and told him how the affair was, just in the same manner I have informed this honourable court; but his worship would not discharge my man until I had given security for his appearance, which I was obliged to do; so he was set at liberty, and the prisoner at the bar was kept in custody.—This is all that I know of the matter.

Here the Prisoner's Counsel rested his defence, there being no other witnesses to examine on his behalf.

Court to Prisoner. You have heard, Sir, what has been sworn; whatever you have to say in your defence, now is your time to speak

it, and the Court will hear you.—(And then the Prisoner spoke to the following effect, after the cryer had made proclamation for silence.)

Morgan. I have heard what has been sworn against me by the witnesses on the behalf of the crown; and I appeal to the Court and the jury, if there are not the greatest improbabilities in the world in the evidence they have given against me. I would speak particularly to what happened at Manchester. The deputy constable swears, That I gave him an order to seize all arms he could find, and to bring them to my quarters: Mr. Maddox swears, That at a consultation amongst the officers at Manchester, I was proposed for colonel of the regiment, which I refused, because I thought Mr. Townley was more fit for such a command than myself.

Now can any reasonable man imagine that I, who had refused to be the chief commander of the regiment, would do the servile office of going up and down the town in search for arms?

Every gentleman of the army (and I see several in this court) very well know, that to go on such an errand, would ill become any officer of a superior rank; and as to my own part, I am sure I could not have done any such business.

I do not deny my being at several places with the rebels; and if I had been indulged with a longer time to prepare for my trial, I should have made appear very clearly, that I was taken prisoner by the rebels, and detained with them much against my inclination; for there was no resisting force.

My landlord, Mr. Chatterton, has made it plainly appear to this honourable Court, that I made my escape as soon as it was in my power; and if I could have done it sooner, or have had an opportunity to get away from them, I should have been very glad to have embraced it.

As to my capacity as one bred to the law, I confess I never pretended to much knowledge that way, and therefore was a very improper person to counsel the chief of the rebels; for my advice, I am sure, could be of little service to him.

There were abundance of gentlemen of fortune seized as well as myself, who were obliged to go with the army, till they found means to escape as I did. I had been to pay a visit to a gentleman at Etherton-hall in Cheshire, and I was seized by the rebels, and they took my horses from me.

The laws of England are very just and equitable; and they say, that every man shall be tried by his neighbours, of the same state and condition with himself.

God help me, I am deprived of that benefit, and I am now amongst strangers, who know nothing of me: they are upon their oaths, and must give credit to the witnesses; but I hope, and do not in the least doubt, that they will do me justice.

I have served the crown of England in two campaigns with some reputation. And I be-

VOL. XVIII.

lieve no gentleman belonging to the army, who knows me, will deny what I now tell this honourable Court. I cheerfully gave all the assistance I could in the public service, and I was always glad when my poor endeavours were crowned with success.

Here have been many witnesses examined against me, and it is very impossible that I should confute them, because of the short time allowed me.

I think it a very great hardship that I should be the last tried of all these gentlemen, because I could have brought several of them to prove my behaviour both at Manchester and in other places, was quite different from what the king's witnesses speak of; but as they are convicted, they cannot give any testimony for me, and that assistance I might have had, can now be of no use to me.

If I was to speak it with my last breath, I must deny that I went voluntarily into the rebellion; but as the evidence for the crown is so strong against me, I must submit to the determination of this honourable Court, and I submit myself accordingly.

When the prisoner had done speaking, Mr. Solicitor General stood up, and made a reply, which was to the effect following:

Sol. Gen. I should not have troubled your lordships, or the jury, with saying one word more relating to the prisoner that is now before you; but I find it necessary, from what has been offered in his defence, to observe, that he has complained of many hardships.

He seems to think it a great grievance, that his being last tried has deprived him of many advantages; but, in my opinion, he has had a better chance to defend himself, because it gained him more time to get his witnesses ready, and to prepare for his defence.

Can any man imagine, that either of the persons who have been convicted (if Mr. Morgan had been first tried) would have appeared to clear him of the charge that is laid against him? If they had done so, they would have been their own enemies; for their evidence would have been a plain proof against themselves, and convinced every body that they were in the rebellion.

The prisoner has no need to complain of any hardships; he has been used with as much lenity and tenderness as any man in his condition ever was; and nothing that he has asked, which the law could grant, was ever refused him. He has had counsel assigned him of his own choosing, to enable him to make his defence, a copy of his indictment in due time, and therefore he could not have any pretence of being ignorant of what he stood charged with; and I am sure no one can say, but he has had a very fair and impartial trial.

I think of all the prisoners convicted, it is very evident, that the prisoner's case really appears the plainest of any; for of six witnesses, there are four who were not concerned in the rebellion, who positively swear to his person,

2 C

and that he was the most active of any one in the rebel service; and Mr. How particularly swears, That he lodged at his house, he gave directions for every thing, and paid the reckoning for himself and eight officers who dined with him; and therefore he thought the prisoner was one of the heads of them.—These were his words.

Then there is Mr. Bowker, the deputy constable of Manchester, and he comes and swears, That the prisoner at the bar, with one Wallis (who is one of the head constables of Manchester, and Bowker's principal) came to him with a paper signed by the Pretender's secretary, ordering him to search for all arms, and carry them to the lodgings of David Morgan, esq. which he did accordingly, for in case of refusal, he, and all those who refused to deliver up their arms, were threatened with military execution. This witness is positive to the person of the prisoner; and I think there can be no plainer proof of high-treason than what has been sworn.

As to what Mr. Chatterton has sworn to the prisoner's escape from the rebels, and leaving Ashborn, I admit to be matter of fact, but this plainly makes against the prisoner; for when he found their affairs were desperate, he was willing to shift for himself, and went away privately from them, purposely that he might not be seized by the king's forces. He had been among the rebels a considerable time before this happened, and if (as he pretends) he was detained against his will, he undoubtedly had frequent opportunities of leaving them; but that you find he never did, till his own preservation and safety required it.

As to his complaint of hardships, there is no one here that ever intended him any; but the jury must go according to the evidence; and I am sure that no evidence in the world could have brought a fact more home to the prisoner than they have done this: and I doubt not but the evidence that has been given will have a due weight with the jury, and that they will find him guilty of the indictment.

The Jury, without going out of court, brought the prisoner in Guilty.

July 22, 1746.

All the prisoners who then stood convicted were brought to the bar to receive judgment; and their counsel, sergeants Wynne and Eyre, took two exceptions in arrest of judgment.

1. That the teste of the commission is not set forth in the caption of the indictment, and consequently, for aught appears on the record, the commission might issue before the commencement of the act on which this commission is grounded: and if so, the whole proceeding is *coram non Judice*.

To this it was answered by the Attorney General, and agreed by the Court, that the jurisdiction of the Court doth sufficiently appear on record. The act of parliament is undoubtedly the foundation of this proceeding: the act,

and this commission grounded on it, are recited in the caption: and it is expressly alleged, that the commission did issue by virtue of the act; which could not be true, unless the commission was subsequent to it.

Their second exception, and on which they seemed chiefly to rely, was, that the act empowers the crown to issue commissions for trying persons then in custody, or who shall be in custody for high-treason, in levying war before the first day of January next, and it is not alleged in the indictment that the prisoners were in custody at the time of the indictment: and consequently it doth not appear on the record, that the Court hath any jurisdiction over the prisoners.*

To this it was answered by the Attorney General, and agreed by the Court, that it doth sufficiently appear on the record as it now stands, though not indeed on the indictment, that the prisoners are in custody; the record allegeth that the prisoners at the time of their arraignment, being brought to the bar in the custody of the sheriff to whose custody they had before been committed for the cause aforesaid, were asked, &c.

The common commission of gaol delivery extendeth only to prisoners in actual custody;† and yet it was never thought necessary to allege in the indictment that the defendant was then actually in prison; and if this exception was to prevail, it would impeach all the judgments that ever have been given at any sessions of gaol delivery.

That the act on which the Preston rebels were tried runs thus in the very words of this act, all the indictments at that time were as these are, and this very exception was then taken and over-ruled.

Lord chief justice Lee produced a note he took at that time in the case of the King and Oxburgh;‡ the same exception was then taken and over-ruled upon the reason last before given.

Judgment was then given as in cases of high-treason.

Mr. Serjeant Eyre afterwards, viz. August 2d, took an exception that bears some affinity to the last, in behalf of Donald Mac Donald and some others who then stood convicted, and were brought to the bar to receive judgment: it was, that it doth not appear that the prisoners were apprehended; and saith he, in fact they were not apprehended, but surrendered. Whereas the act of parliament on which the commission is grounded, speaks only of persons that shall be apprehended and in custody.

* See the Case of *Aeneas Macdonald* afterwards.

† V. 12 Mod. 449. the same point.

‡ Upon the Trials of the lords Kilmarnock, Cromartie and Balmerino, to guard against this objection, the warrants for their commitment were returned by the lieutenant of the Tower, read and entered on the Journal. *Former Edition*.

This fine-spun objection was likewise overruled. The surrender was as much upon compulsion, as the submission of a person who cries for quarter in the heat of battle is. In both cases, the submission is by reason of a superior force, and for fear of immediate death.

David Morgan was about 51 years of age, born in Wales, and bred to the law, and had frequently as a barrister attended the courts at Westminster-hall, and elsewhere. He was a person of a very mean look, and seldom kept company with any gentlemen of his neighbourhood; and if it had not been for his estate, he might have starved, for he was so very lofty, and of so bad a temper, that nobody but such as were beholden to him cared to employ him. This Morgan was possessed of a very good estate in St. Leonard's Shoreditch, but he let it all run to ruin, because he would not pay the ground-rent.

The rebels called Morgan the Pretender's counsellor, and his advice was consulted on every occasion. Even after he was condemned, he was haughty and insolent beyond expression; and the very afternoon before his execution, he grumbled to pay the cook who dressed his dinner, and said she was very extravagant in her demands.

He read to his fellow prisoners above twenty minutes at the gallows, and died very unconcerned.

The morning (about six o'clock) before he went to execution he ordered coffee to be made, and bid them take care to make it very good and strong, for he had never drank any since he had been in that prison fit to come near a gentleman; and because it was ready before he was unlocked, he seemed angry, and in a great passion.

He was executed with the others on Wednesday, July 30, 1746, and his body delivered to his friends to be buried.

The nine that were executed at Kennington Common, July 30, 1746, were Francis Townley, colonel of the Manchester regiment; Thomas Theodorus Deacon, James Dawson, John Berwick, George Fletcher, and Andrew Blood (or Blyde), captains in the Manchester regiment; Thomas Chadwick, lieutenant; Thomas Syddall, adjutant to the same; and David Morgan, a volunteer in the Pretender's army; of these, Fletcher, Berwick, Chadwick, and Dawson, declared themselves members of the Church of England; Townley and Blood died Papists; all their speeches were filled with treasonable expressions, not fit to be repeated (as before-mentioned): but we shall take notice what a strange enthusiastic sort of religion Syddall and Deacon were of, as they mentioned the church they belonged to in their dying speeches; and Mr. Morgan's declaration as to his faith.

Thomas Syddall, the peruke-maker, says, "I die a member not of the church of Rome, nor yet that of England, but of a pure episcopal church, which hath reformed all the errors,

corruptions and defects that have been introduced into the modern churches of Christendom: a church which is in perfect communion with the ancient and universal church of Christ, by adhering uniformly to antiquity, universality and consent; that glorious principle, which if once strictly and impartially pursued, would, and which alone can, remove all the distractions, and unite all the divided branches of the Christian church. This only Catholic principle is agreed to by all the churches, Eastern and Western, Popish and Protestant; and yet unhappily is practised by none, but the church in whose communion I die. May God in his great mercy, daily increase the members thereof! And if any would enquire into its primitive constitution, I refer them to our common-prayer-book; which is entitled, "A Complete Collection of Devotions, both public and private, taken from the Apostolical Constitutions, the Ancient Liturgies, and the Common-prayer-book of the Church of England, Printed at London, 1734." "

Mr. Thomas Theodorus Deacon said, in his speech, "I profess I die a member not of the church of Rome, nor yet of that of England, but of a pure episcopal church, which has reformed all the errors, corruptions and defects that have been introduced into the modern churches of Christendom: a church, which is in perfect communion with the ancient and universal church of Christ, by adhering uniformly to antiquity, universality and consent; that glorious principle, which if once strictly and impartially pursued, would, and which alone can, remove all the distractions, and unite all the divided branches of the Christian church. This truly Catholic principle is agreed to by all churches, Eastern and Western, Popish and Protestant; and yet unhappily is practised by none, but the church in whose holy communion I have the happiness to die. May God, of his great mercy, daily increase the members thereof! And if any would enquire into its primitive institution, I refer them to our Common prayer-book; entitled as above-mentioned."—This book of devotion was supposed to be wrote by Dr. Deacon, the physician at Manchester, father of the above.

The speeches of the rebels were suspected to be wrote by Mr. Creake, a nonjuring clergyman; (some said one of their bishops) at least he had a hand in them.

Counsellor Morgan in his speech said, "To conclude, my brethren and fellow-subjects, I must make profession of that religion I was baptised, have continued, and shall, through divine permission, die in, which is that of the church of England; and which I hope, will stand and prevail, against the malice, devices and assaults of her enemies; as well those of the church of Rome, as those equally dangerous, the followers of Luther and Calvin, covered under, and concealed in, the specious bugbears of Popery and arbitrary power. This my faith, I have fully set forth in a poem of two books, intitled, "The Christian Test, or

the Coalition of Faith and Reason;" the first of which I have already published, and the latter, I have bequeathed to the care of my unfortunate, but very dutiful daughter, Mrs.

Mary Morgan, to be published by her, since it has pleased God I shall not live to see it. To these poems I refer, which I hope will obviate all cavil to the contrary."

513. The Trial of ALEXANDER MAC GROWTHER, for High Treason, at the Town-Hall, St. Margaret's-hill, Thursday, July 31: 20 GEORGE II. A. D. 1746.

THIS morning the right honourable the lord chief-justice Lee, the right honourable lord chief justice Willes, Mr. justice Wright, Mr. justice Foster, Mr. baron Reynolds, and Mr. baron Clive, came into court, and being seated, the Cryer made proclamation for silence; and the keeper brought James Nicholson, a lieutenant in the Duke of Perth's regiment, and Donald Mac Donald, otherwise David Mac Donald, otherwise Daniel Mac Donald, a captain in Cappock's regiment, to the bar, and they desired to retract their former plea; which the Court having granted, they pleaded guilty, and hoped the Court would recommend them to his majesty's mercy.

Alexander Mac Growther was then called, and put to the bar, and for his trial put himself upon God and his country, and after making some exceptions, a jury was sworn to try him.

The counsel for the king having opened the indictment, that the prisoner was a lieutenant in the duke of Perth's regiment, they proceeded to call their witnesses, and Mr. Allen was called and sworn accordingly.

Solicitor General. Pray, Sir, acquaint the Court of all that you know of the prisoner.

Mr. Allen. There are two Mac Growthers, but this is the oldest, and he was a lieutenant in the duke of Perth's regiment; and the first time he was in arms in the Pretender's service was the latter end of last August. He was a tenant to the duke of Perth, and accepted a commission in the rebel service; he was called lieutenant in Perth's regiment by the officers and soldiers, and marched in his highland dress with the rebels from their first beating up for volunteers in Scotland. He was at Edinburgh, and seemed very glad when the Pretender had got possession of the city, and encouraged the soldiers to be diligent, for that there was no fear of success, and if they were hearty, vigilant and active, he did not doubt but they should succeed. He wore a white cockade at Edinburgh, a dirk by his side, had pistols in his girdle, and a blue bonnet, and the highland rebels paid a great respect to him. He was at Perth when possession was taken of that town by the Pretender's party, and always acted there as an officer; and at every place where the rebels came was very warm in their cause, bidding the rebels under his command keep a good heart, and fear nothing.—He spoke this at the battle of Preston Fans; and every attack they made, he spirited up his brother

officers, and desired them to keep a good look-out, and take care the soldiers did their duty.

Mr. Maddox was next called and sworn, who deposed, That he saw the prisoner at Carlisle, in his highland dress, at the time when his royal highness the duke besieged the city; that he was in a highland plaid, a bonnet, a white cockade and dirk, and was called lieutenant Mac Growther, and greatly esteemed by the rebels.

The captains *Vere* and *Nevet*, who are officers in the king's service, deposed, That when the rebels surrendered themselves, they had orders from his royal highness the duke to examine all the rebel officers; and when they examined the prisoner, Mr. Mac Growther, he owned that he was an officer (a lieutenant) in the duke of Perth's regiment; and that he gave in his name as an officer;—and all the witnesses agreed, that the prisoner was under no restraint, but acted as voluntarily as the other rebel officers.

PRISONER'S DEFENCE.

The prisoner's counsel insisted, that the duke of Perth had compelled him to enter into the rebellion,* and had threatened him, if he refused to join them, to burn his house to the ground, to destroy all his cattle and stock of corn, and to lay waste all that belonged to him,† and to prove this they called four witnesses, who, in general, deposed, That several of the duke of Perth's men came and threatened him, the prisoner, with destruction, if he refused joining the rebel forces; and to bind him with cords; and that being compelled, he was forced to join them to save himself from ruin.

The evidence on both sides being closed, my lord chief-justice summed up the evidence to the jury; and as the proof was very strong, and it appearing that he marched with the rebels, and enlisted at the beginning of the rebellion, and continued with them until the surrender of Carlisle, the jury (without going out of court) found him guilty.

ALEXANDER MAC GROWTHER'S CASE.

(*Foster's Reports*, p. 13.)

"In the case of Alexander Mac Growther, there was full evidence touching his having

* See Leach's *Hawkins's Pleas of the Crown*, b. 1, c. 17, s. 24.

† See some observations respecting this plea in the Case of lord Wintoun, vol. 13, p. 306.

been in the rebellion; and his acting as a lieutenant in a regiment in the rebel army called the duke of Perth's regiment. The defence he relied on was, that he was forced in.

"And to that purpose he called several witnesses, who in general swore, That on the 28th of August the person called duke of Perth, and the lord Strathallan, with about twenty highlanders, came to the town where the prisoner lived. That on the same day three several summons were sent out by the duke requiring his tenants to meet him, and to conduct him over a moor in the neighbourhood, called Luiny Moor. That upon the third summons the prisoner, who is a tenant to the duke, with about twelve of the tenants appeared; that then the duke proposed to them that they should take arms and follow him into the rebellion. That the prisoner and the rest refused to go; whereupon they were told, that they should be forced, and cords were brought by the duke's party in order to bind them; and that then the prisoner and ten more went off, surrounded by the duke's party.

"These witnesses swore that the duke of Perth threatened to burn the houses, and to drive off the cattle of such of his tenants as should refuse to follow him. They all spoke very extravagantly of the power lords in Scotland exercise over their tenants; and of the obedience, (even to the joining in rebellion) which they expect from them.

"Lord chief-justice Lee, in summing up, observed to the jury, that there is not, nor ever was, any tenure which obligeth tenants to follow their lords into rebellion.

"And as to the matter of force, he said, that the fear of having houses burnt, or goods spoiled, supposing that to have been the case of the prisoner, is no excuse in the eye of the law for joining and marching with rebels.*

* "An apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief, not endangering the person of the party, will be no excuse for joining or continuing with rebels; otherwise it would be in the power of any leader of a rebellion to indemnify all his followers. It was so ruled in the case of Mac Growther, and of many of the Scotch prisoners, on the special commission, in Surry, in 1746. In Mac Growther's Case, besides the threat of burning his property, it appeared that he and twelve other tenants of the duke of Perth, being summoned to meet him, appeared on the third summons, on the 28th of August, when

"The only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could; agreeable to the rule laid down in Oldcastle's Case, 1 Hale 50. that they joined 'pro timore mortis et recesserunt quam cito potuerunt.'

"He then observed that the only force the prisoner pretends to, was on the 8th of August; and that he continued with the rebels and bore a commission in their army till the surrender of Carlisle, which was on or about the 30th of December.

"The jury without going from the bar found him Guilty. But he was reprieved, and not executed.

"N. B. All the judges that were in town were present, and concurred in the points of law.

"N. B. Many of the Scotch prisoners made force their defence, and produced the same sort of evidence as Mac Growther did; and the same directions in point of law were given as in his case. And the matter of fact whether force or no force, and how long that force continued, with every circumstance tending to shew the practicability or impracticability of an escape,† was left to the jury on the whole evidence."

the duke proposed to them to take arms and follow him into the rebellion; that they all refused to go; whereupon they were told that they should be forced, and cords were brought by the duke's party (about 30) in order to bind them; and that then the prisoner and about ten more went off, surrounded by the duke's party. Lord chief-justice Lee observed to the jury, that the only force pretended to by the prisoner was on the 28th of August, and that he continued with the rebels, and bore a commission in their army till the 30th of December following. He was convicted but not executed. In all the like cases of the Scotch rebels, the matter of fact whether force or no force, and how long that force continued, with every circumstance tending to shew the practicability or impracticability of an escape, was left to the jury on the whole evidence." East's Pleas of the Crown, c. 2. s. 15. See, too, Mr. East's chapter (hereafter as it seems to be published) of persons capable of crimes, tit. Compulsion.

† See in Foster's Reports, 1 Discourse, chap. 2, s. 8, p. 216.

514. The Proceedings at St. Margaret's-hill, Southwark,* relating to ALEXANDER and CHARLES KINLOCH (Brothers to Sir James Kinloch, bart.), on August 23, September 2, October 28, 29, November 15, December 15 and 20, 1746. Before the Lord Chief Justice Lee, Lord Chief Justice Willes, Lord Chief Baron Parker, Mr. Justice Wright, Mr. Baron Reynolds, Mr. Justice Abney, Mr. Justice Dennison, Mr. Baron Clarke, Mr. Justice Foster, Mr. Baron Clive, Sir Thomas De Veil, knt. and Peter Theobald, esq. relating to their Plea that they were born in Scotland, and ought to be tried according to the Laws of that Kingdom, &c. † 20 GEORGE II. A. D. 1746.

August 23, 1746.

THIS day bills of indictment were found against Alexander Kinloch and Charles Kinloch, and others of the rebels to the number of twenty-two. The overt acts were laid in different shires in Scotland, according to the respective cases of the prisoners. And then the Court adjourned to the 2d of September for the arraignment of the prisoners.

September 2, 1746.

On this day, (there being no other judge in town) Mr. Justice Foster sat with two other commissioners, sir Thomas De Veil, knt. and Peter Theobald, esq. for the arraigning the prisoners. Alexander Kinloch and Charles Kinloch, and the rest of the prisoners, who were Scotchmen born, upon their arraignment severally delivered a paper into court whereof the following is a copy :

"As I intend to insist on the benefit of the Act of Union, by which all the laws in Scotland at that time which concern private right are saved to the natives of Scotland, and declared to

* We cannot find that any trial of these two Kinlochs was ever printed; the evidence against them (and the rest tried at St. Margaret's Hill) being so very plain, nothing remarkable happened at their trials. Their principal objection being in nature of a plea to the jurisdiction of the Court, we shall insert their plea, the entry on the record, demurrer, &c. relating to this point, with a brief account of the arguments of the counsel and court, and judge Foster's argument on the case, from his Reports, p. 15, *et seq.* *Former Edition.*

See, also, East's Pleas of the Crown, c. 2, § 41.

† See Foster 16, 23. 1 Wils. 157. East's Pl. Cr. ch. 2, § 41; and sir John Perrott's Case, vol. 1, p. 1315, and lord M'Guire's Case, vol. 4, p. 654, of this Collection, and the other books referred to by Mr. East.

be unalterable by the parliament of Great Britain, except for the evident utility of the subjects within Scotland; and as I am a subject born within Scotland, and stand indicted for treasons charged to have been committed by me in Scotland, I humbly beg that the Court will be pleased to assign me counsel and a solicitor to advise me as to the manner of framing, and the use to be made of this defence; and that the Court will be pleased to indulge me in a few days time to advise with them, before I am compelled to plead; lest by pleading I may be deprived of the benefit of any such defence."

Mr. Justice Foster told the prisoners that copies of their indictments having been delivered to them in due time, they ought now to have been ready to plead such pleas as they would stand by; and that the Court expected they should now plead accordingly. He told them withal, that if the matter contained in their papers would avail them at all, they would have the full benefit of it upon Not Guilty: since it amounts to no more than that their cases are not within the act of the last session, by authority of which act alone this court sits. They then severally pleaded Not Guilty.

The CASE of ALEXANDER KINLOCH and CHARLES KINLOCH, Oct. 28, 1746.

Present lord chief justice Willes, Mr. justice Foster, and Mr. baron Clive. Alexander Kinloch and Charles Kinloch, who were the first of the prisoners concerned in the paper delivered the 2d of September that were brought to trial, were set to the bar; and they agreeing in their challenges, one jury was sworn and charged with them by the clerk of the arraignments. The junior counsel for the crown opened the indictment, and the solicitor general in a few words opened the evidence.

When the counsel for the crown had proceeded thus far, the chief justice, before any evidence was given, told the prisoners' counsel,

that he was informed they had some objection to make in behalf of their clients grounded on the Act of Union ; which objection he said was proper to be spoke to before the counsel for the crown went into their evidence. Whereupon Mr. Joddrell, one of the prisoner's counsel, stated his objection, and spoke largely to it. The chief justice then said, that the objection being in nature of a plea to the jurisdiction of the Court, could not be made on the issue of Not Guilty ; nor could any evidence in support of the objection be received upon that issue ; and therefore proposed that a juror should be withdrawn ; and that the prisoners should have leave to withdraw their pleas of Not Guilty, and to plead this matter specially : and that the attorney general might demur, and so the point would come regularly before the Court.

Mr. Justice Foster said on this occasion, that when he assured the prisoners, they would have the full benefit of this objection on their plea of Not Guilty, he had no intention of leading them into a difficulty, which they could not get clear of, without the indulgence of the Court. He thought they would be entitled *ex viro jure* to the full benefit of the objection without such indulgence ; and added, that the principle he went upon was this, if there be any weight in the objection, it must be that the case of the prisoners is not within the act of the last session, under which act alone this special commission is executed. And if it be not within that act, it is a case at common law ; and consequently, taking it to be a case at common law, if no overt act be proved in the county, where the commission sits, and whence the jury comes, the prisoners must of course be acquitted.

Sir John Strange, of counsel with the crown, strongly insisted, that in point of law the prisoners were entitled to the benefit of the objection on Not Guilty, if they could avail themselves of it ; and the attorney general offered to waive all advantage that might be taken against the prisoners, if any advantage could be taken ; and pressed that the trial might go on upon the issue joined by them, and that the merits of the objection might be now considered.

But it was otherwise ordered, and a juror was withdrawn, and the jury discharged upon the motion of the prisoners' counsel, and at the prisoners' request, and with the consent of the attorney general. And the prisoners withdrew their former plea, in order that they might be ready the next day with their pleas to the jurisdiction in form. To which the attorney general declared he would demur *instante*.

And the Court adjourned to the next day.

The entry on the Record touching this matter, is as followeth :

" Upon the motion of Charles Hamilton Gordon, esq. and Paul Joddrell, esq. being assigned as counsel for the defendants in this cause, and by their consent, and also at the desire and request, and by the consent of the defendants now at the bar here, and also by the

consent of Mr. Attorney General on behalf of the king : It is ordered by the Court here, that Richard Toy the last of the jurors sworn and impannelled in this cause be withdrawn out of the pannel ; and that the rest of the jurors in this cause be discharged ; no evidence whatsoever having been given to the said jury in this cause either on the part of the king or of the defendants. And it is further ordered by the Court here, that the said defendants have leave to withdraw their pleas of Not Guilty by them formerly pleaded to the indictment in this cause, and have leave to plead to the jurisdiction of this court : and that the said defendants have time till to-morrow to put in such plea. And that they deliver copies of such plea to Mr. Sharpe, solicitor for the king in this cause, by eight of the clock this evening. And thereupon the said defendants do now here at the bar withdraw their said pleas of Not Guilty, in order to put in such plea to the jurisdiction of this court as aforesaid."

October 29, 1746.

On this day, present the same judges as yesterday. Alexander Kinloch was first set to the bar and again arraigned ; whereupon he tendered a plea ingrossed on parchment and signed by his counsel Mr. Gordon and Mr. Joddrell ; to which the attorney general demurred, and the prisoner instantly joined in demurrer.

" And the said Alexander Kinloch in his own proper person comes, and having heard the indictment aforesaid read, and protesting that he is not guilty of the premises charged in the said indictment, for plea nevertheless saith, That he ought not to be compelled to answer to the said indictment : because he saith that the kingdom of Scotland, before and until the time of the union of the two kingdoms of England and Scotland, was regulated and governed by the proper laws and statutes of that kingdom, and not by the laws and statutes of the kingdom of England ; and that ever since the said union of the said two kingdoms that part of the realm of Great Britain called Scotland hath been, and yet is governed and regulated by the proper laws of that part of the said realm called Scotland, and not by the laws of that part of the said realm called England.

" And the said Alexander Kinloch further saith, That within the said kingdom before the union of the said two kingdoms, and until the said union thereof, and within that part of Great Britain called Scotland ever since the said union, there hath been, and now is a certain court called the Court of Justiciary ; and that all and singular offences of high-treason committed within the said kingdom of Scotland before and until the said union, and within that part of the realm of Great Britain called Scotland since the said union by the natives thereof, apprehended or taken for such offences there (except peers of the realm of Great Britain), have been and of right ought to be enquired of, heard and determined in the said

Court of Justiciary before the justices of that court, or in some other courts, or before other justices within the said realm of Scotland before the union, and within that part of the realm of Great Britain called Scotland since the said union; and not in any court, or before any justices within the realm of England before the said union, or within that part of the realm of Great Britain called England since the said union.

"And the said Alexander Kinloch further saith, That Fochabars in the shire of Murray in the said indictment mentioned, the place where the said offence contained in the said indictment is supposed to have been committed, before and until the said union of the said two kingdoms was within and parcel of the said kingdom of Scotland, and ever since the said union was and now is lying within and parcel of that part of the realm of Great Britain called Scotland.

"And the said Alexander Kinloch further saith, That he was born within that part of the realm of Great Britain called Scotland (to wit) at Fochabars aforesaid: and that at the time when the said offence in the said indictment contained, is therein supposed to have been committed, and long before that time, and since, he the said Alexander Kinloch was resident and commorant within that part of Great Britain called Scotland (to wit) at Fochabars aforesaid. And this he is ready to verify. Wherefore the said Alexander Kinloch prays judgment if the court of our lord the king here will further proceed upon the indictment aforesaid against him, and that he may be dismissed from the court hereof and upon the premises, &c.⁴

* See the Case of the honourable Robert Johnson, 6 East, 583.

In the Case of *Rex v. Grainger*, Hil. 5 Geo. 3, a motion was made to set aside a dilatory plea to an indictment, which plea had not been verified by affidavit, nor had any probable matter been shewed to the Court, to induce them to believe that the fact of it was true. In support of the plea was cited this case of Alexander Kinloch, "where there was no affidavit." But by lord Mansfield, "That was at the bar: It is not like the present case." And the plea was set aside, for want of an affidavit, 3 Burr. 1617.

In that case of *Grainger* his counsel also cited on his behalf the stat. 4 and 5 Ann, cap. 16, s. 7, which enacts, "That nothing in the act before contained shall extend to any writ, declaration, or suit of appeal of felony or murder, or to any indictment or presentment of treason, felony or murder, or other matter, or to any process upon any of them, or to any writ, bill, action or information upon any penal statute:" but lord Mansfield observed, that the above recited sect. does not extend to the 11th sect. of the same stat., which 11th sect. had been relied on against the plea. It enacts, that "no dilatory plea shall be received in any

Demurrer.

"And the said sir Dudley Ryder, knight, attorney-general of our present sovereign lord the king, who for our said present sovereign lord the king in this behalf prosecuted, as to the said plea of him the said Alexander Kinloch by him above pleaded as aforesaid, for our said present sovereign lord the king, saith, That the said plea and the matter therein contained, are not sufficient in law to preclude the Court here from their jurisdiction to hear and determine the high-treason mentioned and specified in the said indictment, and above charged upon him the said Alexander Kinloch in and by the said indictment. Wherefore for want of a proper and sufficient answer in this behalf, he prayeth judgment, and that the said Alexander Kinloch may answer in court here to our said present sovereign lord the king touching and concerning the premises aforesaid."

Joynder in Demurrer.

"And the said Alexander Kinloch likewise."

The Prisoner's Counsel admitted, that his case is within the letter of the act of the last session, by authority of which this court sits: but insisted, that by the known rules of construction, if any great or manifest inconveniences do arise from adhering closely to the letter of the act, the Court ought, and alway doth depart from the literal construction.

The construction they insisted on was, that for offences committed in England, commissions might issue for hearing and determining the same in any county of England; and for offences committed in Scotland, the like commissions might issue into any county of Scotland, which would, they said, answer all the ends of the act mentioned in the preamble; and would at the same time avoid all the inconveniences which the construction contended for in behalf of the crown is attended with.

They then mentioned several inconveniences attending such a construction of the act; Some of which might possibly have merited the attention of the legislature at the time the act passed.

Mr. Attorney General in answer said, That the rules of construction as applied to acts of parliament grounded on inconveniences, whether imaginary or real, hold in no cases but where the meaning of the act is doubtful: In plain cases, where the intention of the legislature is evident, it is the duty of the Court to put the law in execution, and to leave all considerations of inconveniences to the legislature. And if the parliament had intended that different commissions should issue for the trial of treasons committed in England and Scotland respectively, they would have said so: they

court of record, unless the party offering such plea do by affidavit prove the truth thereof, or shew some probable matter to the Court, to induce them to believe that the fact of such dilatory plea is true."

would not have empowered his majesty to issue commissions into any county or shire within the united kingdom.

And the objection he said is not new ; it was made, but without effect, in behalf of a Scotchman concerned in the rebellion of 1715* (1 Geo. 1. c. 33.)

The Lord Chief Justice declared his opinion, in which the other judges present concurred, that the prisoner's birth, residence and apprehension in Scotland, are facts perfectly immaterial to the present question. That they would have been so, if the case had been at common law. For at common law every man is triable, not where he was born, resided, or was apprehended, but where the fact was committed : That these facts being immaterial, and the whole merits of the objection appearing on the face of the indictment, the prisoner might as well have demurred to it, as pleaded in the manner he hath done.

That in so plain a case as this is, arguments *ab inconvenienti* are of no weight : the law must take its course : inconveniences in plain cases are proper only for the consideration of the legislature.

His lordship observed that the words, 'this realm,' occur in four or five places in the act, and that in every place where they do occur, except in the clause in question, they incontestably mean the united kingdom of Great Britain, and can mean nothing else : and by no rule of construction can they be restrained in this single clause, to that part of the kingdom called England.

The Court over-ruled the plea, and ordered that the prisoner should plead over to the treason ; and he pleaded Not Guilty. Charles Kinloch was then brought to the bar, and being arraigned a second time on the indictment pleaded likewise Not Guilty. And both prisoners agreeing to join in their challenges, a jury (the same persons who were sworn and charged with them yesterday) was sworn and charged with them. And they were both found guilty, but not executed.

November 15, 1746.

On this day, present the two chief justices, Mr. Justice Wright, Mr. Baron Reynolds, Mr. Justice Abney, Mr. Justice Foster, and Mr. Baron Clive. All the prisoners who were convicted since the last execution were brought to the bar to receive judgment.

* This was the case of William Hay upon the special commission at Carlisle, in the year 1716. The objection was then introduced, not by way of plea to the jurisdiction, but by demurrer. And the Court, after hearing the prisoner's counsel, adjourned to the next day. And having considered the arguments of the prisoner's counsel, agreed to over-rule the demurrer. Which being intimated to his counsel, he, by leave of the Court, and with the consent of the Solicitor-General, withdrew his demurrer, and pleaded Guilty. *Former Edit.*

VOL. XVIII.

ment. The two Kinlochs, Alexander and Charles, moved by (Mr. Jodrell) their counsel in arrest of judgment : He took notice of the proceedings with regard to the prisoners on the 28th and 29th days of October, and insisted that their trial on the 29th (a jury having been sworn and charged with them on the 28th) was a mis-trial, and the verdict a mere nullity.

He was proceeding to state his reasons and authorities, when lord chief justice Lee interrupted him and said, that as there is a variety of opinions in the books touching that matter, which is really a point of great consequence, he thought it most advisable to postpone the further consideration of it to the next adjournment, when he should desire the assistance of all the judges in the commission. Then the Court, after passing sentence on the others, adjourned to the 15th of December.

N. B. The Court being full, and the bar crowded in expectation of the event of this motion, Mr. Justice Foster thought it not improper to speak to the purpose he spoke on the 28th of October. And he added, that from what was said by the Court on the 29th, he was confirmed in his opinion, that the prisoners might safely have pleaded the general issue. For if, as was then admitted, the whole merits of the objection appear on the face of the indictment, the prisoners undoubtedly might have had the benefit of it in arrest of judgment. So that, *quacunqve vid*, whether they could have been let into it on evidence (as they certainly might), or in arrest of judgment, they were not ill advised in pleading the general issue.

December 15, 1746.

On this day, present the two chief justices Lee and Willes, the chief baron Parker, Mr. Justice Wright, Mr. Baron Reynolds, Mr. Justice Abney, Mr. Justice Dennison, Mr. Baron Clarke, Mr. Justice Foster, and Mr. Baron Clive—Mr. Jodrell argued in behalf of the Kinlochs in arrest of judgment.

He admitted that there is a variety of opinions in the books touching the power of the Court to discharge a jury sworn and charged in a capital case. And that the practice during the reign of king Charles the second at least, went in favour of that power. But he said that ever since the revolution the contrary practice hath uniformly prevailed. And even in the time of James the second, the judges in lord Delamere's case [vol. 11, p. 510.] declared, that a jury sworn and charged in a capital case cannot be discharged, but must give a verdict. And common justice, he said, requires, that when a prisoner is brought upon his trial, and a jury is once sworn and charged with him, he is to stand or fall by the event of that trial ; otherwise his life may be brought in jeopardy for the same fact as often as the Court pleases, and even when he is not so well prepared for his defence.

To shew that the law and practice before the Restoration was with his clients, he relied on

the authority of lord Coke in his 1st Inst. 227 b. and 3d Inst. 110. And to shew that the judges since the Revolution concurred with lord Coke, he cited Carthew 465; where it is reported to have been said by Holt at the sittings in Guild-hall, on the 9th day of November 1698, in the case of the king and Perkins, "That all the judges of England upon debate among themselves had agreed, that a jury sworn and charged in a capital case cannot be discharged, though all the parties consent to it."

He said that he had seen a MS. note of the same resolution by the late Mr. Justice Tracy, which agrees in substance with Carthew's report of it.

He observed, that according to Carthew's report and Tracy's MS. the judges at the same time came to a resolution, that in criminal cases, not capital, a juror may be withdrawn, or jury discharged by consent of all parties, but not otherwise.

That the practice since that time in criminal cases hath been conformable to this rule. For this he cited the cases of the king and Morgan, Hilary 9 Geo. 2, on an indictment for perjury, and the king and Jelf, Trinity 7 Geo. 2, an indictment for barratry; in both these cases lord Hardwicke, he said, at the sittings, refused to withdraw a juror at the prayer of the king's counsel, because the defendant's counsel refused to consent to it, and cited this resolution in Carthew. The use he made of these two cases was, that since this regard hath been paid to the authority of the resolution in criminal cases, as reported by Carthew, he hoped the same regard would be now paid to that touching capital cases.

As to the matter of consent, he observed that consent may cure an irregularity, but cannot justify the breaking through any of the fundamental principles of law; especially such rules as are in favour of a prisoner who is answering for his life. A prisoner in this circumstance, is hardly *sui juris*; he may be overawed or surprized into a consent, manifestly to his prejudice: And therefore the judges in the resolution cited from Carthew (on which he relied as an authority in point with him) threw the circumstance of the consent quite out of the case.

Upon the whole, he concluded that judgment ought to be arrested.

To this it was answered by the counsel on the part of the crown, (Mr. Attorney General, sir John Strange, Mr. Solicitor General,) that except the resolution reported by Carthew, there is not a single authority in the books which saith that a juror may not be withdrawn, or the jury discharged, even in capital cases, with the consent of all parties: That it was done in the case of Mansell so long ago as the 46th of Eliz. (1 Ann 103, 104.) And all the judges of Serjeant's-inn in Fleet-street then agreed, that it might be done; and had often to their knowledge been done. That the rule laid down by lord Coke in his first and third

Institutes runneth in general terms, and doth not indeed except the case of consent; but that case must be supposed to be excepted.

That it frequently hath been done since lord Coke's time, even without consent, where the circumstance of the prisoner, or the demands of public justice did require it. And for this they cited 2 Hale, 295, 296, 297. 1 Vent. 69. Keil. 46, 47, 52.

They said they did not cite these books with an entire approbation of the practice in every instance in which it prevailed; for some of the cases, particularly Whitebread's,* ought never to be drawn into example, but only to shew what the opinion of those times was.

That the opinion of the judges in lord Delamere's Case doth not affect the present question. For the only question proposed to the judges was, whether in the trial of a peer in the court of the lord high steward, the Court might, after evidence given, adjourn the peers triers from day to day. The judges did not presume to answer that question, it being a point of judicature of which that Court alone was the proper judge. But they did say, that in the case of a common jury sworn and charged, they ought to give their verdict before they are discharged: meaning only, that a jury in a capital case cannot be adjourned and separated after evidence given, but must be kept together till they agree on their verdict. The occasion which led them to say this sheweth, that the case of an adjournment was what they had then in contemplation, and not the case of a total dismission of the jury. And so doth the reason they give for the practice; this, they say, is done for fear of tampering and corruption. In the case of a bare adjournment there may be room for this fear, but in the case of a total dismission, when no verdict is to be given, there cannot.

They insisted on Rookwood's Case† as a case in point. For had the prisoner's counsel taken exceptions to the indictment coming within the restrictions of the act of the 7th of king William, and had those exceptions been allowed, the indictment must have been quashed, and the jury, though sworn and charged, must have been dismissed; and yet it cannot be imagined that the quashing that indictment, and discharging that jury, would have discharged the prisoner from answering to the treason on a fresh bill of indictment.

As to the three Resolutions reported by Carthew, the two last, they said, are manifestly against law, in the latitude laid down in that book. The king in a civil case may by his prerogative withdraw a juror, for he cannot be nonsuit; and it is frequently done in informations in the Exchequer on account of the revenue: and though the Court refused to do it in the cases of Morgan and Jelfs, cited on the other side, yet in the case of one Wilkinson,

* See in vol. 13, p. 321, what sir Bartholomew Shower said of Whitebread's case.

† See it in this Collection, vol. 13, p. 139.

Paschm 6 Geo. 2, which was an indictment for misapplying money raised on the scavengers rate, the Court did discharge the jury at the prayer of Mr. Justice Abney, then one of the king's counsel, without the defendant's consent.

It is objected, that a prisoner may be drawn into a consent to his own prejudice: but certainly a prisoner may do much more than consent, he may abandon all defence, he may plead guilty. He may on his trial waive all his challenges, and put himself on the first twelve that shall appear. An accessory cannot be brought to his trial before the principal is convicted or outlawed; (2 Hale 224.) But if he pleaseth, he may waive that privilege, and submit himself to a trial, and it shall not be error, because he consented. Besides, in the present case, what was done was at the prayer of the prisoners, and, as the Court then took the case, manifestly for their advantage.

Cases may happen where the Court, 'ex debito justitiæ,' and out of regard to the prisoner, ought to discharge the jury, (1 Hale 35.) and postpone the trial. The case put by lord Hale of a madman putting himself on his trial is strong to this purpose. And other cases of the like kind may be put.

On the whole, they prayed judgment for the king.

Sir John Strange cited a record of Hilary 8 H. 7. Rot. 3. a copy whereof he brought into Court. It was an indictment for murder, and Not Guilty pleaded. The jury having heard all the evidence, withdrew to consider of their verdict, and being returned, delivered their verdict into court in writing. And being examined by the Court how they came by that writing, confessed that it was delivered into their hands by the prisoner at the bar as they passed by him. The Court thereupon discharged the jury of the prisoner, and committed them for this misbehaviour. And a new Venire was awarded. And the second jury brought him in Not Guilty.

The arguments being long, and the day far spent, the Court deferred giving their opinion to the 20th.

December 20, 1746.

On this day, present the same judges as on the 15th, the Court delivered their opinions *seriatim*. And all except one (Wright) agreed that judgment ought to pass upon the prisoners. They agreed, That admitting the rule laid down by lord Coke to be a good general rule, yet it cannot be universally binding: nor is it easy to lay down any rule that will be so. The rule cannot bind in cases where it would be productive of great hardship or manifest injustice to the prisoner.

In the present case, the prisoners were advised upon their trial to object to the jurisdiction of the Court: but having pleaded to issue, it was said that they were too late with that objection. In order therefore to let them into

the benefit of this objection, liberty is given them, at their request, to withdraw their plea of Not Guilty, before evidence given, and to plead to the jurisdiction. Now the plea of Not Guilty being withdrawn, the jury had no issue to try, nor evidence before them, and must of course therefore be discharged; and consequently the prisoners have no right to complain of that which was a necessary consequence of an indulgence shewn them by the Court.

The judges who concurred in this opinion paid very little regard to the resolution reported by Carthew; not only for the reasons insisted on by the counsel for the crown, but because, as no other printed report of that time taketh any notice of this resolution, it is very doubtful whether there ever was any such resolution or no; especially since Mr. Baron Clarke informed the Court that he hath a MS. Report of the late lord chief justice Eyre of the case of the king and Perkins, in which case Carthew supposeth Holt to have reported this resolution.

The Case was thus: Perkins was indicted for perjury in an answer in Chancery: the issue came on to be tried before Holt at the sittings in Guildhall the 9th day of November 1698. When the bill was produced by the counsel for the prosecution in order to entitle them to read the answer, it appeared that the bill had never been filed, so that neither bill or answer could be read. Holt offered to stay till the prosecutors could send the bill to the office and have it filed. But they foreseeing that it could not be done in any reasonable time, their counsel insisted on behalf of the crown, upon withdrawing a juror; Holt would not allow of it, and the defendant was acquitted.

Holt upon this occasion said, 'I have had occasion to consider of this matter. In criminal cases, a juror cannot be withdrawn but by consent. And in capital cases it cannot be done, even with consent.'

This is the whole of the case as reported by Eyre, not a word of any resolution of the judges on the point. And Holt's manner of expression, 'I have had occasion to consider,' seemeth to imply that the opinion he gave was the result of his own thoughts on the subject.

With regard to Tracy's MS. it was observed by Mr. Justice Abney, that Tracy was not an English judge * at the time the judges are supposed to have come to these resolutions, or even so early as the year 1698. And therefore he must have taken up the matter upon report at second-hand.

They all agreed that the opinion of the judges in lord Delamere's case doth not affect this question, for the reasons insisted on by the king's counsel; and joined in condemning the proceedings in the case of Whitebread and Fenwick, as cruel and illegal.

The learned judge (Wright) who dissented, admitted that the discharging the jury in the present case was an instance of great indulgence

* He was an Irish judge at this time.

towards the prisoners. But he thought it safer to adhere to the rule of law, which is clearly laid down by lord Coke, than upon any account to establish a power in judges, which it is admitted hath been grossly abused, and may be so again.

He observed that Mansell's case was the first, and except the present, is the only case wherein the prisoner's consent appears to have been taken: and that the asking the prisoner's consent in Mansell's case plainly betrayeth a consciousness in the judges that the thing was irregular, and could not be done at the discretion of the Court.

Cases he said have been put where the circumstances of the prisoner seem to require that such a power should be lodged in the Court. And other cases may be put, where public justice seemeth to require the same. But these are particular and single inconveniences. And the policy of the law of England, and indeed the true principles of all government, will rather suffer many private inconveniences than introduce one public mischief.

He considered the trial by the same jury which is sworn and charged with the prisoner, as part of the *jus publicum*; as a sacred *depositum* committed to the judges, which they ought to deliver down inviolate to posterity. And concluded, that the trial on the 29th being irregular, no judgment ought to be given on that conviction.

But judgment was given as in cases of high-treason.

Mr. Justice Foster delivered his opinion in this case as followeth:

This case hath been very well argued at the bar; but the counsel on both sides went into the general question, touching the power of the Court to discharge juries sworn and charged in capital cases, farther than I think was necessary.

The general question is a point of great difficulty, and of mighty importance. And I take it to be one of those questions, which are not capable of being determined by any general rule that hath hitherto been laid down, or possibly ever may be. For I think it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases which may come under this general question, without manifest absurdity; and in some instances, without the highest injustice.

I therefore choose to consider the present question singly as it standeth upon the record, and to throw out of it every consideration that is foreign to it. And possibly by so doing, most of the objections that have been made in the present case may receive this short answer, That they are levelled at an improper exercise of the power, but do not reach the present case.

The question therefore is not, Whether a jury may be discharged after evidence given, in order to the preferring a new indictment better suited to the nature of the case; where, through the ignorance or collusion of the officer, or the mistake of the prosecutor, the fact

laid varieth from the real fact, or cometh short of it in point of guilt?

This was frequently done before the Revolution, (Keil. 46. 52. Comb. 401.) and in one or two instances* since. But this is not the present question.

Nor is the present question, Whether the Court may discharge a jury sworn and charged, where nudue practices appear to have been used to keep material witnesses out of the way; (1 Vent. 69.) or where such witnesses have been prevented by sudden and unforeseen accidents?

This likewise is not the question, and I give no opinion on it; only let it be remembered, that lord chief justice Hale justifieth this practice, (2 Hale, 295, 296, 297.) which he saith prevailed in his time, and had long prevailed, by strong arguments drawn from the ends of government and the demands of public justice.

Nor is it now a question, nor I hope will it ever be a question again, Whether in a capital case the Court may in their discretion discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict; and in order to bring the prisoner to a second trial, when the crown may be better prepared.

This was done in the case of Whitebread and Fenwick, and it was certainly a most unjustifiable proceeding: I hope it will never be drawn into example.

Nor is the present question, Whether the bare consent of the prisoner, unassisted by counsel, and consenting to his own prejudice, will render the Court quite blameless in discharging a jury after evidence on both sides gone through and concluded?

This was done in the case of Mansell (1 Ann 103.) which hath been cited at the bar. But I think it ought not to have been done; for notwithstanding what the record saith of the uncertainty and insufficiency of the verdict, the truth of the case was no more than this: the jury were not agreed on any verdict at all; and therefore nothing remained to be done by the Court, but to send them back, and to keep them together, till they should agree to such verdict as the Court could have received and recorded; and the prisoner ought not to have been drawn into any consent at all: for in capital cases I think the Court is so far of counsel with the prisoner, that it should not suffer him to consent to any thing manifestly wrong, and to his own prejudice.

I thought proper to premise these things, in order to clear the present question of every consideration which I take to be foreign to it.

And now I will state what I take to be the present question: and that is,

Whether in a capital case, where the prisoner may make his full defence by counsel, the Court may not discharge the jury upon the motion of the prisoner's counsel, and at his own request, and with the consent of the at-

* See Anne Hawkins's case, cit. infr.

torney general before evidence given, in order to let the prisoner into a defence, which, in the opinion of the Court, he could not otherwise have been let into.

And I am clearly of opinion that a jury may in such a case be discharged. And that the discharging the jury under these circumstances, will not operate so as to discharge the prisoner from any future trial for the same offence.

It seems that an opinion did once prevail, that a jury once sworn, and charged in any criminal case whatsoever, could not be discharged without giving a verdict; but this opinion (Ray, 84,) is exploded in Ferrar's Case; and it is there called a 'common tradition' which had been held by many learned in the law.

My lord Coke was one of those learned men who gave into this tradition, as far at least as concerneth capital cases: and he layeth down the rule in very general terms, in the passages which have been cited on behalf of the prisoners from his 1st and 3d Institutes.

The same rule is laid down in Hale's Summary of the Pleas of the Crown (p. 269;) a very faulty, incorrect piece, never revised by him, nor intended for the press.

But as his lordship, in his History of the Pleas of the Crown, justifieth the contrary practice, his authority is clearly on the other side of the question. And his authority is the more to be regarded, because he had seen and well considered the passages cited from lord Coke; though I believe the rule, as it standeth in his Summary, hath contributed not a little to the confirming many people in Coke's opinion.

My lord Coke layeth down the rule in very general terms; but he hath not given us any of the principles of law or reason whereon he groundeth it. He hath indeed, in his 1st Institute, cited one, and but one authority, in support of it, and that authority doth not, to my apprehension, in the least warrant it.

A man was indicted for larceny, (21 E. 3, 18,) and upon his arraignment pleaded Not Guilty, and put himself upon the country: and afterwards, when the jury was in court, he prayed the liberty to become an approver, and this was denied him; for when issue is joined, it ought to be tried. And he was tried, and found guilty, and hanged.

This is the whole of that case. Here is not the least intimation given of any general principle, that a jury once sworn and charged cannot be discharged without giving a verdict; nor did the Court, as I apprehend, go upon that principle. It went upon a principle quite different, a principle adapted solely to the case then before the Court, which I shall mention presently.

Indeed Fitzherbert (Corone 449,) who abridgeth this case, doth say, that the reason of the judgment was, that the inquest having been once charged, could not be discharged: which possibly might induce lord Coke to draw the same conclusion from that case.

But the reason given by Fitzherbert is not the reason given in the book; nor doth it so much as appear by the book that the jury was sworn. The words of the book are, "Après quant l'enquest fuit icy," afterwards when the jury was here, or in court, whether sworn or not, doth not appear by the book. But whether the jury was sworn or not, there was not the least occasion to resort to any general principle, That a jury once sworn cannot be discharged; because there was, as I hinted before, another rule at hand adapted to the case of an approver, which I think wholly governed that case.

And the rule was this; that a person who had once pleaded to issue, could not after that be admitted to a confession in order to save his own life, by charging other persons supposed to be his accomplices in the same fact. For by once solemnly denying the fact upon his arraignment, he had, in the opinion of those times, lost all credit, and so could not be received as an evidence against other people.

This rule is laid down by Stamford, (Pl. Cor. 144. B. Bro. Corone 42,) and it prevailed for a long time; and it is observable, that Brooke, who abridgeth this very case, carrieth the reason the Court went upon no farther than the law then went in the case of an approver: his words are, "A man was arraigned for felony and pleaded Not Guilty, and afterwards would have become an approver, and was not suffered, because he had joined issue before." Not because the jury was sworn, and could not be discharged, but because he had, on his arraignment, denied the fact.

Thus then standeth the case with regard to the single authority cited by lord Coke: the judgment did not go upon the general principle laid down by him and Fitzherbert, but upon a principle peculiar to the case of an approver.

It must be owned, that the judges did in after-times abate of their rigour with regard to the case of approvers: and did admit persons to the liberty of approving, not only after issue joined, but even after the jury was sworn and evidence in part given; but seldom after the evidence gone through and concluded; as appeareth from several instances mentioned by lord Hale. (2 Hale, 288.)

But then it must be owned, on the other hand, that whenever they did so, they went in flat contradiction to the general rule laid down by Coke and Fitzherbert.

I will only add, with regard to this point, that the admitting, or not admitting persons to become approvers, was always considered as a matter of mere discretion in the Court; as a matter of grace and not of right. And yet we see that in a matter of mere discretion, the Court did frequently upon the special circumstances of the case, discharge juries after they were sworn and charged, and had in part heard the evidence.

These instances therefore must be considered as so many exceptions to the general rule: though I confess they do not come up to the

case of discharging one jury, and bringing the prisoner to his trial by another.

But still they shew that the rule now contended for on the part of the prisoners cannot be true, in the latitude the words import. And I think they do in part shew, what I hinted in the beginning, that no general rule can govern the discretion of the Court on this question in all possible cases and circumstances.

But this will appear in a stronger light in those cases where the circumstances of the prisoner appear on his trial to be such, as that the trial cannot proceed without manifest injustice to him.

A great variety of cases might be put upon this head. But as this is a point which ought to be treated with great caution, I think it safer to cite a case which I find stated to my hand, than to suppose and argue from any cases of my own.

The case I mean is that put by lord Hale (1 Hale, 35,) which was mentioned the last time at the bar.

"In case a man in a phrenzy happen by some oversight to plead to his indictment, and put himself on his trial; and it appeareth to the Court on his trial that he is mad, the judge in discretion may discharge the jury of him; and remit him to gaol to be tried after the recovery of his understanding."

But without resorting to authorities in a plain case, the common sense and feeling of mankind, the voice of nature, reason and revelation, all concur in this plain rule, that no man is to be condemned unheard; and consequently no trial ought to proceed to the condemnation of a man, who by the providence of God is rendered totally incapable of speaking for himself, or of instructing others to speak for him. And common sense will at the same time tell us, that the bare postponing a trial under these circumstances, will not discharge the prisoner from a future trial, when his present disability shall be removed.

This case is surely an exception to any general rule that the wit of man can lay down on this point.

Another case which I take to be an exception to the general rule contended for in behalf of the prisoners, is, when by the indulgence of the Court, and the consent of the Attorney General, the trial of the issue goeth off after the jury sworn and charged; in order to entitle the prisoner to some advantage in point of defence, which in the rigour of the law he could not otherwise be entitled to.

And this, I apprehend, appeareth from the Case of Rookwood* which also was cited at the bar.

In that Case the jury was sworn and charged, and the indictment opened by the king's counsel. The prisoners' counsel then offered some exceptions to the indictment, apprehending, as they said, that since the act of 7th king William declareth that the excep-

tions therein mentioned shall not be taken after evidence given, the prisoner, by a favourable construction of the act, had liberty to take exceptions at any time before evidence.

The Court was unanimously of opinion, that the prisoner's counsel had lapsed their time for taking any exceptions at all. That the proper time for taking exceptions is before issue joined, or at least before the jury sworn.

And yet it being a case of life, and on a new act of parliament, the Court did agree that in that instance only, the counsel should be at liberty, with the consent of the Attorney General, to take their exceptions; confining themselves to the exceptions mentioned in the act, of which they could not have the benefit in arrest of judgment.

The prisoner's counsel declined to enter into their exceptions under that restriction, and so the trial went on. But had exceptions under the restrictions of that act been taken and allowed, the indictment must have been quashed; and the jury then sworn and charged must have been discharged without giving a verdict.

Lord chief justice Holt did not come readily into the expedient proposed by the rest of the judges, of letting the prisoner's counsel into their exceptions, even with the consent of the Attorney General, and in the conclusion declareth, that the Attorney could not consent to it, unless he would also consent to discharge the jury.

These are his words, as I have taken them from the printed trial. His lordship surely at that time entertained no doubt, that at the prayer of the prisoner and his counsel, and with the consent of the attorney general, a jury sworn and charged in a case of high treason might be discharged. The other judges present (who were the lord chief justice of the Common Pleas, the lord chief baron, and four of the puisne judges) must certainly be of the same opinion; otherwise they would never have given way to the taking of exceptions, which, if they had been allowed, must have ended in discharging the jury; and at the same time could not in the nature of things have operated, so as to discharge the prisoner from answering to another indictment for the same offence.

It is said, on the authority of a very short and imperfect note in Carthew, That in less than two years afterwards, all the judges of England upon debate among themselves came to a resolution, that in capital cases a juror cannot be withdrawn, though all parties consent to it.

It was very properly asked by the counsel for the crown, upon what occasion this debate among the judges was had? Whether any case was then depending in judgment before them which gave rise to the conference, and which was to be governed by this resolution, and what were the particular circumstances of that case, if any such there was? These questions, I say, were very properly asked. For the true extent of all rules of this kind, however generally they may be penned, is, and always will

* See it in this Collection, vol. 13, p. 139.

he, is a great measure, adjusted by the circumstances of the case under consideration, at the time when the rule appears to be given.

It seems endeavours have been used to come at the necessary light in these particulars, but to no purpose. Only it is said upon the authority of a MS. of a late learned judge (Tracy), that this resolution, among others, was taken upon a conference among the judges in relation to an indictment against the then sheriffs of London for a bare misdemeanor; but what were the circumstances of that case, or what became of it, doth not appear. And therefore I freely own, this extrajudicial opinion (for with regard to capital cases it is extrajudicial) weigheth very little with me in the present question; and doth by no means shake the authority of Rookwood's* case, [vol. 13, p. 139.] which I take to be a case very nearly in point with the present; and moreover was a case where the point did judicially come before the Court, and in which the Court had the assistance of very able counsel on both sides of the question.

* Holt's and Tracy's opinions in 1704, in the Case of Anne Hawkins, were as followeth:

Mr. Justice Tracy's MS. having been cited in the foregoing case by the prisoner's counsel, and taken some notice of by the Court, I think it not amiss to subjoin from the same MS. which I had not then seen, a report of the following case:

"At the sessions at the Old Bailey before Easter term 1704, Anne Hawkins was indicted for breaking the mansion house of Samuel Story in the night time. It appeared on evidence that the house belonged to the African Company; that Story was an officer of the company; and that he and many other persons, as officers of the company, had separate apartments in the house in which they inhabited and lodged; and that the apartment of Story was broke open. It was held by Holt chief justice, myself, and baron Bury, that the apartment of Story could not be called his mansion-house, because he and the others inhabit in the house merely as officers and servants of the company; and thereupon the jury was discharged of this indictment, and it was amended, and laid to be the mansion house of the company."

The record hath been looked into; it warranteth the report of the learned judge in the substantial parts of it, though in some points it is defective. Two bills were in fact preferred against the woman; the first for burglary and larceny in the dwelling house of Samuel Story, to which she pleaded Not guilty, and put herself upon the country; the second for burglary and larceny in the mansion house of the African Company, in which she is charged to have committed the burglary upon the same day, and to have stolen the very same goods, as in the former bill.

It appeareth upon this second bill, that she was acquitted of the burglary and found guilty

The only difference between the cases in this: Rookwood could not have had the benefit of his exceptions without the indulgence of the Court, and consent of the Attorney General; whereas the prisoners at the bar might, in my opinion, have had the full benefit of their point of law without either. I need not repeat what I said on this head the last time I spoke of this matter. But as a doubt arose on that point, the expedient now under consideration was thought of. This expedient the Court came into at the prayer of the prisoners and their counsel, and with the consent of the Attorney General.

Not to bring the prisoners' lives twice in jeopardy, (which is one great inconvenience of discharging juries in capital cases) but merely in order to give them one chance for their lives, which it was apprehended they had lost by pleading to issue.

Nor was it done to postpone their trials to an unreasonable distance, when their witnesses might be dead or wearied out by a long and expensive attendance; (which is another great inconvenience which may attend the discharging of juries at discretion, and was an ingredient of great hardship in the case of Whitebread and Fenwick) but in order to bring them to a trial with all the speed that might be, in case their plea should be over-ruled. And accordingly they were tried the very next day, as soon as judgment was given on their plea.

Upon the whole, my opinion is, that all general rules touching the administration of justice must be so understood, as to be made consistent with the fundamental principles of justice. And consequently all cases where a strict adherence to the rule would clash with those fundamental principles, are to be considered as so many exceptions to it. The cases I have mentioned, and many others that might

of the larceny. But it doth not appear by any entry on the first, that the Court proceeded on it farther than the receiving and recording her plea, and remanding her to Newgate, probably till the second amended bill could be prepared and sent to the grand jury. But certainly it is more reasonable to impute this defect to the neglect of the officer who omitted to make the proper entry, than to imagine that the learned judge was totally mistaken in a plain matter of fact, falling within his own knowledge.

Another circumstance which may beget some doubt, might be, and probably was, owing to mere accident. The first bill is now found upon the file among the indictments of the then next preceding sessions (March 8th 1703). But it ought to be remembered that neither Holt, Tracy nor Bury attended at that time; and that it appeareth by the record, that they did attend at the following sessions. At which time, according to the judge's report, the point came under consideration, upon evidence given on the first bill, and the second amended by the direction of the Court was preferred. Former Edition.

he mentioned, are exceptions to the general rule insisted on in behalf of the prisoners.*

The case at bar is I think an exception to that rule; and at the same time standeth clear of the inconveniences mentioned by the prisoners' counsel.

The discharging the jury in this case was not a strain in favour of prerogative, it was not done to the prejudice of the prisoners; on the contrary, it was intended as a favour to them.

In that light I say it was considered by the Court, in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney General, with his usual candour, consented to it.

And in that light I know of no objection in point of law or reason to it. And therefore I am of opinion that judgment ought not to be arrested.

* The following Case of Gould and his wife is one of the exceptions to the general rule. The introductory observation that till a verdict either of acquittal or conviction is given, no trial has been had, should not have been stated without limitation. As it stands it seems to support those cases of which Mr. Justice Foster most truly said that they ought never to be drawn into example.

"Nothing is so clear, as that no one shall be tried twice for the same offence, but till a verdict, either of acquittal or conviction is given, no trial has been had. A remarkable instance to illustrate this, happened at Dorchester summer assize, 1763: no account of which being in print," [one] "may be added here. One Gould and his wife were indicted for the mur-

The difference of opinion in the Court relating to their cases, it is thought saved their lives; for they were not executed, but pardoned, on condition of being sent abroad.

der of a parish apprentice; at the trial, before all the witnesses indorsed on the indictment had gone through their evidence, one of the jury dropped down in a fit, and was carried out of court; but not being in custody of a bailiff, the whole jury was necessarily discharged. The judges on that assize were both clearly of opinion, that the prisoners were not discharged by this accident, this being no trial at all; but as the case was uncommon, if not new, the prisoners were remanded till the next assize, in order to lay the case, in the mean time, before the twelve judges. The twelve judges were afterwards unanimously of opinion, that the accident which happened to the juror was no bar to any future trial: the prisoners were accordingly tried at the next Lent assize, and acquitted on evidence. At the time the accident happened, and the jury were discharged, it was contended by the prisoners' counsel, that the prisoners were absolutely discharged by this event, and could not have their lives brought again into jeopardy: and *Eliz. Meadow's Case*, in Mr. J. Foster's Discour. p. 76, was insisted on as an authority. She was seized with pangs of labour during her trial, and was thereupon ordered back to prison, and the jury discharged. But J. Foster said afterwards, in talking over the above case, that (though he had by accident omitted it in his printed report) her pains going off she was afterwards tried on the same indictment that very session." *Eunomus*, Note to Dialogue 3, p. 287, line 4.

515. The Trial of JAMES BRADSHAW, for High-Treason, at St. Margaret's-hill, Southwark, October 27: 20 GEORGE II. A. D. 1746.

JAMES BRADSHAW was indicted for high treason, &c. The counsel for the king opened the indictment, that the prisoner at the bar stood indicted by the name of James Bradshaw, for high treason, in compassing and imagining the king's death, adhering to his majesty's enemies, and levying (with other false traitors) a cruel and destructive war in these kingdoms, &c. And the treason was laid to be committed on the 10th of November, at Carlisle, in the county of Cumberland, in the nineteenth year of his majesty's reign, against the duty of his allegiance, against the king's peace, and the forms of the statute, &c.

Then sir John Strange set forth, that the prisoner, contrary to his allegiance to our sovereign lord king George the second, met at Manchester to raise a regiment, which the Pretender intended to distinguish by the name of the Manchester regiment, of which Townley, who was lately executed, was made colo-

nel, and that the prisoner Bradshaw accepted of a captain's commission in the said regiment, and acted as such; that afterwards he marched with the said regiment to Derby in a hostile manner, and in a highland dress, armed with pistols and a sword, a white cockade on his bonnet: that he paid his company and exercised them: that afterwards he retreated with the rebel army from Derby to Manchester, and from thence to Clifton Moor, where he in a skirmish headed his men against the duke's troops: That when he came to Carlisle he often waited on the young Pretender's levee: that when the rebels found themselves closely pursued by his royal highness the duke of Cumberland, there was a council of war directly held amongst them, which part of their army should march for Scotland, and what number should stay in the garrison at Carlisle, to secure a retreat for the rest of the rebels.

The prisoner, to pursue his avowed dis-

loyalty to the present happy establishment, desired he might go on with the rebels to Scotland, and accordingly did go with them in their route to Glasgow, was at the battle of Falkirk, where was such a storm of hail and rain, that his majesty's men could not prime or discharge their pieces: from thence he marched with the rebel army to Stirling, thence to Perth and Strathbogie, and finally was at Culloden Moor, in the lord Elcho's troop of horse, commonly called the Pretender's life-guards, where he was taken a prisoner by his majesty's troops.—To prove which he called the following witnesses.

Samuel Maddox being sworn, said, That Mr. Bradshaw, the prisoner, was at the Bell in Manchester (the young Pretender being present) where was a consultation to raise a regiment of foot, for which Mr. Murray, the Pretender's secretary, delivered a commission for that end; and that Francis Townley, a Roman Catholic gentleman, was appointed colonel of the said regiment, which was to be called the Manchester regiment; and that Mr. Bradshaw was nominated captain, and himself (Mr. Maddox) was also appointed an officer; that afterwards he enlisted several private men and volunteers into the said corps; that he saw the prisoner march with the rebel army to Derby, and from thence back again to Manchester (when they found his royal highness the duke of Cumberland's army was near them,) and from thence to Carlisle, in a highland dress, with pistols and a sword by his side, and a white cockade in his bonnet: that at Carlisle, when the young Pretender had sent for the officers of the Manchester regiment, to take his leave of them, and to direct them how to act if attacked by his majesty's forces, the prisoner was there in the chamber; but on account of some misunderstanding between him and Townley, the prisoner refused to stay behind with the rebel army at Carlisle, and desired the young Pretender would permit him to go on with them to Scotland; and that accordingly the prisoner did march out of the gates of Carlisle to go with the young Pretender to Scotland.

James Patterson being produced and sworn, said, That Mr. Bradshaw, the prisoner at the bar, marched with the rebel army from Manchester to Derby, armed with pistols and broad swords, drums beating, pipes playing, colours flying, and retreated with them from Derby to Manchester, and from thence to Carlisle, which place he left (upon some discontent with col. Townley, who commanded the Manchester regiment under the young Pretender) to go in the rebel army, and then he engaged as volunteer in lord Elcho's troop of horse guards, who were esteemed the life-guards to the young Pretender.

Henry Gibson was also produced and sworn, who said, That he himself was unfortunately seduced into the rebel army, and entered into lord Elcho's troop of horse-guards; that the prisoner, Mr. Bradshaw, marched with them

as a private man in the said corps; that the troop was drawn up at the battle of Culloden, and that he there saw the prisoner on horseback in the said troop, with pistols, and a broad sword by his side, and a white cockade, and that he continued with the said troop till he was taken prisoner by his royal highness the duke of Cumberland's army.

Then Captain *Moore*, an officer in the duke of Cumberland's army, was examined on oath, and gave the Court the following account of the prisoner: That he saw the prisoner (whom he had been acquainted with at Manchester) beyond the wood of Culloden Moor, and told him, that he was sorry to see him in such bad company, having had orders from his royal highness the duke of Cumberland to take an account of all the officers and soldiers that should be made prisoners; that Mr. Bradshaw said he was a captain in the Manchester regiment, but afterwards (on the road to Inverness) he said that he belonged to lord Elcho's troop of life-guards.

After they had gone through the witnesses for the crown, Mr. Jodrell and Mr. Ford, who were counsel for the prisoner, stood up and pleaded on his behalf, admitting that what the evidence for the king had said was true, that the prisoner did unfortunately engage himself in the rebel army, and did march with them from Manchester to Derby, and from thence retreated with them to Manchester, and so on to Carlisle, and then accompanied them to Scotland, until they came to Culloden Moor, where he was taken prisoner; but that the unfortunate gentleman at the bar had been troubled with an insanity of mind from his youth, so that he was *non compos mentis*, and consequently, if they should prove it, he could not be deemed guilty of the high treason laid in the indictment: for, said they, he hath been melancholy from his childhood, and in his apprenticeship endeavoured to destroy himself by flinging himself out of the window; and we shall be able to prove that once he did fling himself out of the window, that he attempted to kill the worthy gentleman his master, that he hath been confined in a madhouse for these lunatic pranks, that after the expiration of his apprenticeship he married a fine lady, whom he dearly loved, and on whose death his insanity of mind increased; that the rebels esteemed him no other than a lunatic, first giving him the titular name of a captain in their Manchester regiment, where he sometimes marched in the columns, and sometimes rambled from them, and at other times a private man in lord Elcho's troop of horse, and sometimes he was left behind. We shall likewise, says he, be able to prove to your lordship's satisfaction, and the Court, that this unfortunate gentleman, after the death of his only son, was in such a mad condition, that he was strapped down to his bed, and a watch set over him, to prevent him from injuring himself, and those about him; and quoted a case from lord chief-justice Hale, wherein it is mentioned, that a per-

son insane in mind cannot be deemed guilty of treason or felony.

Then *Thomas Buerdsell* was called and sworn, who said, That he served his apprenticeship with the prisoner, to Mr. Worrall, a Manchester factor in Lawrence-lane, in London; that when he came out of his time he went down to Manchester to set up for himself with a handsome fortune; that in part of his apprenticeship he lay in the same bed with the prisoner, who used often to jump out of the bed, and skip about the room, like a madman, and several times attempted to jump out of the window; that he (the evidence) was in danger of his life, and particularly, one time he caught him by the throat, in such a manner as had like to have destroyed him, whereupon he complained to his master, who ordered them separate beds: that at another time, his master called him to an account, to settle the books, and make up his cash, when the prisoner attempted to stab his master with a penknife, and that he was discharged from his master before the time of his apprenticeship was out.

[Cross-examined.]

The witness admitted that he did business sometimes very regular for his master; and that he was deficient in his cash; but that he (the witness) was obliged to put the poker, tongs, fire-shovel, and chairs out of the room, to prevent him from doing any mischief, and that he used to walk in his sleep.

Then the judge asked this witness, if the prisoner used to get drunk? which he could not deny.

John Davis was examined, and said, he had known the prisoner 15 years; that he used to be out of his mind in the night, and heard him make a noise inwardly; and that he was often strapped down; but being cross-examined by the Attorney General, he admitted that his being strapped down was to prevent him from walking in his sleep; and that the prisoner used to help to fix the straps, which in the morning he used to unloose himself.

Charles Jernagan said, that there were iron bars put in the window to prevent the prisoner from jumping into the streets, and that he was often strapped down for the like consequences. He often appeared in the day-time melancholy, and had on him the symptoms of a man out of his mind. The witness (being cross-examined) admitted, that he kept his books regular, that he drew bills of exchange that were always honoured by his correspondents, who made no hesitation on account of his infirmity; but at other times he was attended by the doctors for his disorder of mind.

Mr. Worthington, a clergyman, brother-in-law to the prisoner's deceased wife, said the prisoner was disordered in his mind, that he often laid with him, that he was strapped down in the night, to prevent him from doing mischief. That once he seized him by the throat, and if he had not been a strong man, he would have killed him; and that he once jumped out of the window and bruised himself.

Being cross-examined by the Attorney-General, if his being strapped down was not to prevent his hurting himself in his sleep, and if he did not use to walk in his sleep? the witness appeared puzzled to answer the question, till the Lord Chief-Justice demanded a categorical answer, whether his illness, or insanity of mind, was any otherwise, than from fits, or walking in his sleep? The witness, after being asked the question six or seven times, with some hesitation answered in the affirmative.

Then *Mr. Roile*, a country farmer, was produced and sworn, and said the prisoner came to his house, seven miles from Manchester, six months before the rebels came there, to be retired, and take physic for his illness; that he did several frantic tricks that appeared to him to be the acts of a lunatic; but being cross-examined by the Solicitor-General, what particular instances he could give, he said, one day he advised him to plow the field the wrong way, but could not remember any other acts of frenzy; but insisted, that he used to walk up and down in the day-time melancholy, and sometimes walked in his sleep.

Jane Richardson was produced and sworn, who deposes, That she lived as servant-maid with the prisoner several years; that he was very fond of his wife, and that in his frenzy he used to come into her room, and without provocation tear off her cap, and pull her by the hair of her head; that he used to be distracted a week together, sometimes would go into his wife's chamber, when she was in bed, and pull off all the clothes, and fling them about the room; and that at Manchester, he had jumped out of the window; so that they contrived straps to tie him down in his bed.

[Here she opened a handkerchief with two sets of straps, and shewed them to the Court.]

These straps, says she, I made myself; one set we kept at home, to tie him down in his bed at nights, to prevent him from hurting himself, or any body else; and the other set he carried with him when he intended to lay abroad; that when the rebels came to Manchester, and some of them in his parlour, she went into the room to ask him how he did; upon which he got up, and pulled the cap off her head, and that she thought him a lunatic. She farther added, that his wife, on her death-bed, desired, that she (the witness) would live with her husband, on account of his weakness of mind, to take care of him; but on account of his rough usage to her, she had some thoughts of leaving him just before the rebels came to Manchester: She likewise added, that the prisoner's illness had increased since the death of his child.

The counsel for the crown not being apprized that the prisoner would make such a defence, occasioned some debate, whether they should examine more witnesses, and the Court agreed they had a right to examine witnesses so far as to prove the prisoner *compos mentis*,

from the time of entering into the rebellion, to the time of his being taken prisoner at Culloden.

Sir John Strange then called Samuel Maddox; but first observed to the Court and jury, that to him the prisoner appeared to be the wisest man in the Manchester regiment, for none but madmen would enter into such a rebellion against so good and merciful a prince, who had violated no man's property, and who, during a long reign, had never invaded the rights and liberties of the subject; but if an instance could be given of the wisdom of any of those people, who had madly engaged in the rebellion, it was the prisoner, who refused to stay with the others at Carlisle, where there was all the probability that could be of their being taken by the duke of Cumberland, to be delivered up to the justice of their country, some of whom had already been executed, and more like to undergo the same fate, which the prisoner hoped to avoid by the retreat he made with the rebels into Scotland.

Samuel Maddox being re-examined, said, That the prisoner was his captain, and inveigled him into the rebel army; that being short of money, and discontented, the prisoner gave him a guinea; that he never knew the prisoner out of his mind; that often he used to send to Maddox's master, who was an apothecary, for medicines that were cooling, which he apprehended to be for no other use, than after hard drinking; that the prisoner had sometimes been afflicted with fits, but never to continue so as to deprive him of his senses, so as not to know whether he was, or was not, engaging in a rebellious act.

My Lord Chief Justice then summed up the evidence in a very learned manner, and explained the quotations out of Hale's Pleas of the Crown; and without going out, the jury brought the prisoner in Guilty.

James Bradshaw, aged 29 years, was descended from very substantial and reputable parents, his father being a large dealer at Manchester in Lancashire, who having but an only child, (this unfortunate person) he gave him a liberal education, by putting him to the free school, where he learnt writing and arithmetic, and made a considerable progress in the classics. His father then sent him to London, James chusing to be a tradesman rather than go to the university, of which he had his choice; and accordingly was bound apprentice to Mr. Charles Worral, an eminent Manchester factor at the Golden Ball in Lawrence-lane near Chesapeake, where he continued six years, well respected by his master and the customers, being very diligent and obliging in the business; and by the young gentlemen in the neighbourhood, and through the whole circle of his acquaintance was very well beloved, being a very facetious, good-natured young fellow. In the sixth year of his time, a young lady, daughter of Mr. Waggstaff, a wealthy gentleman of Manchester, coming to London to see some of her acquaintance as well as the

fashions and curiosities of this place, Mr. Bradshaw had frequent opportunities of visiting her, and waiting upon her to all the gay and polite places of diversion which this place afforded; he at length informed her of his affection for her, and that his intentions were honourable; if she could like him for a husband, he should think himself the most happy man in the world: After several overtures and addresses of this sort, the young lady kindly answered, that if both their parents approved of it, she would consider on it; and Mr. Bradshaw growing very much in her favour, she desired him to write to Manchester about it, which he did accordingly; but before he received an answer to his letter, he had advice that his father, who had been some time in a bad state of health, was so very ill, that his life was despaired of. On this he determined to go down to Manchester; and acquainting his master with his intention, and of his father's illness, Mr. Worral generously consented thereto; and moreover told him, that if his father did not get over his illness, or continued so long ill, that his absence might be prejudicial to the business, he should be at liberty with respect to serving out the remainder of his time, and, that he should be glad to see him well settled where there was a good established trade. Soon after his arrival at Manchester his father expired, and left him in possession of a considerable fortune to carry it on; and after he had made a decent burial for his father, he then renewed his addresses to Miss Waggstaff, and in a little time was married to her, with whom he had a handsome fortune, and an accomplished lady, sufficient to make any reasonable or prudent man happy, in the state of matrimony.

Not long after he entered into partnership with Mr. James Dawson, a Manchester ware-houseman, near the Axe-inn in Aldermanbury. In about two years time he was so unfortunately as to lose his wife, which it was believed affected him so as sometimes to cause an insanity of mind, and at other times, in his lucid intervals, he appeared a bright wit; but he gave himself up to the keeping of company, whereby he contracted an acquaintance with Jesuits and Popish priests (for in those principles he had been always educated,) from whom he imbibed the principles of Jacobitism more strongly, and from time to time contracted such an affection to the cause of the Pretender and his adherents, as to declare publicly (soon after the Pretender landed) amongst his associates, that he would embrace the first opportunity to serve the cause. When the Pretender came to Manchester, he with several others of the same principles, waited on that mock prince, and tendered his service to him; who finding Mr. Bradshaw to be a young gentleman of a good family and fortune, and of some interest, conferred on him the trust of a captain in a regiment to be raised in Manchester, under the command of col. Towuley, who was since executed on Kennington-Common, for high-

treason; and Mr. Bradshaw had no sooner got his commission, than he went about Manchester, and the neighbouring villages, to recruit for the same regiment, in which he had such success, that he raised a number of men for the service of the said Pretender, by whom he was greatly caressed, and at whose levee he often attended, and was consulted with in several of their councils of war. He afterwards marched in a gallant manner at the head of his company with the rebels to Derby, and accompanied them in their flight back to Manchester, when they heard the duke was at their heels, and from thence to Carlisle, where he waited (with the rest of the officers) on the young Pretender to take his leave of him, it being agreed, that some part of their army should stay at Carlisle to secure a retreat for the rebels; and then he insisted that he would not stay behind under the command of Col. Townley, with whom there was no good harmony: for some misunderstanding happened between them, on account of a young lady, which they had severally addressed at a ball, which was kept at the Bull-head-inn in Manchester, for the neighbouring gentry; and indeed this animosity was increased by the haughty behaviour of Col. Townley, who now imagined the other to be under his dominion, and used often to put Mr. Bradshaw upon duty that was disagreeable to him.

What gave Mr. Bradshaw the greatest disquiet was, that when the Pretender proposed to raise a regiment of horse, of which Townley was to be colonel, Townley was labouring for Thomas Deacon (executed with Townley, &c. at Kennington) to succeed him in the command; and soon after the rebel army had left Carlisle, Bradshaw went away incognito, and joined them again in Scotland, where he listed himself a volunteer in lord Elcho's horse, commonly called amongst the rebels the first troop of guards; and he continued with the rebels in that rank, until he was taken prisoner at the battle of Culloden.

As to Mr. Bradshaw's conduct in general, even from the time of his engaging in the rebellion, and till within a short time of his death, it must be confessed, that his behaviour has been all of a piece. Nothing but infatuation could determine a man to shut up his shop, leave his business and effects, and ruin (with all honest men) his character, to follow a wicked and rebellious multitude: and truly for what?—To be made a captain!—Nay, it is matter of fact, that he was worth several thousand pounds, his trade flourishing, and his credit well established in the world; yet was he so hearty in the good old cause (as he called it,) that he advanced cash out of his own pocket to support his ragged company.

Soon after the battle of Culloden-Moor, which put a happy end to this wicked and unnatural rebellion, an order was sent from the secretary of state's office for bringing to London such of the rebels as had been most active in the young Pretender's service, and amongst those that were put

on ship-board was Mr. Bradshaw: There he behaved with the greatest insolence imaginable, and did not scruple voluntarily to tell those officers belonging to his majesty who had the care of him, that they could not hurt him, for he was above their cut, or words which carried the same meaning.

When the vessel on board of which they embarked arrived in the river, they were (viz. 45) committed to the New-gaol in Southwark, by his grace the duke of Newcastle's warrant, and continued prisoners there till the necessary processes were prepared for their prosecution.

About the time the Manchester rebels were ordered for execution (Bradshaw being at that time a prisoner in the New-gaol, Southwark), the night before they suffered, he spoke to Mr. Townley and Mr. Berwick in a disrespectful manner, saying, I find you must shortly march into other quarters. Mr. Townley made no answer; but Mr. Berwick, always remarkable for his jocularly, said, "Jemmy, you need not triumph at our misfortunes, for, take my word on't, you will find mocking is catching."

Bradshaw, the night preceding the execution of the Manchester rebel officers, drank very freely, and seemed quite unconcerned at the melancholy fate which was inevitably next day to be the consequence of their wicked undertaking. Mr. Berwick told Mr. Chadwick, that Bradshaw seemed to reflect on them, rather than pity or condole with them. Mr. Chadwick replied, "What can you expect from him? I am only sorry that it reflects so much dishonour on us all, as to admit such a fellow an officer in the regiment."

In the morning of the execution of the Manchester rebels, about seven o'clock, when the sledges came in to draw the prisoners to execution, Bradshaw was walking about the gaol-yard in his morning gown, with some gentlemen, who came thither either out of curiosity, or to take leave of their dying friends, and with a sneering and ungentleman-like air, said, (pointing to the sledges) "Don't you think these things are very well contrived? Upon my word, they will do exceeding well for the purpose;"—and then raked amongst the straw in the sledges, telling the drivers, that if they did not get more straw, the lads (meaning the prisoners) would be wet; and many other silly expressions, which, if inserted, the reader would hardly credit.

When he was called upon his trial, he appeared very gay, in a new suit of green cloth clothes, and stood very unconcerned at the bar, minding very little what was sworn against him: but when the evidence was closed, and summed up to the jury, and they brought him in Guilty, he was quite thunder-struck, and changed colour very much, and was so feeble that he could scarcely walk from the bar.

His conviction and condemnation made but little alteration in him; for though he was not so ludicrous as he had been all along, he sup-

plied that part with an undaunted assurance, and ill-grounded hopes of a reprieve, till his master informed him on Tuesday night, that all endeavours that had been used to save his

life were ineffectual; and persuaded him to make his peace with God.

He was executed as a traitor on Friday, November 28, 1746, at Kennington-Common.

516. The Trial of Sir JOHN WEDDERBURN, bart. for High-Treason, at St. Margaret's-hill, Southwark, November 4, before the Lord Chief-Justice Lee, Sir Martin Wright, Sir James Reynolds, Sir Michael Foster, knts. and Mr. Baron Clive: 20 GEORGE II. A. D. 1746.

SIR John Wedderburn, bart. was indicted for high treason; which treason was laid to be committed on the 16th of April, in the 20th year of his present majesty's reign.

Andrew Johnson said, He saw sir John with the officers of lord Strathallan's horse, in plain clothes, and a sword by his side, after the battle of Preston Pans, free and not forced.

John Falkner said, He saw the prisoner at Helyrood-house, among the officers in the rebel army, in plain clothes, with a small-sword by his side.

Roger Mac Donald said, He saw the prisoner at Aberdeen, in a plain dress and small sword (but no cockade) with the officers of lord Strathallan's horse, and that he lodged with Mr. Johnson at Aberdeen, without a billet.

James Mortimer saw him at Aberdeen, with the officers of lord Ogilvie's regiment, under no restraint or force.

John Bruce said, That he paid sir John ten shilling for ale excise, and twelve shillings for malt-excise; and unless he had paid it to him, the rebels threatened to seize his copper; for which excise he took receipts, but did not produce them, because he left them at home.

Henry Edwards deposed, That he saw the prisoner the latter end of October, at old Gordon of Glenbucket's house at Perth; that sir John declared he was not concerned in the rebellion, but that he had a commission sent to him to collect the excise; but it was in his father's name, and that he would go to Edinburgh to get it rectified; and he accordingly did go to Edinburgh, and about the middle of November returned to Perth, where a drum went about the town proclaiming, that all brewers, and dealers in leather, candles and other exciseable goods, should go to sir John and pay the excise, or pain of military execution.

Then several receipts for money paid to him for excise, were produced, and proved to be sir John Wedderburn's hand writing for excise, dated progressively from the 25th of November, to the 8th of January following.

Alexander Russell deposed, That he saw the prisoner, sir John, at Holy-Rood house, after the battle of Preston Pans, in a plain dress, and a small-sword by his side, and that the

young Pretender issued an order forbidding any body from carrying arms, but those who belonged to his army; and that if sir John had not belonged to the rebels, he dared not wear a sword.

Capt. Eyre said, The prisoner acknowledged himself a private man in the Pretender's life-guard.

Andrew Robinson said, He was a servant to major Glasgoe, and saw the prisoner at Dundee with the rebels, and at Burroughburgh, going to the young Pretender's quarters; that the prisoner collected the excise from six persons in this witness's presence.

John Adamson said, He paid excise to the prisoner twice, and that the prisoner had a guard with him at his quarters, where he received the excise duty.

THE PRISONER'S DEFENCE.

The counsel for the prisoner alleged, by the 7th of William the 3d, no overt acts of high treason shall be proved, unless the same is laid in the indictment; and the bare collecting the excise was no overt act, without they could prove him armed in the rebellion; that the prisoner's father did collect the excise for his present majesty king George the second; that the rebels came and took his horses out of his park, and that he went after them to get them back again, where they seized him, and detained him a prisoner, and forced him to continue with them to collect the excise.

George Waters, working mason, was the first witness examined for the prisoner, and he deposed, That the rebels came to sir John's house in September 1745, and took away three of his horses, for the Pretender's service; when sir John said, That he would not let his horses go for such a use; and went to get them back again; and that some of the rebels told him, if he would not give them freely, he himself should go with them, and so forced him with them; that this evidence went to see him, when he found him guarded by the rebels, so close, that he could not go out of the room without liberty from lord Strathallan; that some time after he came to his house, and staid four days at home; that afterwards 100

men came armed, who guarded his house and carried him away; that the witness said, he saw him at the Dee, carried away by the Mac Intoshes; that afterwards he came from the Dee to his house, and staid at his house till the 5th of February, when forty or fifty men came and pressed him, and carried him to Elgin-moore, in the middle of March. The witness further said, That his brother was collector of the excise at Inverness for king George; that he had known the prisoner two years; that he always wore a small-sword, and that he was a prisoner at his own house every day, from November to the beginning of February.

David Hutchenson deposed, That he was a servant to the prisoner sir John Wedderburn; that five armed men came and seized several of his horses in his park, and that his lady went to them, and prevailed on them to release a mare; that they abused her and called her rebel-bitch; that they seized the prisoner when he went after his horses, to get them back, and carried him to lord Ogilvie's; that the prisoner returned, and a hundred armed men came and retook him prisoner, and threatened to stab him with their bayonets.

The jury, without going out, brought him in Guilty.

SIR JOHN WEDDERBURN'S CASE.

(*Foster's Reports*, p. 22.)

"The overt-acts were laid at Aberdeen, in the shire of Aberdeen. It was proved by two witnesses, that he was with the rebels at Aberdeen; and by those and other witnesses, that he was at divers other places with them.

"The King's Counsel called witnesses, who proved likewise, that he was appointed by the Pretender's son, collector of the excise; and that he did actually collect the excise in several places where the rebel army lay, by virtue of that appointment for the use of the rebel army.

"The Prisoner's Counsel insisted, that this sort of evidence ought not to be admitted. For though collecting money for the service of rebels is an overt-act of high-treason, yet it not being laid in the indictment, no evidence ought to be given of it; and they relied on the statute of 7 W. 3. But in this they were over-ruled,* upon the reasons given in the case of *Deacen*."†

Sir John Wedderburn, bart. was the son of sir Alexander Wedderburn, of Aberdeenshire, whose family have been long resident in that

* See *East's Pleas of the Crown*, c. 2, §. 16. §. 57.

† See p. 366 of this vol.; and the Cases of *Rookwood* and *Lowick*, vol. 13, pp. 139. 467.

part of Scotland, several of whose ancestors are honourably mentioned in the Scottish histories, especially sir David Wedderburn, who was killed at the battle of Musselburgh. The late sir Alexander, father to this unfortunate gentleman, was greatly esteemed for his known attachment to the Revolution principles, and the Hanover succession; inasmuch that the government thought proper to make him a receiver of the excise, and other duties, which, with a small estate he had near Dundee, enabled him to bring up a numerous family; but being of a liberal and generous spirit, he left the estate encumbered, so that when sir John arrived to his honour of a baronet, he had nothing to support it; though on the expectation of having an estate to descend to him free, he married a young lady of a reputable family in his neighbourhood; for on his father's death the estate was destined to be sold, in order to satisfy the father's debts; that when sir John found nothing coming in order to support his family, he retired to a small farm, with a thatched house and clay floor, which he occupied with great industry, and thereby made a laborious but starving shift to support a wife and nine children, who used to run about in the fields barefoot.

The extreme poverty of sir John, and his numerous dependants, overcame sir John's duty to all kind of society, and the present happy establishment; and being tempted with a commission from the Pretender to collect the excise, yet in some measure forced to do it, sir John's loyalty at last gave way to his poverty; though it is admitted, that he never did any acts of violence to his majesty's subjects, any other than receiving the duties arising by the excise, having never bore arms, or caused any one to enlist into the rebel service.

After sir John was made a prisoner, he was delivered to the care of captain Eyre, an officer appointed by the duke of Cumberland, to take charge of the rebel officers, who treated him with great humanity, according to his birth and dignity; and conveyed him on board one of his majesty's ships of war to the river Thames, from whence he was carried with the other officers, to the New-gaol in Southwark, where he was lodged in the master-side of the gaol with sir James Kinloch, Mr. Hamilton, and others, during which time he behaved like a gentleman; being plentifully supplied, and indeed flattered himself with being acquitted, as he thought he had not armed himself in the rebellion, but was very much shocked when the jury found him guilty; and after sentence of death, his behaviour was consistent with the character of a gentleman, being sensible of his error, and the calamity he had brought on himself, his inoffensive lady, and innocent posterity.

He was executed at Kennington Common as a traitor, Nov. 28, 1746.

517. Proceedings at the Court of King's-Bench, Westminster, November 21, against CHARLES RATCLIFFE,* esq. on a Conviction and Attainder of High-Treason in May 1716, before Special Commissioners of Oyer and Terminer :† 20 GEORGE II. A. D. 1746.

HE was concerned with his brother, the late earl of Derwentwater, in the rebellion of 1715 ; and in May 1716, was convicted and attainted of high-treason before special commissioners of Oyer and Terminer, pursuant to the act of the first of the late king. While he was under sentence of death, and probably before the act of general pardon of the third of the late king passed,‡ (See the 45th section of the act) he made his escape out of Newgate, and got over to France.

At the latter end of the year 1745, he was, with some other officers, French, Scotch, and Irish, taken on the coast on board a French ship of war ; which was laden with arms, ammunition, and other warlike stores, bound, as was supposed, for Scotland, where the rebels were at that time in arms.

On Friday the 21st of November 1746, he was brought to the bar by virtue of a Habeas Corpus, directed to the constable of the Tower, or his deputy ; and the record of his conviction and attainder was at the same time removed thither by Certiorari.

The Habeas Corpus, with the return, and also the Certiorari and record of the conviction and attainder being read, the substance of the record was opened to him in English by the secondary on the crown side ; who then asked him what he had to say why execution should not be done upon him according to the judgment. He prayed that counsel might be assigned him, and named Mr. Ford and Mr. Jodrell ; who were accordingly assigned his counsel.

They prayed a few days time that they might have an opportunity of knowing from the prisoner himself the truth and merits of his case, which was granted.||

They also prayed a copy of the record,

* See the Case of his elder brother lord Derwentwater, vol. 15, p. 762.

† From Foster's Reports, p. 40.

‡ In the " Impartial History of his Life and Behaviour," &c. it is stated that he escaped on Dec. 11th, 1716. See a note in vol. 15, p. 803.

|| It seems that this prayer was granted in consideration of the circumstances of the particular case, and not on the ground that the benefit asked was matter of right. See 3 Burr. 1811, the Case of John King, to whom a like indulgence was denied.

which was denied them.* But the officer, by the direction of the Court, read over the indictment a second time very distinctly, and the prisoner's counsel took notes of it, and the prisoner was ordered up on Monday next.

His counsel moved for a rule of court that they might have access to their client at all seasonable times. But his solicitor admitting that he had obtained a warrant from a secretary of state to the same purpose, the Court did not make any rule in the case ; nor did the counsel press it ; but the Court declared, That if the secretary's warrant had not been obtained, they would have made such rule ; for the prisoner is now the prisoner of this court ; and the lieutenant of the Tower is, as far as concerneth the prisoner's case, a minister of this court, and subject to the rules of it.

November 24, 1746.

The prisoner was brought to the bar, and being again arraigned, he, *ore tenus*, pleaded that he is not the person mentioned in the record before the Court. The attorney general, *ore tenus*, replied, The prisoner is the same Charles Ratcliffe mentioned in the record, and this I am ready to verify ; and issue was joined.

The prisoner's counsel pressed strongly to put off the trial of this issue, upon an affidavit of the prisoner, which was sworn in court, that two material witnesses named in the affidavit are abroad ; one of them at Brussels, and the other at Saint Germain ; and that he believeth they will attend the trial, if a reasonable time be allowed for that purpose. But the Court refused to put off the trial, and a Venire was awarded returnable *instantanter*. For, said the Court, this proceeding is in nature of an inquest of office, and hath been always considered as an instantaneous proceeding ; unless proper grounds for postponing the trial be laid before the Court. It was so considered in the case of the king against Barkstead and others (Keil. 13. 1 Lev. 61. 1 Sid. 79,) upon the same issue as this is ; a Venire was awarded, and a jury† returned and sworn *instantanter* to try that issue.‡ It was so considered likewise in the

* And so was Rogers's Case. See 3 Burr. 1811.

† See the Record in Dr. Cameron's Case.

‡ Mr. Justice Blackstone has inserted in the Appendix to the fourth volume of his Commentaries, sect. 3, the entry of the trial *instantanter* of the issue upon a plea to the identity in

case of the king against Roger Johnson* in this court, Michaelmas the second of this king.

Thomas Rogers's case (See it in 3 Burr. 1809), and the rule of court for his execution, upon such issue being found against him.

* See 2 Strange, p. 824. Of this Case Foster has published the following report :

Michaelmas, 2 Geo. II. B. R.

The Case of ROGER JOHNSON, cited twice in Mr. Ratcliffe's Case, was thus :

"The defendant stood outlawed upon an indictment for high treason in diminishing the current coin of the kingdom, and was taken and committed to Newgate. Being now brought to the bar by Habeas Corpus, he offered to surrender himself to the chief-justice, pursuant to the act of the 5th and 6th E. 6, c. 11, (being within the year) and to traverse the indictment; alleging that he was at Flushing beyond the seas at the time the outlawry was pronounced.

"The chief-justice said, We cannot refuse to accept his surrender; he must be remanded to Newgate; and let a special entry be made that he offered to surrender, and to traverse the indictment."

"At another day in the same term the defendant was again brought to the bar, and he tendered a plea in parchment, 'That he was out of the realm on the 8th of February when the outlawry was pronounced,' and pleaded over to the treason; which plea was received. The attorney-general prayed, that he might have a copy of the plea, and three days time to demur or join issue; which was granted; the court declaring that the attorney might have joined issue *instantly*; and that on the trial of such issue the prisoner could not challenge any of the jury without cause. The prisoner prayed counsel, and had four assigned.

"At another day in the same term the prisoner being at the bar, by leave of the Court, withdrew his plea; and pleaded the substance of it, viz. his being beyond sea on the 8th of February, *ore tenus*. The attorney-general *ore tenus* replied, 'I say he was within the realm on the 8th of February, and I traverse his being then out of the realm.' Issue being thus joined, the Court awarded a Venire returnable *instantly*, and the sheriff, sitting the court, returned a jury. Then the prisoner's counsel opened the plea and case, and called their witnesses; and the attorney-general insisting that the witnesses should be examined apart, they were so examined; as likewise were the witnesses produced on the part of the crown.

"The prisoner's counsel managed the whole in his behalf, and three of them were heard on the reply; and the jury, after a short recess,

* This justice was refused to sir Thomas Armstrong in a like case. Foster.—Vide 3 Mod. 47, and vol. 10, p. 100, of this Collection,

If Mr. Ratcliffe hath any thing to offer, which may give the Court reasonable grounds to believe that his plea is any thing more than a pretence to delay execution, we are ready to hear him; the single issue is, whether he be or be not the person mentioned in this record. This is a fact well known to him, and if he is not the person, he might, if he had pleased, have made that matter part of his affidavit; he may do so still if he can do it with truth. And if he refuseth to give the Court this satisfaction, touching the truth of his plea, the Court doth him no manner of injustice in denying him the time he prayeth.

As the jurymen were called to the book, the prisoner challenged one of them, and insisted on his right to a peremptory challenge; but his challenge was over-ruled. For though there are some opinions in the books (8. P. C. 163. Co. L. 157.) that in collateral issues of this kind, the prisoner hath a peremptory challenge, yet the later and better opinion is, that he hath not; and the modern practice hath gone accordingly.

Chief Justice Hale (2 Hale, 267.) saith, "In case of an issue joined on error in fact assigned for reversing an outlawry, the prisoner hath no peremptory challenge;" and in p. 378, of the same book, it seemeth to be admitted as a general rule, that in inquests of office (and the present trial is in nature of an inquest of office) the prisoner hath no peremptory challenge. In *Barkstead's* case cited before, (1 Lev. 61. 1 Keb. 244,) the prisoners were not permitted to challenge peremptorily; and in the case of *Roger Johnson*, which hath likewise been already cited, the Court declared that the prisoner had no peremptory challenge."

returned with their verdict, 'That the prisoner was out of the realm on the 8th of February.'

"Then the prisoner was arraigned on the indictment, to which he pleaded Not Guilty; and the attorney joined issue, and prayed a Venire returnable the first return of the next term; which the Court awarded; and the prisoner was remanded to Newgate.

"This note of Johnson's case was communicated to me by my good friend the late Mr. Justice Abney. The case is reported by Serjeant Barnardiston in his first volume, p. 79. 90, 91. 95. 102. 111. 123. and by sir John Strange, p. 824."

* "In the Report of Ratcliffe's Case lord Hale is referred to as an authority for disallowing such challenges, but lord Hale is not absolute in his opinion; and Staundford, whom lord Hale cites, not only writes with a query in the part so cited, but in a subsequent passage (Staundf. Pl. C. 158, a. 163, a.) gives an opinion in favour of the challenge." Hargrave Co. Lit. 157, b. note 8. Blackstone (Comment. book 4, ch. 31, § 2, vol. 4, p. 396.) after stating (on the authority of 1 Lev. 61, and of Mr. justice Foster's learned work) that on collateral issues no peremptory challenges of the jury shall be allowed the prisoner, proceeds

The jury being sworn to try the issue, the indictment was read over to them in English for their information as to the name and addition of the prisoner; and the evidence being concluded,* the jury withdrew for a few mi-

"though formerly such challenges were held to be allowable wherever a man's life was in question:" and for this position he relies on the authority of lord Coke and of Staundford and lord Hale, agreeably to the more exact reference to them by lord Coke's most learned and indefatigable annotator.

* In the 'Impartial History of the Life and Behaviour of Charles Radcliffe, esq. brother to James Radcliffe, late earl of Derwentwater,' which seems to have been published at the time, the following account is given:

"After the jury were called over, the counsel for the crown made a learned observation of the prisoner's case, and proceeded to call their witnesses.

"In behalf of the crown, the two first witnesses examined were Abraham Bunting and Thomas Moseley, two Northumberland men, who being sworn, deposed, That the prisoner at the bar, Charles Radcliffe, was younger brother to the late earl of Derwentwater, who was executed for high-treason, and that they saw him march out from Hexham in Northumberland, at the head of 500 of the earl's tenants and servants, and other rebels, and that they were informed, and verily believed, the prisoner was afterwards taken, tried, convicted, and condemned for high-treason, in the year 1716. Being severally asked, If the prisoner at the bar was the same person, each of them answered, That they remembered him very well, by a scar in his face; that they had been to see him in the Tower, to refresh their memories, and could undertake on their oaths to swear he was the same Charles Radcliffe, and reputed brother to the late earl of Derwentwater.

"Being cross-examined whether either of them were at the trial of this Charles Radcliffe, mentioned in the record lately read, or if they ever saw Charles Radcliffe in Newgate, and if the prisoner was the same person, the evidences severally answered, they did not hear the prisoner tried, or did they ever see him in Newgate, nor could they say that he was the same Charles Radcliffe who escaped out of Newgate. But as to being the same person whom they saw commanding the rebels in Northumberland, they were both positive.

"Then Roger Downs being produced and sworn, he was asked by the counsel if he did not shave the state-prisoners that were confined in Newgate after the year 1715.

"Prisoner. I hope, Sir, you have some conscience, you are now sworn, and take heed what you say.

"Downs. I shall speak nothing but the truth. I well remember that I was appointed close shaver at Newgate, in the years 1715 and VOL. XVIII.

notes, and then returned with their verdict, that the prisoner at the bar is the same Charles Radcliffe that is mentioned in the record.

Note. The prisoner, during the trial of this issue, had the assistance of his counsel; who

1716, when the rebels were confined there, and shaved all those who were close confined.

"Counsel. Pray, Sir, did you shave Charles Radcliffe, esq. the late earl of Derwentwater's brother, who was confined in Newgate for being concerned in the rebellion in the year 1715, or who else did you shave of the said rebels at that time? And pray, Sir, who was keeper, or who were turnkeys of the said gaol of Newgate?

"Downs. Wm. Pitt, esq. was head keeper, and Mr. Rouse and Mr. Revel were head turnkeys, who appointed my master to be barber to shave the prisoners, and I attended in my master's stead, and I used to go daily to wait on the rebel prisoners, and I particularly remember that I shaved Basil Hamilton, a reputed nephew of the late duke Hamilton, and Charles Radcliffe, esq. brother to the late earl of Derwentwater, who I perfectly remember were chums or companions in one room in the press-yard in Newgate, that looked into the garden of the college of physicians, and for which service I was always very well paid.

"Counsel. Then pray, Sir, look at the prisoner, (which he did) and inform the Court if that gentleman is the very same Charles Radcliffe that you shaved in Newgate at the aforesaid time, and who after escaped out of Newgate.

"Downs. I cannot on my oath say he is.

"Then the head keeper of Newgate was called, and he produced the books belonging to the gaol, wherein was the name of Charles Radcliffe, and other rebels, who had been condemned, and were respited several times. This gentleman said, that the books produced them in court were in the same condition that he found them: but as to the person of the prisoner he knew nothing of, his confinement being several years before he belonged to the gaol.

"Then Abraham Mendez, a servant to the above gentleman, who had been subpoenaed on the part of the crown, was called, but he was not sworn, because he could give no account of the prisoner, his confinement being before he the said Mendez was a servant, belonging to the gaol of Newgate.

"Then a gentleman was called, and as the book was handing him to be sworn, the prisoner very earnestly looking at him, asked the officer, What book that was he was going to be sworn on? The officer replied, On the New Testament.

"The prisoner replied, He is no Christian, and believes neither in God nor Devil. The said gentleman being examined, deposed, That the prisoner since his confinement in the Tower had declared himself to be the same Charles Radcliffe who was condemned in the year

cross-examined the king's witnesses, and observed fully upon the evidence.*

After the verdict was brought in, the prisoner's counsel took notice of the act of general pardon passed in the third of the late king; and said, that possibly their client might upon consideration be found to be entitled to the benefit of it; and concluded with a motion, that the Court, before they award execution, would give them some time to consider the act, and to be informed by their client touching the circumstances of his case, that they might be able to submit his case to the opinion of the Court, how far he is, or is not entitled to the benefit of the act.

But the Court declared, that the prisoner having once pleaded in bar of execution, and that plea having been falsified by the verdict, his plea is peremptory, and the verdict conclusive; and nothing now remaineth but for the Court to award execution.

Mr. Justice Foster was satisfied that the principle the Court went upon is a good general rule, but he thought it not universally true. He considered the case of a parliamentary pardon as an exception to it; for surely the Court will never, in any state of a cause, award execution upon a man who plainly appeareth to be pardoned. And therefore he thought that if any person, whether as counsel for the prisoner, or as *amicus curiæ*, will now shew that the prisoner is entitled to the benefit of the act, he ought to be heard. But to this it was answered by the Chief Justice, that the act of pardon containing many exceptions, both as to persons and crimes, the party who would take the benefit of it must plead it specially with all proper averments; so as to shew that he is not within any of the exceptions, according to the resolution (Carth. 131.) in the earl of Salisbury's case.

The counsel for the crown did not urge either of these points against the prisoner. And I have been since informed that, in favour of life, they were determined to waive them; and

1715; and likewise told him in what manner he made his escape out of Newgate, in mourning, with a brown tye wig, when under sentence of death in that gaol. He was asked if the prisoner was drunk when he made this confession; the witness said, No. He was then asked if he had been drinking himself when the confession was made; he answered, He never got drunk: when Mr. Ratcliffe replied hastily, That some people would get drunk, if at free cost.

"The prisoner not examining any witnesses, the king's counsel made the reply; and the Lord Chief Justice summed up the evidence to the jury, who withdrew, and in about 15 minutes brought in their verdict, &c."

* It appears from sir James Burrow's Report of the cases of Rogers, Matthews and King, that those persons were kept in chains during the trial of issues which had been taken upon their respective identities. See a note to vol. 16, p. 93.

were provided with evidence, then attending in the hall, to prove (which was the truth of the case) that the prisoner, after his attainder, made his escape out of Newgate, which brought him within the exception in the 45th section of the act. And the prisoner's counsel being apprized of this by the counsel for the crown in a conversation between them at the bar, thought it in vain to press their motion any farther. And execution was accordingly awarded, and a rule made that it be done on Monday the 8th of December.* And a writ was ordered to the lieutenant of the Tower to deliver the prisoner to the sheriff of Middlesex on that day; and another to the sheriff to receive him, and to cause execution to be done.

N. B. Since the prisoner's counsel, after sufficient time allowed them to inform themselves of the true state of his case, had nothing to offer to induce the Court to think that their client was entitled to the benefit of the act, only that possibly upon further consideration, he may appear to be so entitled, there was certainly no room to delay the awarding execution upon so slight a suggestion from the bar. And Mr. Ratcliffe had no injustice done him in that respect.

He was beheaded on Tower Hill on the day mentioned in the rule.

The award of execution in Mr. Ratcliffe's case was agreeable to the precedent in the case (Cro. Jac. 495. Hutt. 21.) of sir Walter Raleigh. He was convicted and attainted at Winchester before special commissioners, and being brought into the King's-bench by Habeas Corpus, execution was there awarded on the former judgment; judgment not being pronounced afresh, it having been pronounced before.

In the cases of H. Stafford (1 H. 7, 23, 24, 25. 1 Lev. 61. 1 Sid. 72.) and of Barkstead, Okey and Corbet, who were attainted by act of parliament, the tenour of the acts was removed by Certiorari into Chancery, and sent thence by Mittimus into the King's-bench: and the chief-justice pronounced the usual judgment as in cases of high-treason.

There was no proceeding of this kind in the case of the duke of Monmouth, who was attainted by act of parliament 1 Jac. 2. For the action at Sedgemoor happened on the 8th of July 1685, which in that year fell out to be the last day of Trinity term, and on the 15th he was executed. But that was a time of great heat and violence, and few things then done ought to be drawn into example.

N. B. The act of the third of the late king giveth the party liberty to take advantage of it on the general issue, without specially pleading the same; (4 W. and M.) and so doth that on

* "Mr. Ratcliffe spoke to the Court and said he wished they had indulged him with longer time, that the earl of M—— and he might go the same journey together." Impartial History, &c.

which the earl of Salisbury relied. The Court therefore could not in the earl's case, ground itself on the rule of pleading laid down in Carthew;* though the rule might possibly be mentioned *obiter* by some of the judges. I think the true ground the Court went upon, which indeed the reporter himself seemeth to hint at but very darkly, was, that the earl having been committed by the House of Peers upon an impeachment by the Commons for high-treason, this court cannot allow him the benefit of the act; it hath no cognizance of the crime he standeth charged with; the matter lieth before another and higher judicature, and thither his lordship must resort.

And there he afterwards had the full benefit of the act without being put to plead it. For on the 10th of October 1690, upon reading the earl's petition, setting forth that he had been long a prisoner in the Tower, notwithstanding the late act of free and general pardon, and praying to be discharged, the Lords ordered the judges to attend on the Monday following to give their opinions, whether the earl be pardoned by the said act; on the 6th the judges delivered their opinions, that if his offences were committed before the 13th of February 1688, and not in Ireland, or beyond the seas, he is pardoned. Whereupon it was resolved that he be admitted to bail; and the next day he was bailed, and on the 30th of October (see the Journals of the Lords) he and his sureties were discharged from their recognizances.

Charles Ratcliffe, esq. according to a rule of the Court of King's-bench,† was executed on

* The rule laid down in Carthew from Plowden is laid down in the same latitude in many of the old books; but it is to be observed, that the acts of general pardon in those times, had no clauses enabling the party to avail himself of the pardon on the general issue without specially pleading the same. The first act which hath that clause, that I have met with, is the Act of Oblivion (12th Car. 2.) and all acts of general pardon since that time have had clauses to the same purpose. Foster, p. 45.

† On Nov. 21, Charles Ratcliffe, esq. (who was taken on board a French ship bound for Scotland, with Fitz James's horse) was brought under a strong guard from the Tower to the King's-bench bar, Westminster, in order to prove him the person convicted of high-treason for the rebellion in 1715, and who escaped out of Newgate; when his former judgment was read to him; but he told the Court he was quite unprepared, and desired longer time, and prayed that counsel might be assigned him; accordingly the Court granted him Mr. Jodrell and Mr. Ford for his counsel, and ordered him to be brought up to Westminster the Monday following.

Accordingly, on that day, Nov. 24, he was again brought to the bar, but refused to hold up his hand, or acknowledge any jurisdiction over him, but that of the king of France, where

Little Tower hill; whither, two troops of life guards, and one troop of horse grenadier guards, and a battalion of foot guards, marched about eight in the morning. The horse lined

he had lived about 30 years, insisting on a commission he had in his pocket from the French king; but on hearing his former indictment and conviction, which were read to him in English, he said he was not the Charles Ratcliffe therein named, but that he was the earl of Derwentwater; and his counsel informed the Court, that this was the plea he relied on; to which the Attorney General replied, with an averment of his being the same Charles Ratcliffe; and thereupon issue was joined. Then the counsel for the prisoner moved to put off his trial, upon his own affidavit (to which he had subscribed himself the count de Derwentwater) that two of his material witnesses were abroad. To which affidavit the counsel for the crown objected, as not being entitled in the cause before the Court, nor the two witnesses sworn to be material, in the issue then joined between the king and the prisoner; and also, because the prisoner had not so much as undertaken to swear for himself that he was not the person; which, as it was a fact entirely in his own knowledge, ought to be required of him, if he would entitle himself to this favour from the Court; this being a proceeding very different from the trial upon a Not Guilty, in an original prosecution on a charge of high-treason or other crime, the identity of the person being the single fact to be enquired of, and a case in which the crown had a right by law to proceed in *instante*. Upon this, the prisoner amended his affidavit as to the witnesses, but refused to supply it so far as to swear he was not the same person. And the Court said this was a new precedent, there being no instance of any application to put off the trial of a question of this sort before; and that this was like an inquest of office, in order to inform the conscience of the Court, and what the public had a right to proceed in *instante*: and therefore that the prisoner ought to give all reasonable satisfaction to induce them to grant such a favour as he desired, for that they could not in conscience and justice to the public, indulge him, without a reasonable satisfaction, that his plea was true. But the prisoner still refusing to swear to the truth of his plea, the jury were called, and after two or three of the pannel were sworn, Mr. Ratcliffe challenged the next that was called, as of right, without assigning any reason; but upon debate of the question, how far he had right to challenge? the Court said it had been determined before in all the later cases, and particularly in the case of one Jordan, that the prisoner in such a case as this had no peremptory challenge: upon which the rest of the jury were sworn, and after a clear evidence of the identity of the person on the part of the crown, the prisoner producing none on his part, the jury withdrew about ten minutes, and then found their verdict,

the way from the scaffold to Iron-gate, and the foot with some of the horse encompassed the scaffold. About ten, the block, covered with black, with a cushion, and two sacks of saw-dust, were brought up, and the block fixed; and soon after the coffin of the unhappy gentleman, covered with black velvet, and having eight handles, but no plate upon it, was placed on the scaffold.

In the mean time, Mr. Alderman Winterbottom and Mr. Alderman Alsop, the two sheriffs, with their under sheriffs, met at the Mitre Tavern in Fenchurch-street, and from thence proceeded, the under-sheriffs in a mourning-coach, and the sheriffs in their chariots, to the lower end of the Minories, where they were met by their officers, who marched before them till they came over-against the Victualling-office, where they stopt, and then the under-sheriffs went down to the East Gate of the Tower, which is next to Iron-Gate, when getting out of the coach, they went up to the gate, and seeing the warders through the gate, they demanded admittance to the lieut. governor of the Tower; upon which the gate was opened, and they went in, and in about ten minutes returned, and went into the mourning-coach again, which waited for them; and in a short time after, the prisoner was brought in a landau, out at the East-Gate, and then the procession began as follows: First, (the sheriffs officers, then the mourning-coach in which were the two under-sheriffs with their wands; then the landau with the prisoner, and the officers of the Tower who had him in custody; the landau was guarded by a party of foot-guards with their bayonets fixed. Thus they proceeded up Little Tower-hill, till they came over-against the Victualling office, where the sheriffs waited to receive him; and where the prisoner got out of the landau, and was put into the mourning-coach, which carried him about 100 yards further, to a booth built on purpose to repose himself in, and hung with black, at the foot of the stairs of the scaffold. When he got out of the landau, seeing some gentlemen he knew, he paid his compliments in a very genteel

that he was the same Charles Ratcliffe that was convicted of treason in 1716. Then the attorney general moved to have execution awarded against the prisoner on his former judgment; to which the prisoner's counsel objected, tendering a plea of pardon by act of parliament, in bar of execution. But the Court said, as he had already pleaded such a plea as he chose to rely on and stand by, and as that was found against him, nothing more remained for them to do at present, but to award execution; and if his counsel had any thing to offer on his behalf, they would have time to do it before the day of execution: then they ordered a rule to be made for the proper writs for his execution on Dec. 8, and remanded the prisoner to the Tower. From his Case, printed at that time.—*Former Edition.*

manner, and smiled, and coming to the side of the mourning-coach, he asked the officers who stood to wait, whether he was to go in there? And being answered that he was, he only said, It is well, and stepped in directly. Being come to the booth, attended with the sheriffs, he staid there about ten minutes, which he spent chiefly in his devotions, speaking but very little to any body. He then walked up upon the scaffold with great calmness, being dressed in a scarlet coat, with gold buttons, the sleeves faced with black velvet, scarlet waistcoat trimmed with gold lace, a scarlet pair of breeches, and white silk stockings, and his hat with a white feather round it. He soon asked for the executioner, who coming to him, he took a parcel of gold out of his pocket, and gave it him, saying, I am but a poor man, there's ten guineas for you; if I had more I would give it you; and I desire you to do your execution so as to put me to the least misery you can. He then kneeled down before the block, and putting his hands together, made a short prayer, when two of the warders of the Tower came to him, one of each side of him; one of them took off his wig, and the other put a white cap upon his head; and then the unhappy criminal rose upon his legs, and with their assistance pulled off his coat and waistcoat. He then turned about and took his leave, in a respectful manner, of the sheriffs, and then untied the collar of his shirt, which was fastened with a black ribbon, and began to tuck the collar of his shirt down; but not being able to reach far enough behind, he desired the executioner to do it for him; which he did accordingly. Then, after saying a short prayer to himself, and crossing himself several times, he laid his head down upon the block; and desired the executioner to strike far enough, adding these his last words, When I spread my hands thus, do you take my head off. Which signal he gave in less than half a minute, when one stroke of the axe severed his head, except a bit of skin, which was cut asunder at two or three chops. The body then fell down upon the scaffold; and the executioner searching his pockets, found half a guinea, a silver crucifix, and his beads. Four undertaker's men stood ready with a piece of red bays to receive the head as it fell off, and the body and head were put into the coffin, and conveyed in a hearse, to the Nag's-head, in Gray's-Inn-Lane, and soon after interred at St. Giles's in the Fields.

Thus fell this unhappy man, aged 55; 30 years within three days after his escape out of Newgate, part of which time he spent with the Pretender in Italy, but the greatest part in France, where he married the lady Newburgh, relict of Levingston, lord Newburgh, a Scots nobleman, by whom he had a son, who was some time prisoner with him in the Tower, and thought at first to be the Pretender's younger son. He was the youngest brother of James earl of Derwentwater, who was beheaded in 1716, they both being taken at

Pranton. They were the sons of sir Francis Ratcliffe, by the lady Mary Tudor, natural daughter to K. Charles 2, by Mrs. Mary Davis.

Mr. Ratcliffe behaved with much more decency at his execution, than at the bar of the King's-bench, when the only trial was, whe-

ther he was the same person who was condemned for the rebellion in 1715, and made his escape out of Newgate: for there he behaved himself in an insolent manner, which did him no service: but at his execution he was calm and sedate, and suffered with much composure and resignation.

518. The whole Proceedings in the House of Peers, upon the Indictments against WILLIAM Earl of KILMARNOCK, GEORGE Earl of CROMERTIE, and ARTHUR Lord BALMERINO, for High Treason, in levying War against his Majesty. Begun on Monday the 28th Day of July, and continued on Wednesday the 30th of July, and Friday the 1st of August: 20 GEORGE II. A. D. 1746.*

June 24, 1746.

THE duke of Newcastle, by his majesty's command, acquainted the House, That bills of indictment of high-treason were yesterday found, by the grand jury of the county of Surrey, against William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino.

Ordered, That the said indictments be removed before this House by Certiorari: And that a writ or writs of Certiorari be issued for that purpose.

Then a committee was appointed to inspect the Journals of this House upon former trials of peers in capital cases; and to consider of the proper methods of proceeding, in order to bring the lords above named to a speedy trial: And to report to the House, what they shall think proper thereupon.

Their lordships, or any five of them, to meet to-morrow, at the usual time and place; and to adjourn as they please.

Ordered, That the lord chief justice of the court of King's-bench, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer, do attend the said committee.

June 26, 1746.

The House being informed, That the writ of Certiorari, issued for removing the indictments of high-treason, found by the grand jury of Surrey against William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, was brought into the House;

The said writ, return thereof, and indictments, were read.

The lord Monson acquainted the House, That the committee appointed to inspect their lordships' Journals upon former trials of peers

in capital cases; and to consider of the proper methods of proceeding, in order to bring the lords above-mentioned to a speedy trial, had agreed upon a Report: which they had directed him to make to the House, when their lordships will please to receive the same.

Ordered, That the said Report be received to-morrow; and the Lords to be summoned.

June 27, 1746.

The lord Monson (according to order) reported, from the lords committees appointed to inspect the Journals of this House upon former trials of peers in capital cases; and to consider of the proper methods of proceeding, in order to bring William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, lately indicted of high-treason, to a speedy trial; That the committee have met, and inspected the Journals of this House, in relation to the trials of peers in capital cases; and were attended by the lord chief justice of the Court of King's bench, the lord chief justice of the Court of Common Pleas, and the lord chief baron of the Court of Exchequer: And having heard the said judges upon the construction of the act of the seventh and eighth year of king William the third, intitled, An Act for regulating trials in cases of treason, and misprision of treason,* and con-

* "The 10th and 11th sections," says sir M. Foster, "make provision for a more equal and indifferent trial of peers and peeresses in cases of treason and misprision. The mischief recited is, That in the trial of a peer or peeress the major vote is sufficient for condemnation or acquittal; whereas, saith the act, In the trial of a commoner a jury of twelve freeholders must all agree in their verdict. I doubt this was not the real mischief, because the remedy itself is open to the same. The major vote is still sufficient and must be so; and if the method of trial in the court of the lord high.

* See Foster, 9.

sidered the matter to them referred, have come to the following Resolution, viz.

1. That it is the opinion of this committee, That, by virtue of the said act, upon the trial of any peer or peeress in any of the cases of treason, or misprision of treason, within that act, all the peers, who have a right to sit and vote in parliament, ought to be summoned twenty days at least before every such trial, to appear at such trial.

steward was in contemplation, as I conceive it was, yet even there, though the major vote is sufficient, the majority must consist of twelve or more. (Kel. 56.)

"The real mischief, cautiously passed over, I take to have been, that in the trial of a peer in the court of the high steward the peers-triers were a select number returned at the nomination of the high steward, and the prisoner was in every case debarred the benefit of a challenge. (Moo. pl. 849. 1 Inst. 156, b.) This was the real mischief, and it was in many cases severely felt. Accordingly the act applieth the proper remedy; for it enacteth, 'That, upon the trial of any peer or peeress for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned twenty days before the trial to appear at such trial; and that every peer so summoned and appearing shall vote in the trial of such peer or peeress,' having first taken the oaths appointed by the act."

"The next clause provideth, 'That neither this act nor any thing therein contained shall in any way extend or be construed to extend to any impeachment or other proceedings in parliament in any kind whatsoever.' (Sect. 12.)

"The words of the last clause are very general, and seem to exclude every proceeding in full parliament for the trial of a peer in the ordinary course of justice. But that construction was rejected in the cases of the earls of Kilmarnock and Cromartie and of the lord Balmerino; and accordingly all the peers and lords spiritual were summoned; and those lords who appeared having taken the oaths appointed by the act, the bishops upon the day the trial came on, after making the usual protestation, withdrew; and the prisoners, before their arraignment, were informed by the high steward, that they were intitled to the benefit of this act in its full extent.

"The summoning the lords spiritual to the trial of those lords was, I apprehend, a prudent caution, in order to obviate a doubt, that might otherwise, at that critical time, have arisen from the words of the statute, which, as

* "See the conference between the Lords and Commons upon this clause in Keunett, vol. 3, p. 625. Both Houses plainly understood the clause to refer to the trial of a peer in the court of the lord high steward." Foster.

See also New Parl. Hist. vol. 5, pp. 679, 682.

2. That it is the opinion of this committee, That such summons ought to be by order of this House, requiring, That every peer, who hath a right to sit and vote in parliament, do appear at, and attend such trial; and by letters, to be wrote by the lord chancellor, or speaker of the House for the time being, to each particular peer: And that such order of the House be fixed upon the doors of this House, and of Westminster-Hall; and also be published in

I before observed, are very general. But, general as they are, I do not conceive, that they made that measure, though extremely prudent, absolutely and indispenibly necessary; for general words in a statute must be controuled by the apparent intent of the legislature; they must in construction be adapted to cases then in contemplation, and to every other provision in the statute, so as to render the whole one uniform consistent rule.

"I will now in a few words apply this observation to the present case.

"The act provideth, that every peer so summoned and appearing shall vote in the trial. By voting in the trial must, as I apprehend, be meant voting throughout the trial, voting as a competent judge in every question that shall arise during the trial; and, above all, in the grand question for condemnation or acquittal. Now upon this last question the bishops cannot vote; though it hath been resolved, and practice hath established the rule, that in a proceeding in full parliament in a case of blood, they may, if they choose it, vote upon all previous questions.† But in a proceeding in the court of the high steward, which, I conceive, this clause of the statute had principally in contemplation, and to which no mere spiritual lord was ever summoned or could be, no question but for acquittal or condemnation is the subject of any vote; for in all points of law or practice the high steward giveth the rule as sole judge in the court.

"To conclude this head, the act may, with propriety enough, be said to regulate the proceeding in both courts, that of the high steward and that in full parliament; but it doth not alter the nature and constitution of either. Consequently, it doth not give to the lords spiritual any right in cases of blood, which they had not before; what conclusions soever men of interloping busy talents may hereafter be tempted to draw from it, or from this precedent; which, as I said before, is founded in great wisdom for obviating doubts, which might have arisen, and proceeded from the same prudential motives from which the acts I have already cited for saving the rights of the peerage did. The measure in both cases was extremely right, but not of absolute indispenible necessity."

Foster's Crown Law, p. 246.

† "See the Lords' Journal 13th and 14th May 1679, in the case of lord Danby and the popish lords." Foster.

the London Gazette, at least twenty days before such trial; and that such letters be sent at least twenty days before such trial.

3. That it appearing to this committee, That the antient and usual method of summoning the lords to attend upon trials of peers in capital cases, in parliament, has been, by sending the letters of summons, to such lords as are not in town, by the post; it is the opinion of this committee, That the letters, to such lords as are not in town, be sent by the post, according to the antient usage.

4. That it is the opinion of this committee, That the House be moved to resolve and declare, That such order, so fixed up and published as above-mentioned, and such letters, so sent as above-mentioned, are a due summons of the peers in cases of trials during the sitting of parliament, within the true intent and meaning of the said act of the seventh and eighth of king William the third.

5. That it is the opinion of this committee, That every lord, before he shall sit or vote upon such trial, ought to take the oaths, and make and subscribe the declaration required by law to be taken and subscribed by lords, in order to their sitting and voting in parliament.

6. That it is the opinion of this committee, That, in the letters to be wrote, pursuant to the resolutions above-mentioned, notice be taken, that the lords are summoned, pursuant to the said act of the seventh and eighth year of king William the third; and that their attendance is required at such trial, upon pain of incurring the utmost displeasure of the House; and that, in case the lord, to whom any such letter is directed, shall be incapable of attending, by reason of sickness, or other disability, he do send two witnesses to attest the same upon oath.

Then the said Report was read by the clerk.

And the three first Resolutions, being read a second time, were severally agreed to by the House; and ordered accordingly.

And the fourth Resolution being read, the House was moved pursuant to the direction of the committee.

And thereupon,

Resolved and declared, That the order for the attendance of the peers, who have a right to sit and vote in parliament, fixed up and published as above-mentioned, and such letters wrote by the lord chancellor, or speaker of this House, and sent as aforesaid, are a due summons of the peers in cases of trials during the sitting of parliament, within the true intent and meaning of the said act of the seventh and eighth year of king William the third.

Then the two last Resolutions being read a second time, were severally agreed to by the House; and ordered accordingly.

Ordered, That William earl of Kilmarnock be tried on Monday the 28th of July next, at nine of the clock in the morning, upon the bill of indictment for high-treason found against him: and that George earl of Cromer-

tie be tried on the same day, at ten of the clock in the forenoon, upon the bill of indictment for high-treason found against him: and that Arthur lord Balmerino be tried on the same day, at eleven of the clock in the forenoon, upon the bill of indictment for high-treason found against him.

Ordered, That the Trials of the said peers be had in Westminster-hall.

Ordered, That an humble Address be presented to his majesty, to acquaint his majesty, That this House hath appointed the Trials of William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, to begin, in Westminster-hall, on Monday the 28th day of July next; and humbly to desire, that his majesty will be graciously pleased to give orders, That a place be prepared in the said hall for the said Trials; and also to appoint a lord high-steward, to continue during the said Trials.

Ordered, That the said Address be presented to his majesty by the lords with white staves.

Ordered, That every peer, who hath a right to sit and vote in parliament, do appear at, and attend, the said Trials: and that this order be affixed on the doors of this House, and of Westminster-hall; and also be printed and published in the London Gazette, at least twenty days before the said Trials.

Ordered, That the lord chancellor do write letters to all the peers, requiring their appearance and attendance at the said Trials, pursuant to the directions contained in the foregoing Report.

Die Lunæ, 30 Junii, 1746.

The lord chamberlain reported, That the lords with white staves had, according to order, presented to his majesty the Address of this House yesterday, for a place to be prepared in Westminster-hall, for the Trials of the peers indicted of high-treason, and for the appointment of a lord high steward: and that his majesty was pleased to say, he would give orders accordingly.

Die Lunæ, 7 Julii, 1746.

Upon reading the Petition of William earl of Kilmarnock, now a prisoner in the Tower of London, praying in regard he has notice given him, that his Trial is appointed upon the 28th day of this present July, That their lordships will please to appoint Mr. George Ross to be his solicitor;

It is ordered, That the said George Ross be assigned solicitor for the petitioner, as desired; and that he may have access to him at all reasonable times.

Upon reading the Petition of George earl of Cromertie, now a prisoner in the Tower of London, praying, That this House will be pleased to appoint Mr. Adam Gordon, attorney at law, to be his solicitor;

It is ordered, That the said Adam Gordon be assigned solicitor for the petitioner, as desired; and that he may have access to him at all reasonable times.

Die Martis, 8 Julii, 1746.

The lord Monson reported from the lords committees appointed to inspect the Journals of this House, upon former Trials of peers in capital cases; and to consider of the proper methods of proceeding, in order to bring William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, lately indicted of high-treason, to a speedy trial, that they had again met, and taken into further consideration the matter to them referred; and were come to the following Resolutions; viz.

That it is the opinion of the Committee, That all the lords, who shall attend the said Trials, do attend the House, to take the oaths, in order to their sitting and voting upon such Trials, on the Thursday and Friday next preceding the day appointed for the said Trials.

That it is the opinion of the committee, That the said Resolution be printed and published in the London Gazette.

Which, being read twice by the clerk, were agreed to by the House; and ordered accordingly.

Die Mercurii, 9 Julii, 1746.

Upon reading the Petition of Arthur lord Balmerino, now a prisoner in the Tower of London, praying, That this House will appoint Mr. George Ross to be his solicitor;

It is ordered, That the said George Ross be assigned solicitor for the petitioner, as desired; and that he may have access to him at all reasonable times.

Die Veneris, 11 Julii, 1746.

On a report made by the lord Monson, from the committee before-mentioned:

Ordered, That the lord high steward be directed to acquaint the lords to be tried, and all other persons who may have occasion to speak to the Court, that they address themselves to the lords in general, and not to the lord high steward.

Die Martis, 15 Julii, 1746.

Upon reading the Petition of George earl of Cromertie, now a prisoner in the Tower, praying, in regard he is informed, several resolutions have been agreed to by this House, in order to the speedy Trials of the petitioner and others, that he may have copies thereof, the indictment found against him, the Certiorari for removing the same, and the return thereof, or any other proceedings that shall be agreed upon in relation to his Trial:

Ordered, That the petitioner may have copies of such proceedings as have been had in this House concerning him; together with a copy of the said indictment, Certiorari, and return, as desired.

Die Mercurii, 23 Julii, 1746.

Ordered, That the constable of his majesty's Tower of London, or the lieutenant of the same, or his deputy, do bring to the bar of this

House in Westminster-hall, on Monday next, at nine of the clock in the morning, the bodies of William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, now in his custody; together with copies of their respective commitments, signed by the said constable or lieutenant.

Die Jovis, 24 Julii, 1746.

The lord Monson reported, from the lords committees appointed to inspect the Journals of this House upon former Trials of peers in capital cases; and to consider of the proper methods of proceeding in order to the Trials of William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, lately indicted of high treason; That the committee have taken into further consideration the matter to them referred; and have come to the following Resolutions (amongst others); viz.

That it is the opinion of the committee, That all proclamations to be made in the Court in Westminster-hall, during the said Trials, be made in the king's name.

That it is the opinion of the committee, That the three lords, indicted of high treason, be brought to the bar of the Court in Westminster-hall, at the same time in order to be arraigned.

That it is the opinion of the committee, That in case the three lords, indicted of high treason, should plead Guilty to their indictments, the House be immediately adjourned to the chamber of parliament; but if one or more of the said lords should plead Guilty, and the other Not Guilty, in that case, the lord or lords so pleading Guilty be forthwith remanded, in custody of the chief governor of the Tower of London, to the said Tower; and that the Trial of the other lord or lords pleading Not Guilty do proceed.

Which Report being read twice by the clerk, was agreed to by the House; and ordered accordingly.

Die Lune, 28 Julii, 1746.

The Lords met in the House of Lords in their robes; and, after prayers, adjourned into Westminster-hall.

THE FIRST DAY.

About 11 o'clock, the Lords came from their own House into the Court erected in Westminster-hall, in the manner following:

The lord high steward's gentlemen attendants, two and two.

The clerks assistant to the House of Lords; and the clerk of the parliament.

Clerk of the crown in Chancery, bearing the king's commission to the lord high steward; and the clerk of the crown in the King's-bench.

The masters in chancery, two and two.

The judges, two and two.

The peers eldest sons, two and two.

Peers minors, two and two.

York and Windsor heralds,

Four serjeants at arms with their maces, two and two.

The yeoman usher of the House.

Then the Peers, two and two, beginning with the youngest baron.

Then four serjeants at arms with their maces, two and two.

The serjeant at arms attending the great seal, and purse bearer.

Then Garter king at arms, and the gentleman usher of the black-rod, carrying the white staff before the lord high steward.

Philip lord Hardwicke, lord high chancellor of Great Britain, Lord High Steward, alone; his train borne.

When the Lords were placed in their proper seats, and the Lord High Steward upon the wool-pack;

The clerk of the crown in Chancery having his majesty's Commission to the Lord High Steward in his hand, and the clerk of the crown in the King's-bench standing before the clerk's table with their faces towards the state, made three reverences; the first at the table, the second in the midway, and the third near the wool-pack; then kneeled down; and the clerk of the crown in Chancery, on his knee, presented the Commission to the lord high steward, who delivered the same to the clerk of the crown in the King's-bench to read: Then rising, they made three reverences and returned to the table. And then proclamation was made for silence; in this manner:

Serjeant at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king strictly charges and commands all manner of person to keep silence, upon pain of imprisonment.

Then the lord high steward stood up, and spoke to the peers.

Lord High Steward. His majesty's Commission is about to be read: Your lordships are desired to attend to it in the usual manner; and all others are likewise to stand up, uncovered, while the Commission is reading.

All the peers uncovered themselves; and they, and all others, stood up uncovered, while the Commission was read.

GEORGE R.

George the second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth. To our right trusty and well beloved counsellor Philip lord Hardwicke, baron of Hardwicke, in our county of Gloucester, our chancellor of Great Britain, greeting. Know ye, That whereas William earl of Kilmarnock, late of the city of Carlisle, in our county of Cumberland; George earl of Cromertie, late of the town of Perth, in the shire of Perth; and Arthur lord Bal-

* As to this see Foster's Crown Law, pp. 141, *et seq.* and in this Collection the Cases of lord Morley, lord Pembroke, lord Danby, lord Stafford, lord Oxford, lord Derwentwater and others, lord Salisbury, lord Wintoun, lord Lovat, and lord Ferrers noticed by Foster.

VOL. XVIII.

merino, late of the said city of Carlisle, in our said county of Cumberland; stand severally indicted before our justices and commissioners, assigned and constituted by our letters patent under our great seal of Great Britain, bearing date the 5th day of June, in the 19th year of our reign, by virtue and according to the form of the statute made in this our present parliament, intituled, An Act for the more easy and speedy trial of such persons as have levied, or shall levy, war against his majesty; and for the better ascertaining the qualifications of jurors in trials for high treason, or misprision of treason, in that part of Great Britain called Scotland; made to them, and to any three or more of them; to deliver our gaol of our county of Surry of the prisoners therein being, or such as shall or may be detained in the same, on or before the 1st day of January, in the year of our Lord 1746, for or on account of the high treason mentioned in the said act, in levying war against us within this realm; and to inquire, by the oath of good and lawful men of the same county, of all such high treasons, in levying war against us within this realm by the said prisoners, or any of them, or by any other person or persons who are now in actual custody for or on account of the same, or who are or shall be guilty of high treason, in levying war against us within this realm, and shall be apprehended and imprisoned for the same, on or before the said 1st day of January, in the said year of our Lord 1746; and the same treasons to hear and determine, according to the form of the said statute, by the oath of twelve jurors, good and lawful men of the said county of Surry, of high treason, by them the said William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, committed and perpetrated in levying war against us within this realm; and considering, that justice is an excellent virtue, and pleasing to the Most High; and being willing that the said William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, should be heard, examined, sentenced and adjudged before us, in this our present parliament, touching and concerning the said high treason whereof they stand severally indicted as aforesaid; and that all other things which are necessary in this behalf should be in due manner done and executed; and for that the office of steward of Great Britain (whose presence is required upon this occasion) is now vacant (as we are informed); we, very much confiding in your fidelity, prudence, provident circumspection, and industry, have for this cause ordained and constituted you steward of Great Britain, to bear, execute and exercise (for this time) the said office, with all things due and belonging to the same office in this behalf: And therefore we command you, that you diligently set about the premises, and (for this time) do exercise, and execute with effect, all those things which belong to the office of steward of Great Britain, and which are required in this behalf. In wit-

ness whereof, we have caused these our letters to be made patent.—Witness ourself at Westminster, the 28th day of July, in the 20th year of our reign. By the king himself, signed with his own hand.

BISSE.

Serjeant at Arms. God save the king.

Then Garter, and the gentleman usher of the Black Rod, after three reverences, kneeling, jointly presented the white staff to his grace the Lord High Steward: and then his grace, attended by Garter, Black Rod, and the purse-bearer (making his proper reverences towards the throne), removed from the wool-pack to an armed chair, which was placed on the uppermost step but one of the throne, as it was prepared for that purpose; and then seated himself in the chair, and delivered the staff to the gentleman usher of the Black Rod on his right hand, the purse-bearer holding the purse on the left.

Clerk of the Crown. Serjeant at Arms, make proclamation.

Serjeant at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Clerk of the Crown, by direction of the Lord High Steward, read the Certiorari, and the return thereof; together with the captions of the indictments, and the indictments certified thereupon, against the earl of Kilmarnock, the earl of Cromertie, and the lord Balmerino, in *hec verba*:

The CERTIORARI and RETURN.

George the 2d, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, to our justices and commissioners assigned and constituted by our letters patent under our great seal of Great-Britain, made to them, and to any three or more of them, to deliver our gaol of our county of Surry of the prisoners therein being, or such as shall or may be detained in the same, on or before the 1st day of January, in the year of our Lord 1746, for or on account of the high-treason mentioned in the statute made in this our present parliament, intituled, "An Act for the more easy and speedy trial of such persons as have levied, or shall levy war against his majesty; and for the better ascertaining the qualifications of jurors in trials for high-treason, or misprision of treason, in that part of Great Britain called Scotland," in levying war against us within this realm; and to enquire by the oath of good and lawful men of the same county, of all such high-treasons, in levying war against us within this realm, by the said prisoners, or any of them, or by any other person or persons who are now in actual custody for or on account of the same, or who are or shall be guilty of high-treason in levying war against us within this realm, and shall be apprehended and imprisoned for the same, on or before the said first day of January, in the said year of our Lord

1746, and the same treasons to hear and determine, according to the form of the said statute, and to every of them, greeting. We command you, and every of you, that all and singular indictments for high-treason, in levying war against us within this realm, whereof William earl of Kilmarnock, late of the city of Carlisle, in the county of Cumberland; Arthur lord Balmerino, late of the same place; and George earl of Cromertie, late of the town of Perth, in the shire of Perth; stand severally indicted before you in our said county of Surry; which said indictments now remain in your power, or in the power of some or one of you, with all things touching the same, as fully and perfectly as the same were taken before you, by what names, styles or titles soever the said William earl of Kilmarnock, Arthur lord Balmerino, and George earl of Cromertie, may be called or distinguished in the same, you do, without delay, deliver, under your seals, or the seals or seal of some or one of you, to us, in this our present parliament, together with this writ.—Witness ourself at Westminster, the 25th day of June in the 20th year of our reign.

BASSE.

RETURN.

By virtue of this writ to us, and others, our fellows, directed, we do deliver the within-mentioned indictments for high-treason; whereof the within named William earl of Kilmarnock, Arthur lord Balmerino, and George earl of Cromertie, stand severally indicted; which said indictments lately remained before us, and others our fellows, but are now annexed to this writ, with all things touching the same, as fully and perfectly as the same were lately taken before us, and others our fellows; to our present sovereign lord the king, in this present parliament; together with this writ, according to the form of the said writ, as we are within commanded.—The Answer of sir William Lee, knight; sir John Willea, knight; and sir Thomas Parker, knight; three of the justices and commissioners within mentioned.

W. LEE.

J. WILLEA.

T. PARKER.

Surry.—Be it remembered, that at a special sessions of Oyer and Terminer, and gaol-delivery, of our sovereign lord the king, of and for the county of Surry, holden at the borough of Southwark, in the said county, on Monday the 23d day of June, in the 20th year of the reign of our said present sovereign lord George the 2d, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, before sir William Lee, knight, chief justice of our said present sovereign lord the king, appointed to hold pleas before the king himself; sir John Willea, knight, chief justice of the court of Common-Pleas; sir Martin Wright, knight, one of the justices appointed to hold pleas before the king himself; sir James Reynolds, knight, one of the barons of the court of Exchequer;

sir Thomas Abney, knight, one of the justices of the said court of Common Pleas; sir Thomas Burnet, knight, one other of the justices of the said court of Common Pleas; Charles Clarke, esq. one other of the barons of the said court of Exchequer; Edward Clive, esq. one other of the barons of the said court of Exchequer; sir Thomas Deveil, knight, and Peter Theobald, esq. and others, their fellows, justices, and commissioners of our said present sovereign lord the king, assigned by letters patent of our said present sovereign lord the king, under his great seal of Great Britain, made by virtue of the statute made in this present parliament, intituled, "An Act for the more easy and speedy Trial of such Persons as have levied, or shall levy, War against his Majesty, and for the better ascertaining the qualifications of Jurors in Trials for High-treason, or Misprision of Treason, in that part of Great Britain called Scotland," to the said justices and commissioners above named, and others, and to any three or more of them (of whom our said present sovereign lord the king willed, That any of them the said sir William Lee, sir John Willes, sir Martin Wright, sir James Reynolds, sir Thomas Abney, sir Thomas Burnet, Charles Clarke, Edward Clive, and sir Thomas Deveil, and others, in the same letters patent named and appointed, should be one), to deliver the gaol of the said county of the prisoners therein being, or such as shall or may be detained in the same on or before the first day of January, in the year of our Lord 1746, for or on account of the high-treason mentioned in the said statute, in levying war against our said present sovereign lord the king within this realm; and to enquire, by the oath of good and lawful men of the same county, of all such high-treasons in levying war against our said present sovereign lord the king, within this realm, by the said prisoners, or any of them; or by any other persons or persons who are now in actual custody for or on account of the same, or who are or shall be guilty of high-treason, in levying war against our said present sovereign lord the king, within this realm, and shall be apprehended and imprisoned for the same on or before the first day of January, in the said year of our Lord 1746; and the same high-treasons to hear and determine according to the form of the said statute, by the oath of sir William Richardson, of Bermondsey, knight; sir Abraham Shard, of Kensington, knight; sir Thomas Hankey, of Clapham, knight; sir Peter Thompson, of Bermondsey, knight; Josias Wordsworth, of Adcock, esq.; Percival Lewis, of Putney, esq.; Samuel Atkinson, of Croydon, esq.; John Copeland, of Camberwell, esq.; Charles Hoskins, of Croydon, esq.; Joseph Creswick, of Streatham, esq.; William Clarke, of Southwark, esq.; Joseph Willoughby, of Croydon, esq.; Thomas Bevois, of Bermondsey, esq.; Elias Bird, of Rotherhith, esq.; Thomas Tarrant, of Southwark, esq.; Edward Stevens, of Southwark, esq.; Henry Robinson, of Wandsworth, esq.; John Heathfield of Croydon, esq.;

Nathaniel Green of Southwark, esq.; Isaac Beles, of Lambeth, esq.; John Smith, of Lambeth, esq.; Hammett Richardson, of Bermondsey, esq.; and Samuel Nicholson, of Croydon, esq.; good and lawful men of the said county, being then and there sworn, and charged to enquire for our said present sovereign lord the king, touching and concerning the premises in the said letters patent mentioned; it is presented, that the bill of indictment, to this schedule annexed, is a true bill.

"*Surry.* The jurors for our present sovereign lord the king, upon their oath, present, That William earl of Kilmarnock, late of the city of Carlisle, in the county of Cumberland, being a subject of our said present most serene sovereign lord George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, and not having the fear of God in his heart, nor having any regard for the duty of his allegiance; but being moved and seduced by the instigation of the devil, as a false traitor and rebel against our said present sovereign lord the king, his supreme, true, natural, lawful, and undoubted sovereign lord, entirely withdrawing that cordial love, and that true and due obedience, fidelity, and allegiance, which every subject of our said present sovereign lord the king should, and of right ought to, bear towards our said present sovereign lord the king; and also devising, and as much as in him lay, most wickedly and traitorously intending to change and subvert the rule and government of this kingdom, duly and happily established under our said present sovereign lord the king; and also to depose and deprive our said present sovereign lord the king of his title, honour, and royal state, and of his imperial rule and government of this kingdom; and also to put and bring our said present sovereign lord the king to death, and final destruction; and to raise and exalt the person pretended to be the prince of Wales during the life of James the second, late king of England, and so forth; and, since the decease of the said late king, pretending to be, and taking upon himself the stile and title of, king of England, by the name of James the third, to the crown, and to the royal state and dignity of king, and to the imperial rule and government of this kingdom, upon the 10th day of November, in the 19th year of the reign of our said present sovereign lord the king, at the city of Carlisle aforesaid, in the county of Cumberland aforesaid, with a great multitude of traitors and rebels against our said present sovereign lord the king, to wit, to the number of 3,000 persons, whose names are as yet unknown to the said jurors, being armed and arrayed in a warlike and hostile manner, to wit, with colours displayed, drums beating, pipes playing, and with swords, clubs, guns, pistols, and divers other weapons, as well offensive as defensive, with force and arms did falsely and traitorously assemble and join himself against our said present sovereign lord the king; and then and

there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose himself against our said present sovereign lord the king; and then and there, with force and arms, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage, and levy, a public and cruel war against our said present sovereign lord the king, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful subjects of our said present sovereign lord the king; and also then and there, during the said war, with force and arms did, with the said traitors and rebels so assembled, armed and arrayed, as aforesaid, falsely and traitorously, against the will of our said present sovereign lord the king, enter into, and take possession of, the said city of Carlisle, and the castle thereto belonging within the same city (the said city and castle being a city and castle of our said present sovereign lord the king); and the said city and castle, with force and arms, then and there did falsely and traitorously possess, hold, keep, maintain, and defend, against our said present sovereign lord the king, against the duty of his allegiance, against the peace of our said present sovereign lord the king, his crown and dignity, and also against the form of the statute in such case made and provided.

"Witnesses,

DAVID GRAY,	HUGH DOUGLASS,
JOHN VERE,	SAMUEL MADDOCK,
JAMES BARCLAY,	CHARLES CAMPBELL, Esq.

"A True Bill. Sworn in Court."

The Caption of the Indictment against George earl of Cromertie was read, in the like form as that against William earl of Kilmarnock; and then followed the Indictment; viz.

"*Surry.* The jurors for our present sovereign lord the king, upon their oath, present, That George earl of Cromertie, late of the town of Perth, in the shire of Perth, being a subject of our said present most serene sovereign lord George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, not having the fear of God in his heart, nor having any regard for the duty of his allegiance, but being moved and seduced by the instigation of the devil, as a false traitor and rebel against our said present sovereign lord the king, his supreme, true, natural, lawful, and undoubted sovereign lord, entirely withdrawing that cordial love, and that true and due obedience, fidelity, and allegiance, which every subject of our said present sovereign lord the king should, and of right ought to bear towards our said present sovereign lord the king; and also deriving, and, as much as in him lay, most wickedly and traitorously intending to change and subvert the rule and government of this kingdom, duly and happily established under our said present so-

vereign lord the king, and also to depose and deprive our said present sovereign lord the king of his title, honour, and royal state, and of his imperial rule and government of this kingdom, and also to put and bring our said present sovereign lord the king to death and total destruction, and to raise and exalt the person pretended to be prince of Wales, during the life of James the second, late king of England, and so forth, and, since the decease of the said late king, pretending to be, and taking upon himself the stile and title of, king of England, by the name of James the third, to the crown, and to the royal state and dignity of king, and to the imperial rule and government of this kingdom, upon the first day of December, in the 19th year of the reign of our said present sovereign lord the king, at the town of Perth aforesaid, in the shire of Perth aforesaid, with a great multitude of traitors and rebels, against our said present sovereign lord the king; to wit, to the number of a thousand persons, whose names are, as yet, unknown to the said jurors, being armed, and arrayed in a warlike and hostile manner; to wit, with colours displayed, drums beating, pipes playing, and with swords, clubs, guns, pistols, and divers other weapons, as well offensive as defensive, with force and arms, did falsely and traitorously assemble and join himself against our said present sovereign lord the king; and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose himself against our said present sovereign lord the king; and then and there, with force and arms, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage, and levy a public and cruel war against our said present sovereign lord the king, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful subjects of our said present sovereign lord the king; and also then and there, during the said war, with force and arms, did, with the said traitors and rebels, so assembled, armed, and arrayed, as aforesaid, falsely and traitorously, against the will of our said present sovereign lord the king, enter into, and take possession of, the said town of Perth (the said town of Perth being a town of our said present sovereign lord the king), and the said town of Perth, with force and arms, then and there did falsely and traitorously possess, hold, keep, maintain, and defend against our said present sovereign lord the king, against the duty of his allegiance, against the peace of our said present sovereign lord the king, his crown and dignity, and also against the form of the statute in such case made and provided.

"Witnesses, HUGH ROSS,
DAVID GRAY,
JOHN M'KAY,
JAMES LOGIE.

"A True Bill. Sworn in Court."

The Caption of the Indictment against Arthur lord Balmerino was read in the like form as that against William earl of Kilmarnock; and then followed the Indictment; viz.

"*Surry.* The jurors for our present sovereign lord the king, upon their oath, present, That Arthur lord Balmerino, late of the city of Carlisle, in the county of Cumberland, being a subject of our said present most serene sovereign lord George the second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, not having the fear of God in his heart, nor having any regard for the duty of his allegiance, but being moved and seduced by the instigation of the devil, as a false traitor and rebel against our said present sovereign lord the king, his supreme, true, natural, lawful, and undoubted sovereign lord, entirely withdrawing that cordial love, and that true and due obedience, fidelity, and allegiance, which every subject of our said present sovereign lord the king should, and of right, ought to bear towards our said present sovereign lord the king; and also devising (as much as in him lay) and most wickedly and traitorously intending to change and subvert the rule and government of this kingdom, duly and happily established under our said present sovereign lord the king; and also to depose and deprive our said present sovereign lord the king of his title, honour, and royal state, and of his imperial rule and government of this kingdom; and also to put and bring our said present sovereign lord the king to death and final destruction; and to raise and exalt the person pretended to be prince of Wales, during the life of James the second, late king of England, and so forth, and since the decease of the said late king, pretending to be, and taking upon himself the stile and title of king of England, by the name of James the third, to the crown and to the royal state and dignity of king, and to the imperial rule and government of this kingdom, upon the 10th day of November, in the 19th year of the reign of our said present sovereign lord the king, at the city of Carlisle aforesaid, in the county of Cumberland aforesaid, with a great multitude of traitors and rebels, against our said present sovereign lord the king; to wit, to the number of three thousand persons (whose names are, as yet, unknown to the said jurors), being armed and arrayed in a warlike and hostile manner; to wit, with colours displayed, drums beating, pipes playing, and with swords, clubs, guns, pistols, and divers other weapons, as well offensive as defensive, with force and arms, did falsely and traitorously assemble and join himself against our said present sovereign lord the king; and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose himself against our said present sovereign lord the king; and then and there, with force and arms, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did

falsely and traitorously prepare, order, wage, and levy a public and cruel war against our said present sovereign lord the king, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful subjects of our said present sovereign lord the king; and also then and there, during the said war, with force and arms, did, with the said traitors and rebels, so assembled, armed, and arrayed, as aforesaid, falsely and traitorously, against the will of our said present sovereign lord the king, enter into, and take possession of, the said city of Carlisle, and the castle thereto belonging within the same city (the said city and castle being a city and castle of our said present sovereign lord the king), and the said city and castle, with force and arms, then and there did falsely and traitorously possess, hold, keep, maintain, and defend, against our said present sovereign lord the king, against the duty of his allegiance, against the peace of our said present sovereign lord the king, his crown and dignity, and also against the form of the statute in such case made and provided.

"Witnesses, HUGH DOUGLASS,
JOHN VERE,
JAMES BERCLAY,
DAVID GRAY,
JAMES LOGIE.

"A True Bill. Sworn in Court."

Lord High Steward. Is it your lordships' pleasure that the judges have leave to be covered?

Lords. Ay, ay.

Clerk of the Crown. Serjeant at Arms, make proclamation for the lieutenant of the Tower to bring his prisoners to the bar.

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoners, William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, to the bar, together with copies of their respective commitments, pursuant to the order of the House of Lords.

Then William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, were all brought to the bar, by the deputy-governor of the Tower, having the axe carried before them by the gentleman gaoler, who stood with it, on the left hand of the prisoners, with the edge turned from them. The prisoners, when they approached the bar, made three reverences; and then fell upon their knees at the bar. The deputy-governor of the Tower also delivered in the copy of the commitment.

L. H. S. Your lordships may rise.

Then the prisoners rose up, and bowed to his grace the lord high steward, and to the House of Peers; which compliment was returned them by his grace, and the Lords.

L. H. S. Let the copy of the commitment be read.

Which was read as follows;

"Thomas Holles, duke of Newcastle, marquis and earl of Clare, viscount Haughton, baron Pelham of Loughton, knight of the most noble order of the Garter, one of the Lords of his majesty's most honourable Privy Council, and principal Secretary of State, &c.

"These are in his majesty's name to authorize and require you to receive into your custody the bodies of William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmorino, herewith sent you, for high-treason, in levying war against his majesty; and to keep them safe and close, until they shall be delivered by due course of law: And for so doing, this shall be your warrant.—Given at Whitehall, the 27th day of May 1746, in the 19th year of his majesty's reign.—HOLLIS NEWCASTLE.—To the right honourable the lord Cornwallis, constable of his majesty's Tower of London, and in his absence to the lieutenant of the said Tower, or his deputy.—This is a true copy of the original warrant.—CORNWALLIS."

Then proclamation having been again made for silence, the lord high steward spake to the prisoners as follows:

L. H. S. William earl of Kilmarnock, George earl of Cromertie, Arthur lord Balmorino; your lordships are brought before the most august judicature in this kingdom, in order to receive your several trials, upon different charges of high-treason against you, returned before this House.

As the crimes, whereof you stand accused, are of the most heinous nature, so the accusations against you are grounded upon no slight foundations: They are no less than indictments for levying war, and raising a rebellion against his majesty, found by a grand jury of gentlemen, of great worth and consideration, in the county of Surry, upon evidence produced before them.

But though your charge is thus weighty and solemn, it is still but a charge, and open to all such defences as the circumstances of your several cases, and the rules of law and justice will admit.

The law is the solid basis and support of the king's throne: It is the great bulwark of the property, the liberty, and life of every subject; and it is the security of the privileges and honours of the peerage. By this measure, which is uniform and equal to every member of the community, your actions which are now called in question, are this day to be examined and judged.

If your lordships are innocent, this will be one ground of a reasonable confidence in your present unhappy circumstances: But to this consideration your own thoughts cannot fail to add another; I mean, that the rules of this law are to be expounded and dispensed to you by this illustrious assembly, the whole body of the peers of Great-Britain, in whose noble and discerning minds nothing can have weight but

evidence and justice: Guilt alone can take place against you, and innocence alone can acquit you.

Your first consideration will be, what pleas to put in to these indictments: If your lordships shall put yourselves upon your Trials, you may rest assured from the motives I have already mentioned, that they will be legal, fair, and impartial; and as you stand here to answer for your estates, your lives, your honours, and your posterity, it is incumbent upon you to recollect yourselves, and to call up all those succours of reason, discretion, and temper, which you are masters of.

There is a circumstance in your case which is new, and makes it unnecessary for me to say much, by way of admonition, concerning your defence: Your lordships are the first of your rank and quality who have been brought to trial upon indictments for high-treason, since the act made in the reign of our great deliverer king William the third, for regulating of Trials in cases of high-treason, and misprision of treason.

It has been the peculiar happiness of this nation, since the Revolution, that our princes have had that confidence in the affections of their people, and the interests of both are become so evidently the same, that the regal sanction has, since that period, been graciously granted to laws for the security of the subject, which were in vain wished for in former reigns.

However injuriously that Revolution has been traduced, whatever attempts have been made to subvert this happy establishment founded upon it, your lordships will now have the benefit of that law in its full extent.

Before I conclude, I am by command of the House to acquaint your lordships, and all other persons who shall have occasion to speak to the Court, during these Trials, that they are to address themselves to the Lords in general, and not to any lord in particular.

L. H. S. Your lordships will do well to give attention, while you are severally arraigned upon your indictments.

Here the earl of Kilmarnock was arraigned, in the form of the said indictment against him, by the Clerk of the Crown in the King's-bench.

Clerk of the Crown. How say you, William earl of Kilmarnock, are you Guilty of this high-treason whereof you stand indicted, or Not Guilty?

Earl of Kilmarnock. Guilty.

L. H. S. The distance I am at from the bar is so great, that I am not sure whether I heard your lordship right; and therefore desire to ask you, Whether you plead Guilty, or Not Guilty?

Earl of Kilmarnock. Guilty, my lords.

George earl of Cromertie was arraigned in the same manner, upon the said indictment against him.

Clerk of the Crown. How say you, George earl of Cromertie, are you Guilty of this high-

treason whereof you stand indicted, or Not Guilty?

Earl of Cromertie. Guilty.

L. H. S. Not perfectly hearing your lordship's answer, I must give you the same trouble as I did the earl of Kilmarnock, by asking your lordship the same question, Whether you plead Guilty, or Not Guilty?

Earl of Cromertie. Guilty, my lords.

Arthur lord Balmerino was arraigned in the same manner, upon the said indictment against him.

Cl. of the Cr. How say you, Arthur lord Balmerino, are you Guilty of this high-treason whereof you stand indicted, or Not Guilty?

Lord Balmerino. Will your lordships be pleased to hear me, and I will be very short: I have only two or three words to say: I will not take up your time, my lords.

L. H. S. Your lordship is now arraigned; and the indictment has been read to you: now is your time to plead.

Lord Balmerino. If I should plead guilty, there is no occasion to speak after that.

L. H. S. This is not a proper time to speak to other matters. It is my duty to inform your lordship of the rules of law, and methods of proceeding; which require that you should first plead to the indictment.

Lord Balmerino. Then, my lords, you will oblige me to take up more of your lordships' time than I intended; for I cannot plead guilty. I desire to be heard: I will not take up your lordships' time. I want an answer to one question, and then I will plead.

L. H. S. If your lordship has any thing material, you may mention it.

Lord Balmerino. My lords, if there be any fault in the form of the indictment, or if it is so faulty, that no judgment can be given upon it, I want to know, whether I can be indicted again.

L. H. S. If your lordship has any exception to take to the indictment for mis-writing, mis-spelling, or any informality of that nature, now is your proper time to offer such exceptions.

Lord Balmerino. My lords, I am indicted by the title lord of Balmerino, of the city of Carlisle; and, I am sure, that is no title belonging to me: and I am indicted for being at the taking of his majesty's city and castle of Carlisle on the 10th of November; and I can prove, that, at that time, I was not within 12 miles of it: now, my lords, will that be of any use to me? I can prove I was 12 miles off, when they say I was at Carlisle.

Cl. of the Cr. Serjeant at Arms, make proclamation for silence.

Serj. at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king doth strictly charge and command all manner of persons to keep silence, upon pain of imprisonment.

L. H. S. My lord Balmerino, you have made two objections of different natures; the first of them is to the addition of place given to you

in this indictment; and the other goes to the fact thereby charged upon you. As to the first, I must inform your lordship, that the words 'late of the city of Carlisle in the county of Cumberland,' are not made part of your title, but are only an addition of place, which the law, for good reasons, requires to be inserted by way of description of the defendant in all indictments; and it is most commonly taken from that place, where the crime is by such indictment charged to have been committed. As to your other objection, it relates to the fact alleged in the indictment, and will depend upon the evidence; which cannot be entered into till your lordship has pleaded.

Lord Balmerino. Then, my lords, though I could prove I was elsewhere, it would be of no use to me at all?

L. H. S. Your lordship mistakes me; I do not tell you so; but only, that this your last objection cannot be taken into consideration, till after you have pleaded, and the evidence appears.

Lord Balmerino. I can make it appear, that I was not at Carlisle at that time.

L. H. S. I have acquainted your lordship, according to my duty, with the method of proceeding, and the proper time for making use of your objection. It must be left to your consideration, how far you think it for your advantage to insist upon it.

Cl. of the Cr. Arthur lord Balmerino, are you Guilty of the high-treason whereof you stand indicted, or Not Guilty?

Lord Balmerino. Not Guilty, my lords.

Cl. of the Cr. Culprit, how will your lordship be tried?

Lord Balmerino. By God and my peers.

Cl. of the Cr. God send your lordship a good deliverance.

L. H. S. Let the lieutenant of the Tower take my lord Kilmarnock and my lord Cromertie from the bar.

These two lords were then taken from the bar by the lieutenant of the Tower; who returned again, and stood on the right hand of lord Balmerino; the gentleman-gaoler standing all the time on his left hand, with the axe turned from him.

Cl. of the Cr. Serjeant at arms, make proclamation.

Serj. at Arms. Oyes, Oyes, Oyes! all manner of persons, that will give evidence on behalf of our sovereign lord the king, against Arthur lord Balmerino, the prisoner at the bar, let them come forth, and they shall be heard; for now he stands at the bar, upon his deliverance.

L. H. S. My lords, the distance of this place from the bar is so great, that I must desire your lordships leave to go down to the table, for the convenience of hearing.

Lords. Ay, ay.

Then his Grace removed to the Wool-pack, and delivered the White Staff to be held by the Gentleman Usher of the Black Rod;

who, during the whole Trial, always received and delivered back the White Staff upon his knee.

Sir Richard Lloyd, counsel for the king. May it please your lordships; Arthur lord Balmerino stands indicted at your lordships' bar for high-treason; and the charge against him, in the indictment, is, That he being a subject of our present most serene sovereign lord king George, and not having any regard for the duty of his allegiance, as a false traitor and rebel against our sovereign lord the king, his supreme, true, natural, and lawful sovereign, and withdrawing that cordial love, and true and due obedience, which every subject of his majesty should and ought to bear toward him; and wickedly and traitorously devising and intending to change and subvert the rule and government of this kingdom, and to depose and deprive his majesty of his title, honour, and royal state, and imperial rule and government of these kingdoms, and to put and bring him to death and final destruction, and to raise and exalt the person pretending to be prince of Wales, during the life of James the second, and since pretending to be, and taking upon himself the stile and title of, king of England, by the name of James the third, to the crown, and to the imperial rule and government of this kingdom; that he did, upon the tenth day of November, in the nineteenth year of his present majesty's reign, at Carlisle, in the county of Cumberland, with a multitude of rebels, armed, and arrayed, in a warlike and hostile manner, with arms, as well offensive as defensive, assemble themselves together; and then and there did falsely and traitorously array themselves, with force and arms, against our said lord the king; and then and there did levy a public and cruel war against the king, and make a miserable and cruel slaughter of his majesty's subjects, and, with the said traitors and rebels, so armed and arrayed, did enter into, and take possession of, the said city and castle of Carlisle, the same being a city and castle of our said lord the king, and did falsely and traitorously keep and defend the same against our said lord the king, against the duty of his allegiance, against the peace of our said present sovereign lord the king, and against the form of the statute in such case made and provided.

My lords, to this indictment he has pleaded, That he is not guilty: it is incumbent upon us, who have the honour to serve the crown in this prosecution, to prove this guilt upon him; and then nothing remains for us, but to pray your lordships' judgment accordingly.

Mr. Serj. Skinner, the King's Serjeant.

My lords; I am counsel, in this cause, for the king, against the unfortunate peer at your lordships' bar; who stands accused of a crime, the highest which is known to the laws of this realm.

For high treason comprehends all other

offences: murder and rapine accompany, and are closely connected with high-treason; and waste, destruction, and famine, are the marks it leaves behind.

To be guilty of the lowest of these, as a single offence, would be abhorrent to a person of a noble heart: to be guilty of each of these offences, is such a weight of crime, as would depress and bear down a noble mind: yet such is the case of that unhappy person, who is guilty of the crime of high-treason.

I will not bring a railing accusation against this unfortunate lord: indeed, the offence cannot admit of aggravation: but, when I consider the inevitable ruin which must have befallen our country, if these pernicious designs had taken their effect; the total subversion of our religious and civil liberties; I then cannot help lamenting that neither high blood, nor those generous sentiments of gratitude and humanity, which are usually implanted in a noble breast, that these could not restrain a high-born peer from engaging in these wicked councils; the uniting in which is a stain to his honour, and will be a mark of infamy to his posterity.

For the most grievous thought, to this unhappy lord, must be, that the consequences of his crime will affect his descendants: He was their root of honour; he now derives to them disgrace and infamy.

But the law in this proceeds with great reason and justice: the punishment of the guilty person alone may not be sufficient to deter men from the commission of this crime: he may be so hardened, as to think his own suffering to be light; but he may lament for the fate of his children and family: such likewise were the laws of nations the most famed for their rule and polity.

In this House, so eminently distinguished for learning as well as honour, I want no apology, when I repeat the opinion of the great Roman lawyer and orator, upon this subject: Tully states this as an objection; and I submit, that he gives an answer, natural and affecting: his words are:

"Nec verò me fugit, quàm sit acerbum parentum scelera filiorum poenis lui; sed hoc præclare legibus comparatum est; ut caritas liberorum amiciores parentes reipublicam redderet."

Rebellion surely is the sin of witchcraft; otherwise what can engage a person in an attempt to destroy the religious and civil liberties of his country, though in the same ruin he thus involves the fate of himself and his posterity? Our religion is a reasonable service; its establishment is the law of the land; and for a Protestant peer to endeavour to extirpate this our most holy religion, and to introduce superstition and idolatry amongst us, is a proposition as absurd as transubstantiation: our civil rights must have fallen a sacrifice to the ambition of France; for it was a vain imagination, to think, that France would in earnest have set any king over us. Whoever is a British king, must, in

time, at least, act upon British principles: from that moment he is equally an enemy to France, as any of the boldest or best of his predecessors. France knows, and will pursue, her natural interest: to make us tributary, to make us provincial, to destroy us as a nation, was, and must, and can only be, the true design of France.

But the genius of the nation exerted itself in the cause of liberty, under the command of his royal highness the duke; and when we consider our misfortunes under former leaders, and how the true English valour prevailed, when animated and influenced by the presence and example of so great a commander, we may justly apply to his royal highness what was said of Scipio, '*tantus exercitus, quantus imperator.*'

Before I come to the particular part, which the lord at the bar has acted; it may be necessary to give a short history of this unnatural rebellion: and here the names of the two unfortunate peers, who have just confessed their guilt at your lordships' bar, must often occur.

In June 1745, the son of the Pretender landed in the west highlands of Scotland: few then were his company or followers; but the cloud, which seemed, at first, to be no larger than a man's hand, quickly gathered, and blackened that part of the hemisphere. The first who appeared were the Macdonalds and the Camerons, men famed for rebellious acts: they were soon joined by the duke of Perth, the marquis of Tullibardine, lord Elcho, and lord George Murray; and when they came to Perth, their number was 5,000 men; from thence they marched to Edinburgh, and there they proclaimed the Pretender; and soon after, September the 21st, followed the battle of Preston Pans. I wish that we could forget the mis-carrriages of that day!

In October the Pretender's son was joined by another body of rebels, under the command of the earl of Kilmarnock: his lordship made his first appearance on the banks of the river which divides England from Scotland; here I wish, for the sake of the nation, and for his own sake, that the noble lord had made some stop, and had well considered the enterprize on which he was going: could he have then foreseen the calamities, which his rash undertaking has brought upon his native country; could he have then beheld with his eyes the rapine, the violence, and the oppression, which have ensued; the opposition of the son to the father, of the brother to the brother, and how all the charities of one man to another were destroyed; could he have foreseen his own shameful retreat, and final overthrow, his feet had never passed the banks of that river.

From thence they marched into England, laid siege to Carlisle, and took it; and here again they proclaimed the Pretender: From thence they went to Penrith, and to many other places in England, till they came to Derby: in this town they heard, that his royal highness the duke was advancing towards them.

VOL. XVIII.

Here rebellion grew pale; the fame of the duke's approach made them retreat: their march was expeditious; yet they left behind them so many marks of their cruelty and barbarity, as if their only design was to plunder and destroy.

His royal highness, with a detachment, pursued the rebels to Clifton; and it is doubtful, whether their cowardice or cruelty was here the most remarkable: they fled, and yet, in their haste, they took time to murder the king's soldiers, who lay wounded on the ground: from hence they got back to Carlisle, and from thence proceeded to Dumfries and Glasgow. And here I must remember the noble zeal and firmness which the magistrates and citizens of Glasgow expressed for their royal master, our most gracious sovereign: they paid, indeed, most heavy exactions for this their loyalty; which remain like so many scars; but the wounds were honourable.

From thence they marched to Bannockburn, and so to Stirling: here they were joined by the earl of Cromartie, and then laid siege to Stirling Castle: this occasioned the battle of Falkirk: to this place the lord Balmerino, the prisoner at the bar, marched at the head of his regiment: here the rebels retired; but victory was reserved for his royal highness. But, before I leave this field, I must lament the fate of a valiant soldier and commander; wounded, indeed, in the field of battle, but afterwards murdered in cold blood; let one more mark of infamy, at least, be fixed on this rebellion, for this murderous act, committed on so worthy and brave a gentleman.

From Falkirk the rebels retired to Stirling; from thence into the highlands, those hills of the robbers: after some time they joined again at Inverness; they attacked Fort George, then in the possession of his majesty's forces, and took it; they took Fort Augustus, and demolished it; before Fort William they met with a repulse: from thence they marched to Cul-loden field; a bloody field! where fell rebellion, I hope, never to rise again. To point out the conduct, to celebrate the courage of his royal highness, to paint the glory of that memorable day, is an attempt too bold: the gratitude of the nation, the united thanks of the parliament, and the approbation of his royal father, shew the greatness of the merit by the richness of the reward.

My lords, the particular circumstances attending the case of the unfortunate peer at your lordships' bar are considerable: high-treason is an offence foul and black in itself; it wants no colouring to make it appear more deformed and hideous; but the lord Balmerino has heightened every feature of this deformity; he was in the service of the king, a captain in the regiment commanded by the lord Shannon; not only therefore by his oath of allegiance, as a subject, but by his military oath as his majesty's soldier, as a soldier trusted by his sovereign with a command, he lay, under the strongest obligations to be faithful; but he be-

2 H

trayed this trust; he deserted his station, in the which virtue bid him stand.

As a reward for his treachery, the prisoner, my lords, was advanced to be the captain of the second troop of life-guards attending on the person of the Pretender's son: we shall shew, that soon after the city of Carlisle surrendered to the rebels, the prisoner entered that city at the head of his troop, with his sword drawn, colours displayed, and drums beating; he, dressed in the uniform of the regiment, with a white cockade in his hat: he went the same progress through the several places in England with the rebel army, an army of locusts; as they went, they devoured the land: before them was plenty, behind them destruction and desolation: he was present at the several places and times when the Pretender was proclaimed; and, on the return of the rebels into Scotland, he appeared in all places at the head of his troop: he commanded them at the battle of Falkirk; and with them he was defeated, and made a prisoner, in the field of Culloden.

To answer for these treasons is this unfortunate peer now brought to your lordships' bar: an awful tribunal! the illustrious judges who here preside, are under the strictest obligation to do impartial justice; for their only oath is their honour: to this tribunal we submit the cause of the king, and of our country: we will endeavour to prove the fact; and then we shall, with all deference and submission, expect your lordships' judgment.

Att. Gen. May it please your lordships; Your lordships have heard the nature of the charge against the noble lord at the bar, as it is laid in the indictment; and have likewise heard the rebellion, in which he was engaged traced from its rise to its happy conclusion. There is little room, in a case so notorious, for me to trouble your lordships in the opening. But, as the crime charged on the noble lord, is part of that great treason which was aimed against his majesty's throne and royal person, it may be incumbent on me to say something upon this very solemn occasion.

And however disagreeable it must be, to prosecute and try a noble person, one of your lordships high order, for a crime of this nature, public justice requires it, and it must be submitted to. Even your lordships, from your great regard to your king and country, will be easy in the discharge of that part of it, which belongs to your lordships.

As the noble lord has thought proper to plead not guilty, and thereby put the proof of his guilt on the king's counsel; there are two things that will fall under your lordships' consideration: The one, relating to the nature of the crime; the other, to the proof in support of it.

As to the former, your lordships can have no trouble: it is a charge of high treason, in levying war against his majesty; a crime declared to be so by the express words of the statute of the 25th of Edward the 3d, framed on

purpose for the ease and safety of the subject; to remove that anxiety, which attended the obscurity of the law, in a point of the greatest importance to themselves and their posterity; and to reduce the law of treasons, which before lay hid in the breast of the judges, to certainty: or, if that law had never been made, this is one of the sorts of treasons that never did admit of a doubt; and, if the noble prisoner had impartially consulted his own breast, it must have told him it never could.

As that act makes it necessary to conviction, that the treason should be proved by some overt act; it has been usual, in indictments for this species of treason, not only to charge the levying war generally, but to specify those circumstances of hostility which usually accompany it, as a kind of overt act; such as joining himself to great numbers of other traitors, armed and arrayed with various sorts of weapons in a warlike manner, with colours displayed, drums beating, and the like: these circumstances are charged in the present indictment; to which another more particular overt act is added, of entering, possessing, and detaining the city of Carlisle against his majesty.

If these charges are proved, the consequence cannot be disputed. This brings me to that which alone will demand your lordships particular attention; how this charge is brought home, in point of evidence, to the prisoner at the bar.

And in this likewise, I believe I may venture to say, your lordships will have no difficulty; but you will have that great satisfaction, of being perfectly clear in the judgment you shall give.

The charge is not of that nature, which rests principally in the breast of the offender, to be discovered and proved by a variety of circumstances, set together and connected by art, to find out the secret designs of conspirators. It consists in a great number of facts, done in open day-light, in the face of the world, avowed and justified, and in which the noble lord did not rely on the secrecy of his treason, but the power of the traitors, for his defence.

Your lordships therefore will permit me very shortly to point out some of those facts, which will be fully proved by the witnesses: I don't mean to enter into a detail of what passed during the course of the rebellion; but only to touch on those matters, which will directly affect the prisoner, and shew the particular part he acted in this great scene of treason and confusion.

The noble prisoner seems to have engaged early in the rebellion. Whether it was owing to that, or his former attachments, he soon obtained a trust about the person of the Pretender's son; which could be reposed in none but the most zealously affected to that cause. He was made the commander of the second troop of horse called his life-guards.

In this post, he accompanied the rebel army

in their first march into England, and entered Carlisle, at the head of his troop, in November last. In the same command he followed them through the counties of Cumberland, Lancaster, Cheshire, Staffordshire, and part of Derbyshire, till they came to Derby; and when they were stopped there by the approach of his royal highness the duke, and forced to fly before him by the way they came, he kept with them in their flight, and entered Carlisle a second time, with his troop. He did not wait till his royal highness came up, but with the rest of the rebel army, except the garrison, continued his flight into Scotland. He went with them to Glasgow, and Stirling, was present at the battle of Falkirk, and though not personally engaged, was drawn up at the head of his troop, to support the rebels that were. He still continued to attend the rebellion in all its stages, till the same great commander, who gave the first check to its progress, put a final end to it at Culloden.

Your lordships will see him, by the evidence, in all the places I have mentioned, clothed in the uniform of the rebel guards, with a white cockade, his sword drawn, heading, commanding, and leading his troops, guarding the Pretender's son, proclaiming the Pretender, entering and seizing his majesty's towns, and acting as an enemy in his majesty's dominions, in open defiance of the laws, and to the infinite mischief of his majesty and his subjects; and all this with a direct view of dethroning his majesty, extirpating his royal family, and setting up a Popish Pretender in his room.

The several instances of his lordship's marching with the rebels in a hostile manner, will be so many distinct proofs of the first part of the charge; and the particular acts of his entering and continuing in Carlisle, in the same hostile manner, will fully prove the second.

I have stated all these things, not because they are all necessary to the conviction of the noble lord, but for the clearer manifestation of his guilt. A very small part of these facts would be sufficient, if proved to your lordships' satisfaction: nor would it avail his lordship, if we should fail in the proof of any part of the charge on the very day it is laid in the indictment, as the noble lord vainly seems to think. The precise point of time, as it is in its own nature immaterial to the guilt, is equally so in the forms of our law.

All that remains is to call the witnesses; which, I doubt not, will fully make out the facts we have stated.

Sir John Strange. My lords, we will now proceed to call our witnesses.

Lord Balmerino. My lords, may I be heard? I thought, when a person was indicted, if there was any one article in the indictment that was not good against him, that all the rest was good for nothing.

L. H. S. You must hear the evidence. This cannot now be determined till the evidence is heard.

Lord Balmerino. Will your lordships please to examine them as to the time of my being at Carlisle?

L. H. S. The King's Counsel must proceed in their own method, provided they proceed according to law.

Lord Balmerino. My lords, I humbly thank you for your advice.

L. H. S. Would your lordship have counsel assigned you?

Lord Balmerino. No, my lords, I don't want any.

Sir John Strange. Call William M'Ghie.

William M'Ghie sworn.

Sir John Strange. Look at the noble lord at the bar. Do you know him?

M'Ghie. Yes; I know him very well.

Sir J. Strange. Pray, will you acquaint my lords, whether you saw him at any time, and where, in the rebel army?

M'Ghie. I saw the noble lord at Carlisle, going and coming.

Sir J. Strange. Do you mean the noble lord at the bar?—*M'Ghie.* Yes, I do.

Sir J. Strange. Pray, do you recollect the first time of your seeing him?

M'Ghie. It was some time in November last; but the day I am not very sure of.

L. H. S. The witness's voice is so low, that some of my lords desire, That a clerk may repeat what he says. Is it your lordships' pleasure, that one of your clerks be appointed to stand by the witness, and report to your lordships what he says?

Lords. Ay, ay.

Then one of the clerks was sworn, truly to report what the witness should say; and stood within the bar, near the witness, and repeated his answers.

Sir J. Strange. If it is your lordships' pleasure, I will begin the examination again.

L. H. S. I desire he may repeat again what he has said.

Sir J. Strange. I ask you, if you know the noble lord at the bar?

M'Ghie. Yes; I do know the noble lord at the bar.

Sir J. Strange. Will you please to acquaint their lordships, at what time, and where, you saw his lordship with the rebel army?

M'Ghie. I saw him at Carlisle, going and coming. The first time I saw his lordship there was in November last.

Sir J. Strange. Did not you see him before you came to Carlisle?

M'Ghie. I saw him before we came to Carlisle; I also saw him coming into Carlisle, and in Carlisle.

Sir J. Strange. What company was he in then?

M'Ghie. He was in company with the rebels.

Sir J. Strange. How did he appear, and what command had he then?

M'Ghie. I don't know whether he had a

command; but he was heading a troop of horse.

Sir J. Strange. What horse were they called?

M'Ghie. I don't know.

Sir J. Strange. Were they part of the rebel army?—*M'Ghie.* Yes.

Sir J. Strange. Did you see them enter into the city of Carlisle?—*M'Ghie.* Yes.

Sir J. Strange. Fix the time as near as you can.

M'Ghie. It was about the 18th of November, as near as I can guess.

Sir J. Strange. Can you tell what number there was of them?—*M'Ghie.* I cannot really.

Sir J. Strange. Will you acquaint the lords, whether the noble lord at the bar had any arms?—*M'Ghie.* He had pistols, and a sword.

Sir J. Strange. Was his sword drawn, or undrawn?

M'Ghie. I do not mind to have seen it drawn.

Sir J. Strange. Did you observe, whether he had any thing in his bonnet or hat, by way of distinction?—*M'Ghie.* I do not mind that.

Sir J. Strange. Did you observe in what manner the noble lord was dressed?

M'Ghie. In a common dress.

Sir J. Strange. When you call it a common dress, do you mean the dress that the officers wore, or his own habit?

M'Ghie. I mean his own former habit.

Sir J. Strange. Was there any thing particular in the form of the habit that the officers of that regiment wore?

M'Ghie. I do not mind any body but himself.

Sir J. Strange. You saw him march at the head of that body going to Carlisle, after it was in possession of the rebels?

M'Ghie. Yes; and I saw him in the going back from Derby.

Sir J. Strange. I ask you, Whether you observed the noble lord in Carlisle, after it was in possession of the rebels, and after the marching you talk of, and before the rebels left Carlisle, to come southwards?

M'Ghie. Yes; I saw him in Carlisle when the rebels were there.

Sir J. Strange. Did you observe what he was doing then?

M'Ghie. Nothing, but riding on horseback.

Sir J. Strange. Was that with the troop, or without?

M'Ghie. It was with the troop.

Sir J. Strange. Did you observe whether his sword was drawn?—*M'Ghie.* I did not.

Sir J. Strange. How long did the rebels stay in Carlisle, before they marched southwards?

M'Ghie. About two days.

Sir J. Strange. Did you observe the noble lord to go out of Carlisle?

M'Ghie. No; I was not south.

Sir J. Strange. Did you observe him then?

M'Ghie. I was in the hospital; but when I came back again, I saw this lord.

Sir J. Strange. Did you observe him to march out of Carlisle?—*M'Ghie.* Yes.

Sir J. Strange. What time was that?

M'Ghie. It was in November.

Sir J. Strange. What distance of time was there between their going and coming back? You can tell us when they marched back again?

M'Ghie. It was about Christmas, or a day or two before it.

Sir J. Strange. Did you observe the noble lord coming into Carlisle upon the return? Or do you only speak of seeing him there?

M'Ghie. I saw him coming back again from Derby to Carlisle.

Sir J. Strange. Will you acquaint my lords, whether you saw him at the head of his troop, or in what manner?

M'Ghie. I saw him at the head of a troop of horse in Carlisle.

Sir J. Strange. What were they? Were they part of the rebel army?—*M'Ghie.* Yes.

Sir J. Strange. Had they any drums, colours, and music?

M'Ghie. They had both colours and drums, and pipes playing.

Sir J. Strange. How long did my lord stay at Carlisle upon his return?

M'Ghie. Only one night.—I am very sure of it.

Sir J. Strange. Did the noble lord go out of Carlisle in the manner you have mentioned, at the head of his troop?

M'Ghie. In the same manner, riding at the head of a troop of horse.

Sir J. Strange. Will you acquaint my lords, Whether, at the time the noble lord was there, the young Pretender was in Carlisle?

M'Ghie. Yes, he was there.

Sir J. Strange. Was he there when they first went into Carlisle, before they came southward?

M'Ghie. No, he did not come till the next day.

Sir J. Strange. Did you see the Pretender's son the next day?—*M'Ghie.* Yes.

Sir J. Strange. In what manner did he enter Carlisle?

M'Ghie. He came in with horse life-guards.

Sir J. Strange. Whose life-guards were they?—*M'Ghie.* The young Pretender's.

Sir J. Strange. Who commanded those guards at that time, or any part of them?

M'Ghie. I don't well know, there were so many commanded.

Sir J. Strange. Did you observe the noble lord at the bar to command any?

M'Ghie. No, I did not.

Sir J. Strange. When they marched away from Carlisle for Scotland, did the young Pretender go along with them?—*M'Ghie.* Yes.

Sir J. Strange. And did the greatest part of the rebel army go with him?

M'Ghie. All, except those that were left at Carlisle, and those that were upon the road.

Sir J. Strange. Was there a garrison left at Carlisle?—*M'Ghie.* Yes.

Sir J. Strange. By whose order?

M'Ghie. By order of the young Pretender.

Att. Gen. My lords, we have done with this

witness: Will the noble lord ask him any questions?

L. H. S. My lord, if you would ask this witness any questions, now is your time.

Lord Balmerino. I think, my lords, he has contradicted himself: He says first it was in November, and then in December, and then in January.

L. H. S. If you want him to explain himself as to the time, you may ask him any question.

Lord Balmerino. What was done in November?

M'Ghie. The rebels came first to Carlisle in November; and, when they came back, on their return, it was December about Christmas.

L. H. S. He applies November to your first coming to Carlisle, and December to your returning thither.

Lord Balmerino. I can't tell the time myself, unless I was at home to look at my notes.

L. H. S. Will your lordship ask him any more questions?

Lord Balmerino. No, my lords.

Sir J. Strange. I would beg leave to ask the witness one question. He says there was a garrison left in the city of Carlisle; I would ask him, Who that garrison was to defend the place against?

M'Ghie. Against his majesty king George.

Hugh Douglas sworn.

Solicitor General. Look at the noble lord at the bar, and see whether you know him.

Douglas. Yes, I know him.

Sol. Gen. Then give my lords an account, Whether you saw him in the rebel army at any time; and when, and where, and what he did: And give your account, as near as you can, in order of time.

Douglas. I saw him at Diddeston, before the Pretender marched out of Edinburgh.

Sol. Gen. Now, go on: Where did you see him next?—*Douglas.* I saw him at Kelso.

Sol. Gen. Where next?

Douglas. At Carlisle.

Sol. Gen. In what manner did he march along with them from these several places to Carlisle?

Douglas. He was colonel of the second troop of the Pretender's life-guards.

Sol. Gen. Did he, during this march, command this second troop, or ride at the head of them?

Douglas. He commanded them, and rode at the head of them.

Sol. Gen. How were they armed?

Douglas. They had each a carbine, a brace of pistols, and a broad sword.

Sol. Gen. Did you see him at Carlisle?

Douglas. He marched from Penrith to Carlisle, and back again into Scotland, at the head of the troop of life-guards. I saw him all the way.

Sol. Gen. What did you see him do at Carlisle?

Douglas. I saw him at the head of his troop

of horse in the street, when they were drawn up, upon coming in there.

Sol. Gen. Where did you see him else? Did you see him in the return?

Douglas. I saw him at Derby, and at Manchester, in returning.

Sol. Gen. Did you see him any where else?

Douglas. I saw him at Falkirk, and saw him march all the way from Penrith to Carlisle, in returning.

Sol. Gen. Did you see him at Carlisle on his return?—*Douglas.* Yes.

Sol. Gen. When you saw him at Carlisle, was he with the rebel army?—*Douglas.* Yes.

Sol. Gen. Did you see him at the head of his troop?

Douglas. Yes; I saw him at the head of his troop of horse march from Penrith to Carlisle.

Sol. Gen. Did you see him, at any time in that march, act as an officer?

Douglas. Yes, he acted so far as an officer, that he rode at the head of his troop all the way.

Sol. Gen. Did you afterwards see him?

Douglas. Yes, I saw him at Diddeston.

Sol. Gen. Do you speak of your seeing him in going, or in the return?

Douglas. I speak of the return. I saw him at Carlisle, and at the battle of Falkirk.

Sol. Gen. Did you see him engaged in that battle?

Douglas. No, he was not engaged; none of the horse were engaged.

Sol. Gen. Did you see him with his sword drawn?

Douglas. All the men had their swords drawn; but I don't remember particularly as to him, whether I saw him with his sword drawn, or not.

Sol. Gen. Did you see him there at the head of any troop of horse?

Douglas. I saw him at the head of the second troop of life-guards at the battle of Falkirk.

Sol. Gen. Did you see him after that time?

Douglas. I don't remember that I saw him afterwards.

Sol. Gen. What sort of dress had he?

Douglas. He had a blue coat faced with red, a gold-laced hat, and a cockade.

Sol. Gen. What colour was the cockade?

Douglas. White.

Sol. Gen. What was the uniform of the troop?

Douglas. They all had blue coats with red facings, and gold-laced hats.

Sol. Gen. Had they all white cockades?

Douglas. Yes.

Sol. Gen. Had the troop their swords drawn?

Douglas. Yes, at Falkirk they were all drawn up together, and every one had his sword drawn.

Att. Gen. Where was this troop at the battle of Falkirk?

Douglas. They were drawn up together in a field, with the earl of Kilmarnock, and lord Pitligo,

Att. Gen. Was a white cockade any distinguishing mark of belonging to the rebel army?

Douglas. Every one who was in the rebel army had a white cockade.

L. H. S. Will your lordship ask this witness any questions?

Lord Balmerino. No, my lords.

James Barclay sworn.

Mr. Noel. Look upon the noble lord, the prisoner at the bar. Do you know him?

Barclay. Yes.

Mr. Noel. Did you see him at any time in January last?

Barclay. Yes, I did.

Mr. Noel. Where did you see him?

Barclay. At Glasgow.

Mr. Noel. I think you say you saw him at Glasgow in January last?

Barclay. Yes.

Mr. Noel. Who was he with at Glasgow?

Barclay. He was with the Pretender's son.

Mr. Noel. Was he with any forces, and what forces, at Glasgow?

Barclay. He was colonel of the second troop of guards.

Mr. Noel. Who did those guards belong to?

Barclay. He was colonel of the second troop of the Pretender's son's life-guards.

Mr. Noel. Were they called by any particular name?

Barclay. They were called Mr. Arthur Elphinston's guards.

Mr. Noel. What Elphinston?

Barclay. He that is lord Balmerino now, the prisoner at the bar.

Mr. Noel. How was he armed?

Barclay. He was armed with a broad sword, and a brace of pistols.

Mr. Noel. How did he march?

Barclay. At the head of his troop.

Mr. Noel. Where did you see him march?

Barclay. I saw him march out of Glasgow and Kelso.

Mr. Noel. Did he march out with his sword drawn?—*Barclay.* I don't remember.

Mr. Noel. Had he pistols?

Barclay. He had pistols.

Mr. Noel. How was he dressed?

Barclay. He had a blue coat turned up with red, a gold-laced hat, and a white cockade.

Mr. Noel. I desire to know what cockades were worn by the forces in the service of the Pretender's son?

Barclay. White cockades.

Mr. Noel. Were they the distinguishing mark of the rebel forces?

Barclay. Yes.

Mr. Noel. Did you see the noble lord at the bar at Bannockburn?

Barclay. Yes, I saw him there several times at the head of his troop.

Mr. Noel. Were they drawn up in any form?

Barclay. They were drawn up at the Pretender's lodging-door.

Mr. Noel. Where was that?

Barclay. At one Mr. Paterson's.

Mr. Noel. Was he armed then?

Barclay. Yes.

Mr. Noel. How was he armed?

Barclay. With a broad sword, and a brace of pistols.

Mr. Noel. Did you see him at any time at Stirling?

Barclay. I saw him at Stirling; but not at the head of his troop.

Mr. Noel. I desire to ask one general question, Whether, at all the places where you saw him, he was armed, and with troops belonging to the Pretender?—*Barclay.* Yes.

Sir John Strange. He says, he saw the troop drawn up at the Pretender's lodging-door: I desire to know, Whether the Pretender's son saw the troops drawn up?

Barclay. I don't know whether he saw them drawn up; but I know he was there at that time.

L. H. S. Would you ask this witness any questions?

Lord Balmerino. No, my lords.

David Gray sworn.

Sir Richard Lloyd. Do you know the prisoner at the bar?

Gray. Yes, Sir.

Sir R. Lloyd. How long have you known him?

Gray. I have known him about six or seven years.

Sir R. Lloyd. Do you remember him at any time marching with any guards or soldiers with him?

Gray. Yes, I saw him march with a troop of horse.

Sir R. Lloyd. Where was that, and when?

Gray. After Carlisle was taken by the rebels, I saw him marching southward with the second troop of life-guards.

Sir R. Lloyd. What, the Pretender's life-guards?—*Gray.* Yes.

Sir R. Lloyd. Whither were they marching?

Gray. Southwards.

Sir R. Lloyd. Did the rest of the rebel army march at that time?

Gray. Yes, and the same way.

Sir R. Lloyd. Was the prisoner armed?

Gray. Yes.

Sir R. Lloyd. How was he armed?

Gray. With a broad sword and pistols.

Sir R. Lloyd. What dress was he in?

Gray. He was in blue, turned up with red.

Sir R. Lloyd. Whose dress was that?

Gray. It was the dress of all the guards.

Sir R. Lloyd. What distinction had he in his hat?—*Gray.* Nothing but a white cockade.

Sir R. Lloyd. Was that any mark of distinction?

Gray. No, it was no mark of distinction at all; for they all wore it.

Sir R. Lloyd. You say you saw his lordship march southward: did you see him afterwards on his march northward?

Gray. I saw him march from Elgin of Murray towards Inverness, a little before the battle of Culloden.

Sir R. Lloyd. Was he then armed?

Gray. Yes.

Sir R. Lloyd. How was he armed?

Gray. In the same form as he was before.

Sir R. Lloyd. How was he dressed?

Gray. In the same clothes he was before.

Sir R. Lloyd. Was he then at the head of his troop?—*Gray.* Yes, he was.

Sir R. Lloyd. Do you speak of the same life-guards?—*Gray.* Yes.

Sir R. Lloyd. How long was it before the battle of Culloden that you saw him at the head of his troop?—*Gray.* About ten days.

Att. Gen. I desire he may explain who he meant, when he said they all wore a white cockade.—*Gray.* The rebel army.

Lord Balmerino. I observe, that none of the witnesses who have been called, have made good the charge against me, that I was at Carlisle on the 10th of November, nor for some time afterwards. I believe it will be to little purpose, to go any further; and am sorry I have taken up so much of your lordships' time; for I was of opinion, that if any article in the indictment was not good against me, all the indictment fell.

L. H. S. What does your lordship insist upon? Do you insist on the day being mistaken in the indictment, or that you were not present at the actual taking either of the town or castle of Carlisle by the rebels?

Lord Balmerino. That I was not at Carlisle, either at the taking of the town or the castle.

Serj. Skinner. I beg leave to call another witness.

James Paterson sworn.

Serj. Skinner. Look at the noble lord there: Do you know the noble lord?

Paterson. Yes, I know the noble lord very well.

Serj. Skinner. How long have you known him?

Paterson. Ever since we marched from Lauder.

Serj. Skinner. What time was that?

Paterson. I remember it was the first night we marched from Dalkeith.

Serj. Skinner. What time was that you marched from Dalkeith?

Paterson. I don't remember the time particularly.

Serj. Skinner. How long before Christmas was it?

Paterson. I can't say I remember how long it was before Christmas.

Serj. Skinner. Where was it this noble lord lodged?

Paterson. He lodged at the same house I happened to be in.

Serj. Skinner. What command had he at that time?

Paterson. I did not know that he had any command then.

Serj. Skinner. Do you remember his coming to England?—*Paterson.* Yes.

Serj. Skinner. Do you remember what month that was?

Paterson. No; I don't remember the time exactly.

Serj. Skinner. Do you remember being at Long Town?—*Paterson.* Yes.

Serj. Skinner. Was the Pretender's son at Long Town?—*Paterson.* Yes.

Serj. Skinner. Was lord Balmerino there?

Paterson. He was there as a witness to the proclaiming the Pretender.

Serj. Skinner. Were you present when the Pretender was proclaimed? And was he there?

Paterson. Yes.

Serj. Skinner. In what manner did the noble lord attend there, when the Pretender was proclaimed?

Paterson. My lord only appeared as one of the volunteers with the Pretender's life-guards.

Serj. Skinner. Was that lord at the bar with them?—*Paterson.* Yes.

Serj. Skinner. Was he at the head of them then?

Paterson. No; he stood only amongst the rest.

Serj. Skinner. What dress had he on?

Paterson. A blue coat with red facings.

Serj. Skinner. What was the uniform dress of those guards?

Paterson. A blue coat with red facings.

Serj. Skinner. Had he any thing in his hat?

Paterson. Yes; he wore a cockade.

Serj. Skinner. What colour was his cockade?

Paterson. White.

Serj. Skinner. Was that wore by all the Pretender's forces?—*Paterson.* Yes.

Serj. Skinner. Where did you see my lord next?—*Paterson.* At Lancaster.

Serj. Skinner. What was he doing there?

Paterson. He was witness to the proclaiming the Pretender there.

Serj. Skinner. Were there any guards there?

Paterson. I remember very well all the life-guards were present there, and the prisoner was with them.

Serj. Skinner. How did the prisoner at the bar appear there?

Paterson. He was at the head of his troop there.

Serj. Skinner. How was he armed?

Paterson. With a brace of pistols and a sword.

Serj. Skinner. What sort of a sword was it?

Paterson. A highland sword.

Serj. Skinner. Was it drawn?

Paterson. Yes.

Serj. Skinner. Where did you see him next?

Paterson. I remember to have seen him at the battle of Falkirk.

Serj. Skinner. Was he at the head of any forces there?

Paterson. Yes; he was at the head of his corps there.

Serj. Skinner. Was his sword drawn then?

Paterson. Yes.

Serj. Skinner. Was the troop engaged?

Paterson. No; I think it was not.

Serj. Skinner. Do you know what became of him afterwards?

Paterson. I saw him frequently afterwards; but I can't tell any particular place, but at the battle of Culloden.

Serj. Skinner. Where did you see him then?

Paterson. I remember to have seen him drawn up at the head of his corps at the battle of Culloden.

Serj. Skinner. Was his sword drawn?

Paterson. Yes, his sword was drawn.

Serj. Skinner. Did you see him any where afterwards?

Paterson. I saw him afterwards at Castle Grant; I saw him come in there after the battle of Culloden.

Serj. Skinner. Was he taken prisoner there?

Paterson. As far as I can tell, my lord surrendered there.

Att. Gen. Do you remember to have seen the noble lord at Carlisle?

Paterson. Yes, I remember to have seen my lord march into Carlisle on their retreat, at the head of his own corps.

Att. Gen. We have done with this witness: will the noble lord ask him any questions?

Lord Balmerino. He might see me at Long Town, but not at Carlisle at the proclaiming the Pretender; for I was not there till a fortnight after.

Att. Gen. Did you see the prisoner at Carlisle?

Paterson. As far as I remember any thing in the world, I saw my lord there.

Lord Balmerino. What was this witness there?

Paterson. My lord, I was a gentleman's servant.

Lord Balmerino. I don't remember him: I want to know what regiment this man was in; or what he was; and what was his business?

L. H. S. You hear what his lordship says: what were you there?

Paterson. I was a gentleman's servant in the first troop of life-guards.

L. H. S. Whose life-guards?

Paterson. The Pretender's guards; I was servant to Mr. Hume.

Lord Balmerino. I was at Long Town then.

Roger M'Donald sworn.

Att. Gen. Give an account, whether you saw the prisoner march with the rebel army, at the time of their first setting-out, either in Scotland or England, and where.

M'Donald. The first time I saw him was at Holyrood-house.

Att. Gen. What did you see him do there?

M'Donald. The only thing that I observed was, that I saw the prisoner with the guards; but he was in no place of distinction.

Att. Gen. What guards?

M'Donald. The Pretender's guards.

Att. Gen. Where did you see him with them?

M'Donald. In the court of Holyrood-house.

Att. Gen. Was the Pretender's son at Holyrood-house at that time?

M'Donald. He was at Edinburgh at that time.

Att. Gen. Where did you see him the next time?

M'Donald. The second time that I remember to have seen the prisoner, was on the retreat, coming from Derby, entering into the town of Manchester, when the horse were formed at the outside of the town of Manchester.

Att. Gen. How did the prisoner appear there?

M'Donald. With his sword drawn at the head of his squadron.

Att. Gen. Was the prisoner at the bar at the head of those rebels that were drawn up?

M'Donald. Yes; I remember to have seen the prisoner in particular.

Att. Gen. Did he command any part of the rebel army?

M'Donald. Not to my knowledge; but I remember to have seen him there.

Att. Gen. Do you remember seeing him any where else?

M'Donald. The next time I particularly remember was, that I saw him at the battle of Falkirk, after the squadron was formed, and lord Elcho's horse were drawn up there.

Att. Gen. Did you see the prisoner command any horse there?

M'Donald. The squadron was not fully formed when I saw him; but I remember to have seen the prisoner at the bar at the head of a squadron of horse there.

Att. Gen. Did you, at any time, see him marching out of Elgin of Murray to Inverness, at the head of the same squadron?

M'Donald. I remember to have seen the prisoner at the head of the same squadron at Inverness.

Att. Gen. Did you see him in any particular dress at that time?

M'Donald. I don't remember his dress then; but at Manchester I remember it was a suit of blue turned up with red cuffs.

Att. Gen. Was it the uniform dress of any part of the Pretender's army?

M'Donald. It was the uniform dress of the Pretender's guards.

Att. Gen. Was there any particular distinguishing mark that he wore?

M'Donald. I can't say I do remember any.

Att. Gen. Had he a white cockade?

M'Donald. Yes; he had.

Att. Gen. Was that the common distinguishing mark of the rebel army?

M'Donald. Yes; it was the distinguishing mark. They all wore white cockades; that was the general thing that was worn.

Att. Gen. We will trouble your lordships with no more witnesses.

L. H. S. Will your lordship ask this witness any questions?

Lord Balmerino. No, my lords; I am sorry I have taken up so much of your lordships' time.

L. H. S. The king's counsel having gone through their evidence, now is your lordship's time to make your defence.

Lord Balmerino. My lords, I have said all that I have to say. I observe, that none of the witnesses have agreed upon the day charged in the indictment; and I have nothing else to say.

L. H. S. You say the witnesses have not proved, that your lordship was at Carlisle on the particular day laid in the indictment: but the witnesses have proved, that they saw you in arms at the head of your troop of rebels at Carlisle. If your lordship can disprove that fact, this is your time to do it. Have you any thing to say in support of what you have observed, about the particular day not being proved, as laid in the indictment? I should be glad to know upon what your lordship would put your defence. They have proved you to be in arms at Carlisle in November.

Lord Balmerino. But not at the taking of Carlisle; and I can prove, I was not there at the time Carlisle was taken; but was twelve miles off.

Serj. Skinner. The witnesses don't say he was at the surrender of the town; but he was in the town after it was taken by the rebels; and that he marched into the town at the head of his troop. He was with them, on their march, at Long Town and Lancaster, and several other places; and, if we have made out any one fact laid in the indictment, it is sufficient, and, I hope, your lordships will think the treason is proved.

Att. Gen. I beg your lordships would spare me a few words upon this occasion: and, if I am right, I take the prisoner's objection to be this, that the witnesses for the crown have not proved the facts to be committed on the precise day laid in the indictment.

Lord Balmerino. That is not the case: you mistake it entirely.

L. H. S. My lord Balmerino objects, that it is not proved he was at Carlisle, when it was actually taken by the rebels.

Att. Gen. Then I apprehend the objection to be only this, that he was not there at the taking of Carlisle.

Lord Balmerino. That is the objection.

L. H. S. What have the king's counsel to say to that objection?

Serj. Skinner. My lords, the objection made by the noble peer at your lordships' bar, is, that on the 10th day of November, the day laid in the indictment, he was not at Carlisle; and that he was not at the taking of that city and castle.

My lords, the day laid in the indictment is merely matter of form. Some day, previous to the indictment, must be laid; but the proof is not tied up to that time: any proof, before or after the day, may be admitted; and it is sufficient, if it be before the time of preferring the indictment.*

* See Leach's Hawkins's Pl. of the Crown, book 2, ch. 46, § 179.

And suppose the noble lord was not present at the time that the city and castle of Carlisle were actually taken; yet it is proved, that he marched into the city armed, and at the head of his troop, the second day after the castle was taken; so that he was in the possession of the city and castle. And the detainer of the king's town or castle is high treason: and where many acts of treason are laid in an indictment of high treason, if any one charge be made good the person must be convicted.

I therefore submit, that there is no weight in the objection made by this noble lord.

Att. Gen. My lords, the objection, if it can be of any use to the noble lord, must be to shew, that the evidence is not sufficient to induce your lordships to find him guilty. The indictment consists of a general charge of levying war, together with the circumstances of being arrayed and assembled in a warlike manner against his majesty, and the particular fact of entering, possessing, taking, and defending the city and castle of Carlisle against his majesty. The former is fully proved; for every one of the witnesses prove, he marched in the rebel army, arrayed in a hostile manner, riding at the head of the second troop of the Pretender's son's horse-guards. As to the other fact, of his entering and taking of Carlisle; it is proved by three witnesses, that the prisoner came into Carlisle, at the head of his troop, when the rebels were in possession of it, and held it for the Pretender: which is a full, positive proof of that fact.

But the noble lord objects, that he was not present at the taking.

There are two clear answers to this: one, that neither the law, nor the charge in the indictment makes that necessary, if it appears that he did enter it, and was in possession of it, in a hostile manner.

Another is, That if that particular fact was not at all proved, it could be of no service to his lordship, while there is another act of treason charged and proved.

By the law, every entry and possession of the king's town or fortress in a hostile manner, against the king, is high treason; nor does the law distinguish how that entry and possession is obtained, if it is done by rebels, and in opposition to the royal authority. His lordship neither denies his entry and holding the possession for the Pretender, nor disputes the weight of the evidence that proves it: and it can do him no good, if it appeared never so clearly, that the time of his personal entry was not till after the rebel army had made themselves masters of it.

But if this fact was as doubtful as it is clear, the evidence of the other part of the charge is certain and unobjected to; and there is nothing plainer, in point of law, than that the proof of any one overt act, laid in the indictment, is sufficient, though no evidence is given of any others that are charged.

The noble lord, though he now seems to

give it up, did object at first, that the evidence did not prove the treason on the 10th of November, the day charged in the indictment. Lest that should have any weight, I would only say, that it has been frequently adjudged, that, though a precise day must be charged, the day is immaterial in point of proof: so it was particularly in the case of sir Henry Vane, in the time of king Charles the 2nd: he was indicted for high treason; and it was laid in the indictment, that the facts were committed on a certain day, in the 11th year of king Charles the 2nd. It was only proved, that they were committed in the 1st year of his reign, and yet held it was sufficient to support the indictment.

The question, therefore, on the whole, will only be, whether treasonable acts of hostility have been proved upon the noble lord? And, as that can admit of no doubt, neither can his being guilty of the treason, charged on him by this indictment, admit of any.

Sir John Strange. My lords, I don't know whether it is necessary for all of us to speak in this case. For my part, I shall say but a word or two. Here are several acts of treason that are alleged in the indictment; and whoever hath given the noble lord, who is the prisoner, to understand, that every particular act must be proved (if any such advice can have been given him) hath been mistaken; because it is clear and certain, in point of law, that though ever so many facts are laid in the indictment, yet, if there is legal proof of any one of those facts, which is high treason, it is sufficient to found your lordships' judgment, that the person so proved guilty of any particular fact, is to be adjudged guilty of high treason.

Your lordships, however, will be pleased to observe, how many particular acts are laid in the indictment, and whether they are not all proved. First, it is laid, That the noble lord at the bar did, with many others, arm, array, and dispose himself in a warlike and hostile manner against the king. This, my lords, is clearly proved; for the witnesses have told your lordships, that he had the command of the second troop of the Pretender's life-guard, which was part of the rebel army: that he marched at the head of this troop, with drums beating, and colours displayed: that he wore a particular habit, which was blue turned up with red, a laced hat, and a white cockade, being the uniform dress of the troop: and the being thus arrayed in this hostile manner, my lord Hale, in his first volume, H. P. C. 150. 152, says, is levying war against the king; and this has been fully proved to your lordships against this noble lord, the prisoner at the bar, by more than two witnesses. His being present at several places at the proclaiming of the Pretender has been likewise proved to your lordships: and we use it as a circumstance to lead your lordships' judgment, with what intent he was thus armed and arrayed in a hostile manner, which was plainly in order to dethrone his ma-

jesty, and place a Pretender upon the throne. This has been proved against the noble lord at the bar to have occurred at two places, where this proclamation was made.

Another circumstance which has been proved, is, his being drawn up and formed at the battle of Falkirk; and though the witnesses do not say, that that party of the Pretender's life-guards was actually engaged upon this occasion, yet, I humbly apprehend, that is not material. There can be no doubt, in point of law but that every body, who is so drawn up in a warlike and hostile manner, is waging war, though every party is not engaged. He was there drawn up with his forces with his broad sword drawn, and ready to engage at that time. And, my lords, we trace him from thence to the glorious field of Culloden; and your lordships observe he was there an officer, leading his squadron, and commanding the second troop of life-guards of the Pretender; and after the disaster which befel them that day, and for which we have great reason to be thankful, the noble lord at the bar surrendered himself to the king's forces, as one of those engaged against the king at that battle. My lords, lay all these things together, and your lordships will see, it is no way necessary to prove, whether this noble lord was present at the first taking of Carlisle, or not: Which seems to be the only point on which the noble lord has rested his defence.

But, my lords, if it was necessary to shew that, I apprehend it is proved. The taking of a town or city is not the act of a single man, but the act of a great number of persons, got together for that purpose; therefore, as to any man, who was a part of the rebel army, and went into the city of Carlisle, after it surrendered to the rebels, and joined with them, it is an actual taking of that city: For it was the force and terror without the city, and the appearing in the hostile manner, already described, which occasioned the surrender of the place. Every one, therefore, who joined in this force and terror, is instrumental in the taking of the town. It is proved, that he entered into Carlisle, and was in possession of the town; it is proved, by more than one witness, that he did it at the head of the Pretender's life-guards: He lay there one night, while the rebels were in possession of the town, and then he marched out southward. Then there is his returning back to Carlisle; taking possession of it the second time; his being there with the young Pretender; his going away with him and the rebel army, and leaving a garrison in the town, to defend it against the king's forces, when they should come up. My lords, this, with submission to your lordships, is a strong and clear proof, that he entered and took possession of Carlisle, and kept it against the king, as laid in the indictment; and whether he remained there a longer or a shorter time, whether he lay one night or twenty nights in it, makes no difference in point of law.

I don't observe, the noble lord lays much

stress upon the 10th of November's being laid in the indictment, as the day on which the treason was committed; and therefore I forbear to trouble your lordships upon it; for, to be sure, it does not signify, whether the facts committed were on the 10th of November, or any other day.

My lords, I apprehend every particular act of treason laid in the indictment, against the noble lord at the bar, is fully proved; and therefore I submit the whole to your lordships' judgment.

Sol. Gen. My lords—

Lord Balmerino. I am satisfied I was mistaken; and ask your lordships pardon, for taking up so much of your time.

Sol. Gen. I was going to have said, that I did not apprehend it necessary for me to speak upon this point from any difficulty in the objection. But as the answer to the objection depended not upon natural, but legal reasoning, and established forms, and as the noble lord had chose not to have the assistance of counsel in stating and enforcing his objection, I would, for his satisfaction, have said a word or two, not only to shew that the matter is settled by the uniform authority of all our books, and many adjudged cases; but to have explained why it has been settled, that the treason must be laid in the indictment to have been committed on a particular day, and yet, at the trial, need not be proved to have been committed on that precise day. As he has declared himself satisfied, there is no occasion to say any thing.

Then the Lord High-Steward returned back to his chair.

Lord President. My lords, I move your lordships to adjourn to the Chamber of Parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the Chamber of Parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament, in the same order they came down: And after some time, the House was adjourned again into Westminster-hall; and the Peers being there seated, the lord high steward in his chair, and the House resumed, the serjeant-at-arms made proclamation for silence, as usual.

L. H. S. Your lordships were pleased, in the Chamber of Parliament, to come to a resolution, that the opinion of the learned and reverend judges should be taken upon the following question, viz. Whether it is necessary, that an overt act of high-treason should be proved to have been committed on the particular day laid in the indictment? Is it your lordships' pleasure, that the judges do now give their opinions on that question?

Lords. Ay, ay.

L. H. S. My Lord Chief Justice.

L. C. J. Lee. The question proposed by

your lordships is, Whether it be necessary, that an overt-act of high-treason should be proved to be committed on the particular day laid in the indictment?

We are all of opinion, that it is not necessary to prove the overt-act to be committed on the particular day laid in the indictment: but as evidence may be given of an overt-act before the day, so it may be after the day specified in the indictment; for the day laid is circumstance and form only, and not material in point of proof: and this is the known, constant course of proceeding in trials.*

L. H. S. Lieutenant of the Tower, take my lord Balmerino from the bar.

Lord Balmerino. Will your lordships be pleased to allow me to speak two words?

L. H. S. If you think fit, my lord.

Lord Balmerino. Your lordships may think I have had very bad advice in this case: but to do justice to my solicitor, Mr. Ross, he laid my case before counsel; and he told me, they were of the same opinion with what the king's counsel have offered: but I myself had a notion, that not being at Carlisle at the time it was taken, I was not within the indictment; and I thought there was something in the objection; and that was the reason of my giving your lordships so much trouble. I am very sorry for it; and ask your lordships' pardon.

L. H. S. Has your lordship any thing further to offer?

Lord Balmerino. No, my lords.

L. H. S. Lieutenant of the Tower, take my lord Balmerino from the bar.

Which was done accordingly.

L. H. S. Your lordships have heard the evidence, and every thing that has been alleged on both sides; and you have also heard the opinions of the learned and reverend judges on a particular question stated to them. The solemnity of your proceedings requires, that your lordships' opinions on the question of Guilty or Not Guilty, should be delivered severally in the absence of the prisoner,

* As to this, see Lowick's Case, vol. 13, p. 267, and the books there cited.

"Neither is the time or place laid in an overt-act charged in the indictment more necessary to be strictly proved in this than in any other case, provided a time be laid before the finding of the bill, and a place be laid within the county. In Mr. Townley's Case it was strongly pressed as an objection under the clause in the stat. of William, above referred to," [7 W. 3.] "that all the overt-acts proved were subsequent to the time laid in the record. But all the Court were clearly satisfied that such strictness was not necessary, but that it was sufficient, as at common law, to prove the overt-acts on any day before the finding of the bill. The same was ruled on lord Balmerino's trial in the House of Lords, by the advice of all the judges." East's Pleas of the Crown, c. 2, s. 60.

beginning with the junior baron; and that the prisoner should afterwards be acquainted with the result of those opinions by me. Is it your lordships' pleasure to proceed now to give your opinions on the question of Guilty, or Not Guilty?—*Lords.* Ay, ay.

Then the Lord High Steward stood up uncovered; and beginning with the youngest peer, said,

L. H. S. Henry Arthur lord Herbert of Cherbury, what says your lordship? Is Arthur lord Balmerino Guilty of the high-treason whereof he stands indicted, or Not Guilty?

Whereupon Henry Arthur lord Herbert of Cherbury, standing up in his place uncovered, and laying his right hand upon his breast, answered—Guilty, upon my honour.

In like manner the several lords after-mentioned, being all that were present, answered as followeth:

Lords—Sandys, Edgecumbe, Fitzwilliam, Chedworth, Ilchester, Monfort, Talbot, Raymond, Monson, Hobart, King, Ducie, Cadogan, Romney, Onslow, Bathurst, Masham, Trevor, Mansell, Montjoy, Hay, Somerville, Hervey, Conway, Butler of Weston, Craven, Cornwallis, Berkeley of Stratton, Ward, Byron, Strange, Clifton, St. John of Bletsoe, North and Guildford, Willoughby of Parham, Wentworth of Nettlested, Willoughby de Broke, Dudley, Delawarr:—Guilty, upon my honour.

Viscounts—Torrington, Harcourt, Falmouth, Cobham, St. John, Lonsdale, Hatton, Weymouth, Townshend, Fauconberg, Say and Sele, Hereford:—Guilty, upon my honour.

Earls—Brooke, Clinton, Leicester, Bath, Harrington, Orford, Effingham, Fitzwalter, Waldegrave, Ker, Graham, Pomfret, Macclesfield, Harborough, Stanhope, Cowper, Halifax, Granville, Tankerville, Dartmouth, Strafford, Ferrers, Portmore, Dunmore, Findlater, Home, Sutherland, Cholmondeley, Godolphin, Poulett, Grantham, Jersey, Rochfort, Warrington, Scarborough, Gainsborough, Abingdon, Berkeley, Radnor, Litchfield, Shaftesbury, Burlington, Ailesbury, Doncaster, Anglesey, Sandwich, Thanet, Chesterfield, Winchelsea and Nottingham, Stamford, Peterborough and Monmouth, Westmorland, Warwick and Holland, Northampton, Exeter, Salisbury, Suffolk and Berkshire, Lincoln, Pembroke and Montgomery, Derby:—Guilty, upon my honour.

Marquises—Rockingham, Lothian, Tweeddale:—Guilty, upon my honour.

Dukes—Chandos, Manchester, Portland, Newcastle, Kingston, Ancaster and Kesteven (Lord Great Chamberlain), Argyll, Montagu, Rutland, Marlborough, Bedford, Leeds, Bolton, St. Alban's, Beaufort, Richmond, Grafton, (Lord Chamberlain) Devonshire (Lord Steward):—Guilty, upon my honour.

Earl Gower, (Lord Privy Seal,) and the Duke of Dorset (Lord President of the Council,) Guilty, upon my honour.

Then the Lord High Steward, laying his right hand upon his breast, said;

Lord High Steward. My lords, I am of opinion, that Arthur lord Balmerino is Guilty of the high-treason whereof he stands indicted, upon my honour.

L. H. S. Your lordships have unanimously found, that Arthur lord Balmerino is Guilty of the high-treason whereof he stands indicted. Is it your lordships' pleasure, that he should be called in, and acquainted therewith?

Lords. Ay, ay.

Proclamation was then made for the lieutenant of the Tower to bring the prisoner to the bar: which was done in the same order as before; and afterwards proclamation made for silence, as usual.

L. H. S. Arthur lord Balmerino, the Lords have considered of the charge of high-treason which has been brought against you; they have likewise considered the evidence, and every thing which your lordship has alleged in your defence; and, upon the whole matter, their lordships have unanimously found, that you are Guilty of the high-treason, whereof you stand indicted.

Lord President. My lords, I move your lordships to adjourn to the chamber of parliament: is it your lordships' pleasure to adjourn to the chamber of parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the chamber of parliament.

Then the Lords returned, in the order before mentioned, to the chamber of parliament: and the House being there resumed;

Ordered, That the said earls of Kilmarnock and Cromartie, and lord Balmerino should be remanded prisoners to his majesty's Tower of London, there to be kept in safe custody; and that they should be brought to the bar of the House in Westminster Hall on Wednesday next, at eleven of the clock in the forenoon, that their lordships might proceed in order to giving of judgment upon them.

THE SECOND DAY.

Wednesday, July 30, 1746.

The Lords and others came from the chamber of parliament into Westminster Hall in the same order as on Monday last; and the peers were there seated, and the Lord High Steward in his chair.

L. H. S. The House is resumed. Is it your lordships' pleasure, that the judges may be covered?

Then the Serjeant at Arms made proclamation for silence, as usual; and afterwards the following proclamation:

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoners, William earl of Kilmarnock, George earl of Cromartie, and Arthur lord Bal-

merino, to the bar, pursuant to the order of the House of Lords.

The deputy governor of the Tower brought the prisoners to the bar in the like form as before; and then they kneeled down.

L. H. S. Your lordships may rise.

The Serjeant at Arms made proclamation for silence, as usual.

Att. Gen. My lords, it appears, that the three noble lords at the bar have been severally indicted for high-treason, in levying war against his majesty. They have severally been arraigned; and, to their indictments, two of the noble lords, the earls of Kilmarnock and Cromartie, have pleaded guilty; and the other, my lord Balmerino, has pleaded not guilty, and put himself upon his trial by his peers. As to the two noble lords, who have pleaded guilty, I pray your lordships' Judgment against them, according to that confession; and, as to the lord Balmerino, who hath pleaded not guilty, and put himself upon his trial by his peers, your lordships, upon hearing the evidence, having found him guilty, I also pray your lordships' Judgment accordingly against him.

L. H. S. William earl of Kilmarnock, you stand indicted of high-treason, in levying war against his majesty; to which you have pleaded guilty, and are thereby convicted: what has your lordship to say, why judgment of death should not pass upon you, according to law?

Here the Lord High Steward asked leave to go down to the table: which being done; proclamation was made for silence, as usual.

Earl of Kilmarnock. My lords; I shall not attempt to say any thing in justification of a crime, which is of too heinous a nature to be vindicated; and which any endeavour to excuse would rather aggravate than diminish. With unfeigned humility I am ready to submit to the sentence I am too conscious I have deserved. I have already owned myself guilty; and, covered with confusion and grief, I throw myself at his majesty's feet for mercy.

I shall plead no excuse for my behaviour, in a circumstance which makes me so much the more unhappy, as it has effaced my former character, and blotted out the memory of my constant attachment to his majesty's interest all the preceding part of my life.

But, if a man's former uniform conduct can be any evidence of his principles, and way of thinking, I may appeal to mine. My lords, I appeal to the world, if ever any sentiment of the nature of the crime I am now arraigned for, ever appeared in it; or if the contrary was not very conspicuous through my whole life and conversation.

My sphere of action, indeed was narrow; but, as much as I could in that sphere, it is well known, I always exerted myself to the utmost in every part of his majesty's service I had an opportunity to act in, from my first appearance in the world, to the time I was drawn into this

crime, for which I now appear before your lordships; in which I did not engage till very late, not till many weeks after the battle of Preston.

While I was engaged, it was my constant care, as far as it lay in my power, to protect and prevent any injuries to his majesty's faithful subjects in their persons, houses, or estates: for the truth of which I can appeal to every town and country, through which I passed, or at any time halted in.

I had the same regard for the prisoners that were taken: and, I believe, officers, private men, and others, will vouch for me, that they had better usage, and their condition was rendered more supportable, through my means, though I never had any particular charge of them. I must at the same time own, that all I did, or could do, in this way, for the service of particular persons, is no atonement for the blood I have been accessory to the spilling of; nor do I plead it as such, or at all in defence of my crime.

I have a son, my lords, who has the honour to carry his majesty's commission; whose behaviour, I believe, will sufficiently evince, that he has been educated in the firmest Revolution principles, and brought up with the warmest attachment to his majesty's interest, and the highest zeal for his most sacred person, and the title of his illustrious house to the crown of these realms.

That he was impressed with a firm and settled opinion, that the Revolution was just and necessary; and that civil and religious liberty and property cannot be secured to the nation, otherwise than by the strictest adherence to these principles, and maintaining and supporting the succession to the crown, as it is by law established in the person of his most sacred majesty, and his illustrious house.

It was my chief care to instruct him in these principles from his earliest youth; and to confirm him, as he grew up, in the justice and necessity of them to the good and welfare of the nation. And, I thank God, I have succeeded: for his father's example did not shake his loyalty; the ties of nature yielded to those of duty: he adhered to the principles of his family, and nobly exposed his life at the battle of Culloden, in defence of his king, and the liberties of Britain; which I, his unfortunate father, was in arms to destroy.

I was instructed in the same principles myself from my infancy, by the best of fathers, who distinguished himself early on his late majesty's accession, by his zeal and activity in suppressing the rebellion in 1715 (in which he contracted his death, that followed soon after,) as was well known then, and may still be remembered by some of your lordships. I then had the honour to serve under him, as far as my years would admit of, in the same cause which my family had always been remarkable for supporting, and which I have ever since strictly adhered to, both in my heart and practice, till this unhappy period.

My lords, I am not one of those dangerous persons, who can raise a number of men when they will, and command them on any enterprise they please: my interests lie on the south side of Forth, in the well inhabited and well affected counties of Kilmarnock and Falkirk, in the shires of Ayr and Stirling. I have the honour to speak to those who know the map, the situations of these countries, and the dispositions of their people; these places are so well affected (and, perhaps, partly through my means), that any influence I, or any other, could have on them to the contrary, would be very small; and if I could have had any, I did not use it on this occasion. Though I was, in the months of December and January last some weeks at Falkirk, I did not raise a single man out of it; and though, immediately before that, I was a week at Glasgow, a few miles from Kilmarnock, I brought nobody from thence. These last, indeed, were much strengthened in their loyal principles by my father's long residence, and by my being much among them; and I used my endeavours, with success, to confirm them in those sentiments, in a visit I made them last September; when I passed some days with them, about the time of, and after the battle of Preston: at that time I got them put in as much readiness to act for his majesty's service, as the law would then admit of; and procured their settling a correspondence with their neighbouring boroughs of Ayr and Irvine, for their common defence: which had so good an effect, that the town of Kilmarnock alone had soon a good body of militia on foot, which marched into Glasgow the beginning of winter.

I cannot omit to inform your lordships, that, at the battle of Culloden, I not only surrendered myself, but I surrendered when it was very easy for me to have escaped, as all that body did with whom I was when they gave way. Lord Ancram, to whom I made my surrender, can acquaint your lordships, that, when I came up to him, I was quite alone, at a very great distance from those I had left; and that I neither was running, nor pursued by any enemy. But though I could have escaped, I did not choose it; because the consequences in an instant appeared to me more terrible, more shocking, than the most painful or ignominious death. To throw myself into the hands of a foreign power, the natural enemy to my country, with whom to have merit, I must persist in continued acts of violence to my principles, and of treason and rebellion against my king and country; I had already been too far engaged with those, who were encouraged by that power, to think of continuing in so criminal an error; and therefore I chose to surrender, and commit myself to his majesty's mercy.

I beg leave to repeat what I said before, That I did not mean to advance any thing in excuse, or even in mitigation of my crime: I only pray to be looked on, by your lordships, as an object of his majesty's compassion; and,

if I am so happy, I beg leave to implore your lordships' intercession with his majesty for mercy, in my behalf. It is your lordships' intercession, and that of my countrymen alone, that I implore. I heard there was an offer of mediation made by a foreign prince at war with his majesty; and I heard it with an indignation that ought to fire the heart of every Briton, when a French king dares attempt to direct, or in any respect influence, the counsels or determinations of a king of Britain; or presume to interpose between his majesty and his offending subjects. I was but too far drawn in, and unhappily engaged, with those who were assisted and influenced by that prince; and I never can sufficiently testify my sorrow and repentance for it: but I would look on it as the highest aggravation of my crime, to hope, or even to wish for favour through his office, by whose means chiefly, I believe, they were misled, with whom I was necessary to the disturbing the peace of these nations, and swerving from my duty and allegiance to his majesty, which all the former part of my life I had kept inviolable.

It is by Britons only, that I pray to be recommended to a British monarch. If his majesty shall be pleased, from the steady loyalty of my family, from my father's past services, from my own constant adherence to his majesty's interest, from my present anguish for having ever been concerned in this unnatural rebellion, and from my undissembled sorrow and remorse for it, which must attend me to my last moments: if from these, but much more from his own unbounded mercy, my royal master shall incline to spare that life which I have justly forfeited, let me owe it to his majesty through the intercession of your lordships, who are witnesses to my grief and repentance.

But if justice will not allow of mercy, my lords, I will lay down my life with patience and resignation: my last breath shall be employed in the most fervent prayers for the preservation and prosperity of his majesty, and his august house, and to beg his forgiveness, and the forgiveness of my country.

L. H. S. George earl of Cromertie, You stand indicted of high-treason, in levying war against his majesty; to which you have pleaded Guilty, and are thereby convicted: What has your lordship to say, why judgment of death should not pass upon you, according to law?

Earl of Cromertie. I have now the misfortune to appear before your lordships, guilty of an offence of such a nature, as justly merits the highest indignation of his majesty, your lordships, and the public: and it was from a conviction of my guilt, that I did not presume to trouble your lordships with any defence. As I have committed treason, it is the last thing I would mean to justify it: my only plea shall be, your lordships' compassion; my only refuge, his majesty's clemency.

Under this heavy load of affliction, I have still the satisfaction, my lords, of hoping, that my past conduct, before the breaking out of the rebellion, was irreproachable, as to my attachment to the present happy establishment, both in church and state: and, in evidence of my affection to the government, upon the breaking out of the rebellion, I can appeal to the then commander in chief of his majesty's forces at Inverness, and to the lord president of the court of session in Scotland, who, I am sure, will do justice to my conduct upon that occasion.

But, my lords, notwithstanding my determined resolution in favour of the government, I was most unhappily seduced from that loyalty in an unguarded moment, by the arts of desperate and designing men: and it is notorious, my lords, that no sooner did I awake from that delusion, than I felt a remorse for my departure from my duty; but it was too late.

Nothing now, my lords, remains, but to throw myself, my life, and fortune upon your lordships' compassion; but those, my lords, as to myself, are the least part of my misery.

I have involved an innocent wife (no party to my guilt), and, with her, an unborn infant, to share its penalty: I have involved my eldest son, whose infancy, and regard to his parent hurried him down the stream of rebellion: I have involved also eight innocent children, who must feel their parent's punishment, before they know his guilt.

Let them, my lords, be pledges to his majesty; let them be pledges to your lordships; let them be pledges to my country, for mercy: let the silent eloquence of their grief and tears, let the powerful language of innocent nature, supply my want of eloquence and persuasion: let me enjoy mercy no longer than I deserve it; and let me no longer enjoy life, than I shall endeavour to efface the crimes I have been guilty of. Whilst I thus intercede for your lordships' recommendation to his majesty for mercy, let my remorse for my guilt, as a subject; let the sorrows of my heart, as a husband; let the anguish of my mind, as a father, speak the rest of my misery! Your lordships are men, you feel as men; but may none of you ever suffer the smallest part of what I suffer!

But, after all, if my safety shall be found inconsistent with that of the public, and nothing but my blood thought necessary to atone for my unhappy crimes; if the sacrifice of my life, my fortune, and family, are judged indispensable for stopping the loud demands of public justice; if, notwithstanding all the allegations that can be urged in my favour, the bitter cup is not to pass from me; not mine, but thy will, O God, be done!

L. H. S. Arthur lord Balmerino, When you were last at this bar, I acquainted your lordship, That upon your trial, your peers had unanimously found you guilty of the high-treason of which you stand indicted, whereby

you are convicted: What have you to say, why judgment of death should not pass upon you, according to law?

Lord Balmerino. My lords, I have here a paper in my hand, which says, There are some reasons, why judgment should not pass against me. I desire your lordships will let it be read.

L. H. S. Will your lordship please to read it yourself?

Lord Balmerino. I desire your lordships would let it be read.

L. H. S. My lords, This paper, which is offered by my lord Balmerino, cannot be read at the table; but your lordships may give leave, that a clerk may go down to the bar, and read it for the prisoner.

Lords. Ay, ay.

Clerk of the Crown reads the Paper; viz.

July 29th, 1746.

It is conceived, that the late act of parliament, empowering his majesty to transport such as are taken in arms from one county to another, where they may be tried by the course of the common law, did not take place, till after the time that the facts, implying treason, were actually committed by the accused prisoners; and, if so, the grand jury of Surry, or of any other county whatsoever, where these acts of treason are not alleged to have been committed, could not, agreeable to law, find bills against such prisoners: And it may, on that score, be prayed, That the indictment be quashed, or that an arrest of judgment be thereupon granted.

NAT. WILLIAMSON.

If the bill, found by the grand jury, has any flaw, so as to make it illegal, all the superstructure falls of course. *NAT. WILLIAMSON.*

L. H. S. What has your lordship to offer upon this paper?

Lord Balmerino. I say, my lords, if the grand jury of the county of Surry had not power to find a bill of indictment against me, I can't have judgment pass against me; for I can't see, how the indictment can be good.

L. H. S. Has your lordship any thing more to offer?—*Lord Balmerino.* No, my lords.

L. H. S. Your lordships hear what is alleged by my lord Balmerino.

Earl of Bath. I desire my lord Balmerino may be asked, Whether he knows, that he is entitled to have counsel, if he thinks fit?

L. H. S. Has not your lordship been acquainted, before this time, that you were entitled to have counsel, if you thought fit to apply for it?

Lord Balmerino. Yes, my lords; I was acquainted some time ago, that I might have counsel; but I have not had time to speak to any on this paper. I received this paper but within this half hour from the constable of the Tower.

L. H. S. If you were told, that you might have counsel, why did not your lordship apply for counsel before?

Lord Balmerino. I told your lordships the

other day, That I did not know I should have occasion for counsel. I have had no counsel to advise me on this paper. Do your lordships think fit to allow me counsel now?

L. H. S. Doth your lordship now move for counsel?

Lord Balmerino. Yes, my lords, I do, upon this point only.

The Lord High Steward went back to his Chair.

L. H. S. My lords, By the statute of the seventh of king William the third, for regulating trials in cases of high-treason, my lord Balmerino might have had counsel assigned him by your lordships to make his full defence, if he had thought fit to apply for that purpose: and as he had long ago, by your order, a solicitor assigned him, with liberty of access to him at all seasonable times, he admits that he was rightly informed concerning that matter. It seems his lordship did not think it proper to apply for counsel before now, though he admitted, on Monday last, that he had had the advice of counsel upon his case; but he has now moved your lordships to assign him counsel, to speak to one particular point offered by him in arrest of judgment. As this is the state of the proceeding, it is proper for your lordships' consideration, Whether before you appoint counsel to argue a particular point, you will not have that point so far opened, as to see, whether there is any colour in it, or not. This will best appear, by hearing one of the king's counsel state the matter upon the act of this session of parliament, referred to by the paper which was just now read; and then possibly my lord himself may be so well satisfied, as not to insist on having counsel assigned to argue it.

Duke of Newcastle. As the prisoner at the bar has made his objection, and moved an arrest of judgment, I think one of the king's counsel ought to have liberty to be heard to that matter. Your lordships will then see, what weight there is in the objection insisted on by the prisoner, and be the better able to determine about assigning counsel to argue it. I am therefore of opinion, that the king's counsel should be heard in the manner proposed by my lord high steward.

Earl Granville. By the known rules and usage of parliament, there can be no debate in this place; and therefore I move your lordships to adjourn to the chamber of parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the chamber of parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the chamber of parliament.

The Lords and others returned to the chamber of parliament in the same order they came down; and after some time, the House was adjourned again into Westminster-hall; and the Peers being there seated, the Lord High Steward in his Chair, and the House resumed, the Serjeant at Arms made proclamation for silence, as usual.

L. H. S. My lord Balmerino, the Lords have, in their House above, unanimously come to this resolution, that I should ask your lordship, whether you do now desire that counsel should be assigned you; and that I should acquaint you, that in case you do desire it, their lordships will assign you such counsel as you think fit to propose.

Lord Balmerino. Yes, my lords, I do.

L. H. S. What counsel does your lordship desire should be assigned you?

Lord Balmerino. Mr. Wilbraham and Mr. Forrester, my lords.

Lord President. I move, that your lordships will adjourn to the Chamber of Parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the Chamber of Parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

Then the Lords went back, in the order before-mentioned, to the Chamber of Parliament.

And the House being there resumed;

Ordered, That Mr. Wilbraham and Mr. Forrester be assigned counsel for the lord Balmerino, as desired; and that they may have access to him at all seasonable times.

Ordered, That the earls of Kilmarnock and Cromertie, and the lord Balmerino, be remanded prisoners to his majesty's Tower of London, and there kept in safe custody, until the farther order of this House.

Ordered, That this House will proceed further, in order to the giving judgment against the said lords on Friday next, at eleven of the clock; and that they be then brought to the bar of this House, in Westminster-hall, for that purpose.

Friday, August 1st, 1746.

The Lords, and others, came from the Chamber of Parliament into Westminster-hall, in the same order as on Monday last; and the Peers were there seated, and the lord high steward in his chair.

L. H. S. My lords, the House is resumed.—Is it your lordships' pleasure, that the judges have leave to be covered?

The Serjeant at Arms made proclamation for silence; and afterwards the following proclamation:

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoners, William earl of Kilmarnock, George earl of Cromertie, and Arthur lord Balmerino, to the bar, pursuant to the order of the House of Lords.

The deputy-governor of the Tower brought the prisoners to the bar, in the like form as before; and then they kneeled down.

L. H. S. Your lordships may rise.

Mr. Wilbraham and Mr. Forrester, the counsel assigned to the lord Balmerino, attended.

L. H. S. My lord Balmerino, when you were last at this bar, you thought fit to move

in arrest of judgment; and desired, that counsel might be assigned you: whereupon the Lords have been pleased to assign you such counsel as you proposed. Does your lordship now desire that your counsel may be heard?

Lord Balmerino. As your lordships have been pleased to allow me counsel, I have advised with them; and my counsel tell me, there is nothing in that paper, which I delivered in on Wednesday last, that will be of any use to me: So I will not give your lordships any further trouble about it.

L. H. S. If I understand your lordship right, you do not desire your counsel should speak to that matter.

Lord Balmerino. No, my lords.

L. H. S. Do you desire your counsel should be heard?

Lord Balmerino. I desire they should not plead.

L. H. S. My lords, though the prisoners have already been asked what they had to say, why judgment should not pass upon them according to law; yet as they are now brought up at a subsequent day, it is the regular course to ask them the same question over again; because something material may possibly have arisen or occurred since the former day.

William earl of Kilmarnock, has your lordship any thing further to say, why judgment of death should not pass upon you, according to law?

Earl of Kilmarnock. No, my lords, I have nothing further to offer.

L. H. S. *George earl of Cromertie,* has your lordship any thing further to say, why judgment of death should not pass upon you, according to law?

Earl of Cromertie. No, my lords, I have nothing further to trouble your lordships with.

L. H. S. *Arthur lord Balmerino,* has your lordship any thing further to say, why judgment of death should not pass upon you, according to law?

Lord Balmerino. No, my lords; I only desire to be heard a moment. My lords, I am very heartily sorry, that I should take up so much of your lordships' time, and give you so much trouble. It was not to delay time, or to gain a few days; but only as I believed there was something in the objection that would do me service; and I beg your lordships' pardon for the trouble I have given you.

My lords, I acknowledge my crime, and I beg your lordships will intercede with his majesty for me.

L. H. S. Make proclamation for silence whilst judgment is giving.

Serj. at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king doth strictly charge and command all manner of persons to keep silence whilst judgment is giving, upon pain of imprisonment.

Lord High Steward. *William earl of Kilmarnock,* *George earl of Cromertie,* *Arthur lord Balmerino;* In the course of this solemn

VOL. XVIII.

proceeding, you have already been acquainted, That you stand convicted of the high-treason charged upon you by the several indictments on which you have been arraigned.

By this conviction, it is now finally determined, That your lordships are guilty of that crime, which not only the laws of Great Britain, but of all other countries, for the wisest reasons, adjudge to be the highest.

As it gives the deepest concern to every one of my lords your peers, to find persons of your birth and quality stained with so foul an offence, so it must give them some satisfaction, that all of you, in effect, have confessed it, two of your lordships by expressly pleading guilty upon your arraignment, and the other, by openly declaring himself satisfied with the determination of this House, upon the only point on which his defence was rested. Charity makes one hope, that this is an indication of some disposition to that repentance which your guilt so loudly calls for.

You, my lord Balmerino, have since moved in arrest of judgment; and their lordships were pleased to assign the counsel you desired, to support that motion: but, upon advising with your counsel, you have now voluntarily at the bar withdrawn it, as being wholly without foundation.

To attempt to aggravate crimes of so deep a dye, and in themselves so incapable of aggravation, against persons in your unhappy circumstances, would be a vain, as well as a most disagreeable task. And yet the duty of that place, in which I have the honour to sit, requires that I should offer some things to your consideration, to explain more fully the necessity of that justice which is this day to be administered, and to awaken in your minds a due sense of your own condition.

If any rebellion can be heightened by the circumstances attending it, it is that in which your lordships have been engaged: a rebellion against a king celebrated through the world for his mild and gracious government; the whole series of whose reign has been distinguished by the strictest adherence to the laws, and the most indulgent care of the rights of his people, unblemished with any single instance of an attempt or design to violate either.

To overturn the government of such a king, you took arms; and in consequence of this, to destroy the purest religion, and subvert the best constitution, formed and established upon the justest balance of prerogative in the crown, and liberty in the subject, for the preservation of the whole.

What did your lordships, who profess the Protestant religion, and claim the benefits of this constitution, seek to introduce in the room of these invaluable blessings? In religion, Popery, attended with its train of superstitious, and inhuman principles of persecution; in government, despotism and tyranny; and to cement and support this horrid system, an abjured Pretender, deriving his principles of religion and civil policy from Rome and France.

When I name France, I find myself obliged to remind your lordships of one circumstance, which it will become you to reflect upon in your most serious moments. The time you chose to arm against your country, was, whilst it stood engaged in a just and necessary war against that crown, and Spain; a war, to preserve its own commerce and independency, and its ancient natural allies. Though some of your lordships have thought it proper, at this bar, to disclaim that connection, or any advantage from it; yet, with that ambitious and encroaching power, you avowedly joined yourselves; by this aid, you endeavoured to effect the dreadful change you meditated; and, to such a master, to enslave this free nation.

Nor were the other countries of Europe, which have united themselves against the pernicious views of France, less essentially, though more remotely, interested in the event. From Great Britain they derived their chief assistance in this war; in her centered their hopes of support: but the contrivers of this scheme laid the axe to the root of the tree; and, by endeavouring to deliver up this kingdom a province to France, strove to cut off that resource, without which the cause of public liberty must have sunk for ever.

Thus widely spread were the calamities, which this rebellion was formed to introduce. By calling off the arms of Great Britain to her necessary self-defence, some progress was made towards effectuating one part of the intended mischief. How far it may be retrieved, and in what manner, is still in the womb of time, and in the hands of Providence: but is it not astonishing that men, who call themselves Britons and Protestants, should become the dupes and abettors of so execrable a design? A design to erase the very foundations of true religion and freedom, and to turn the riches and strength of this kingdom, through a course of ages so differently employed, into instruments of the common slavery?

After all this, to mention the plundering and devastation of particular towns and counties; the miseries brought upon private persons and families; or the many murders committed (for the death of every loyal subject killed in this rebellion was a murder);—to mention these things, though most important and moving in themselves, after the other more extensive considerations, would make them appear of less weight.

Some of your lordships, in what you have been pleased to offer for yourselves, have urged several topics to excite mercy and compassion. Those, if of any moment, are only proper for that place, where the seat of mercy must be acknowledged to be fixed. But, when arguments of compassion have been urged in behalf of the guilty, let us balance those arguments with a becoming compassion for our country, for those who have suffered innocently by the miseries which this rebellion brought upon it, and for those who died gloriously in its defence.

Give me leave to urge this a little further. Even the sufferings of those, who so far forgot their allegiance, as to adhere to, or favour, this impious cause, are in justice to be charged only to the account of such as fomented and supported it. They who take arms against a lawful established government, create the necessity of all acts requisite to be done on the side of that government, in order to repel and subdue them; or which, in the nature of things, become unavoidable in the course of suppressing them.

Upon such a subject it is more difficult to stop than to enlarge. But, whilst I am endeavouring to raise in your minds a just sense of the many evils involved in your crimes, permit me to intreat your lordships to deal impartially with yourselves, and to consider seriously, what could be your temptation to commit them.

Every one of you enjoyed the common benefits of that legal and mild government, which, in violation of the most solemn oaths, you sought to destroy; and some of you had received particular advantages from it. You, my lord Kilmarnock, and my lord Cromartie, have thought fit to appeal to your former conduct as a proof of your good principles for the support of the Revolution, and of our present happy establishment. With real grief I lament that you ever deviated from those sentiments. If, as your lordships would have us believe, they were sincere, and proceeded from the heart, what could possibly be your inducement to this sudden apostacy? Your lordships have left that a blank in your apologies; and I choose rather to leave it to be filled up by the constructions of others, than to supply it myself.

Thus much I am warranted to say: no glittering prospect of success in the beginnings of this rebellion could tempt you. On the one hand, those beginnings were so weak and unpromising, as to be capable of seducing none, but the most infected and willing minds, to join in so desperate an enterprise. On the other hand, it was impossible, even for the party of the rebels, to be so inconsiderate or vain, as to imagine that the body of this free people, blest in the enjoyment of all their rights both civil and religious under his majesty's protection; secure in the prospect of transmitting them safe to their posterity, under the Protestant succession in his royal house (of which they see so many illustrious branches); I say, it was impossible that they could imagine, the body of this free people, under these circumstances, would not rise up, as one man, to oppose and crush so flagitious, so destructive, and so unprovoked an attempt.

Happy is it for ourselves, happy for our posterity, that this was verified by the event. The rebels soon saw his majesty's faithful subjects, conscious both of their duty and interest, contending to outdo one another in demonstrations of their zeal and vigour in his service. The merchants and trading part of this great metropolis,

one of the most useful and respectable branches of the community, to their lasting honour, associated themselves, at the risk of their private fortunes, to support the public credit of their country. Men of property, of all ranks and orders, crowded in with liberal subscriptions, of their own motion, beyond the examples of former times, and uncompelled by any law; and yet in the most legal and warrantable manner, notwithstanding what has been ignorantly and presumptuously suggested to the contrary. The clergy, with a zeal becoming their holy function, regulated by christian charity, instructed their bearers by their doctrine, and led them by their example, in defence of the crown, and of our common liberties; of this reformed church, and consequently of the reformation itself.

The rebels soon saw many of the nobility and gentry, from amongst the first families, the greatest estates, and the best blood in the kingdom, surrounding the throne, soliciting to be permitted to hazard their lives in this glorious cause, and to be authorized, at their own expence, to raise forces for the support of it.

But, above all, they saw both Houses of Parliament, the great council of the nation, the representative body of this people, warmed with a truly British spirit, and treading in the steps of their ancestors, overcoming all difficulties, and unanimously concurring in every measure to strengthen the king's hands, and to maintain that government, on which the very being of parliaments, and the preservation of this limited monarchy, depend.

If these enemies of our peace had formed to themselves any false hopes of contrary appearances, it must be owing to the highest degree of infatuation, that they were not soon convinced of their mistake. Great reason have we to offer up our thanks to heaven, that they have been effectually disappointed. Even your lordships, if you will allow yourselves to weigh your own case in the just balance of religion and conscience, will find cause to be thankful that the measure of your guilt was not suffered to be filled up and enhanced by the final direful success of it.

If, from any unforeseen accidents, not uncommon in military operations, those delusive hopes were for some time kept alive, it seems to have been judicially designed by Providence to render the more signal that vengeance, which was reserved for them at the battle of Culloden. How much was owing, on that memorable day, to the bravery and discipline of his majesty's troops, to the animating example, the intrepid valour, and the wise conduct of a prince descended from him, is so deeply engraven on the heart of every member of this great assembly, that I could only repeat what their own grateful minds have already suggested to themselves, and represented to the throne.

Then was experienced how much that courage, which virtue, true loyalty, and the love of our country, inspire, is superior to the rash-

ness and false fire of rebellion, accompanied with the terrors of guilt.

I will add no more. It has been his majesty's justice to bring your lordships to a legal trial; and it has been his wisdom to shew, that, as a small part of his national forces was sufficient to subdue the rebel army in the field, so the ordinary course of his laws is strong enough to bring even their chiefs to justice.

What remains for me, is a very painful, though a necessary part. It is, to pronounce that sentence, which the law has appointed for crimes of this magnitude;—a sentence full of horror! such as the wisdom of our ancestors has ordained, as one guard about the sacred person of the king, and as a fence about this excellent constitution, to be a terror to evil-doers, and a security to them that do well.

The judgment of the law is, and this high court doth award;

‘That you, William earl of Kilmarnock, George earl of Cromartie, and Arthur lord Balmerino, and every of you, return to the prison of the Tower, from whence you came; from thence you must be drawn to the place of execution; when you come there, you must be hanged by the neck, but not till you are dead; for you must be cut down alive; then your bowels must be taken out, and burnt before your faces; then your heads must be severed from your bodies, and your bodies must be divided each into four quarters; and these must be at the king's disposal.—And God Almighty be merciful to your souls!’

L. H. S. Lieutenant of the Tower, take the prisoners from the bar.

Which being done, proclamation was made for silence, as usual.

L. H. S. My lords, this proceeding being at an end, nothing remains to be done here, but to determine the commission.

Lords. Ay, ay.

L. H. S. Let proclamation be made for dissolving the commission of high steward.

Serj. at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king does strictly charge and command all manner of persons here present, and that have here attended, to depart hence in the peace of God, and of our sovereign lord the king; for his grace my lord high steward of Great Britain intends now to dissolve his commission.

Then the white staff being delivered to the lord high steward by the gentleman usher of the black rod, upon his knee, his grace stood up uncovered; and holding the staff in both his hands, broke it in two, and declared the commission to be dissolved; and then leaving the chair, came down to the wool-pack, and said, Is it your lordships' pleasure to adjourn to the chamber of parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the chamber of parliament.

Then the Lords and others returned in the same order they came down.

And the prisoners were carried back to the Tower of London.

AN ACCOUNT OF THE BEHAVIOUR OF THE
LATE EARL OF KILMARNOCK, AFTER
HIS SENTENCE, AND ON THE DAY OF
HIS EXECUTION, AUGUST 18, 1746.
BY JAMES FOSTER.

Mr. Foster says, his first access to lord Kilmarnock was on Thursday, August 7, in the evening; and after some serious discourse with his lordship on religion, he proceeds thus:

"He desired me to administer the sacrament of the Lord's supper to him, which at first I declined, without absolutely refusing it. And my reason was this, That I chose not to do it till I had authority from general Williamson to tell him, that there remained no hope of his life. Then I thought I should have clearer evidence, if he still continued in the same ingenuous temper, that his confessions and repentance were sincere; and I consented at last only upon this condition, that he would allow Mr. Fowler, the gentleman-gaoler of the Tower, to be present, and renew his acknowledgments before him. To this he made no objection; and the questions which I proposed to him, together with his answers, were in substance as follows.

"Do you acknowledge, with deep penitence and contrition, the guilt of the late unprovoked, unnatural, and wicked rebellion in which you engaged; the share you had, by being involved in it, in the oppressions and murders of your fellow subjects, and the desolation and spoil of your native country; your great guilt in rebelling against your just and lawful king, and against a mild and gracious government? 'I do.'

"Are you ready to declare that it is your steadfast resolution to persist in this humble confession to the last, and to pray for the prosperity of king George, the establishment of his royal house, and the welfare and peace of your country, with your dying breath?—'I readily declare this to be my steady purpose.'

"Do you, also, with shame and humiliation before God, acknowledge the irregularities and excesses of your private life; and will you endeavour to form your mind to a deeper and deeper repentance for both your public and more personal crimes?—'This is my resolution, which I will adhere to, by the help of God.'

"Be pleased to declare, that you expect no benefit at all from receiving the sacrament, if your remorse and penitence be not sincere.—'I do not think that it will be of any service to me.'

"I desire, in the last place, that you will also declare, what of your own accord you have mentioned to me before,—That you consider

yourself, in this act of receiving the sacrament under your present critical and melancholy circumstances, as making an implicit appeal to God, that you expect no mercy from him, if your confessions are feigned and hypocritical; and that you look upon the death of Christ (which you are now solemnly to commemorate as a ratification of God's covenant of mercy to unfeigned humble penitents, and to them alone) as both a strong encouragement and motive to you, to endeavour to strengthen and perfect your repentance.—'I consider the whole of this in the light in which it has now been represented.'

"I shall only add under this head, that all the confessions of this unfortunate lord appeared to me to be free and ingenuous: He never scrupled the questions that were asked him, nor took the least time to meditate and prepare an answer. His confessions, likewise, were perfectly consistent and uniform, and never varied as to the general substance, and in no other circumstance than this, which will be thought perhaps to redound to his honour, that he continued to the last recollecting and searching himself, and declaring particular incidents as they occurred to him, which tended, upon the whole, not to the extenuation, but to the heightening of his crime. And a few days before his death he said, That he thought he should rather prefer the speedy execution of the sentence, which was justly passed upon him, than a longer continuance in life, if he was sure that he should be again entangled by the snares and temptations to which he had formerly yielded. What would really be the event, if he was let loose among the quietudes and pleasures of life, he did not certainly know, and somewhat dreaded; but in the declaration he had made, he thought he found himself clear.

"Heavy charges of inhumanity and cruelty, I told him, were spread among the people concerning him; and by many believed. I desired him therefore to be honest and free in clearing his conscience of such a load of most unnatural guilt, by answering to the following interrogations, which included in them the substance of these charges. And I here subjoin for the perusal of the public, the questions, as I proposed, and have now transcribed them from a paper written before I went to the Tower, and his distinct reply to each.

"Was your lordship present in the Pretender's council at Inverness, or any other place, before the battle of Culloden, where it was proposed to destroy the prisoners taken by the rebels?—'I can most sincerely and freely answer, No.'

"Were you ever present in council where this was proposed?—'No.'

"Did you ever move for such an order?—'No.'

"Did you ever sign such an order?—'No.'

"Did you ever carry an order of this kind to the French general Stapleton? Did you ever in his presence approve of such an order?

Did you at any time, hearing it had been communicated to him, encourage and excite him to the execution of it?—To all which he answered in the same manner, 'No.'

"Did you ever know or hear, that such a thing, or an order to give no quarter, was debated, or agreed to, or signed in the rebel army, till you were taken by the king's forces, and a prisoner at Inverness: Or do you know yourself guilty of any cruelties, by you authorised or committed, against the king's soldiers or subjects taken prisoners by the rebels?—The answer to both these questions was the same as before.

"As to what passed in the church of St. Ninians, he told me, that he knew nothing at all of it, till, upon the retreat of the rebel army, he was at some distance from Stirling, where he had been confined to his bed by a fever; that the first notice he had of it, was the noise of blowing up the church, of which he could never get any but an indistinct and confused account; that it was represented by the rebels as accidental; but concerning this he could certainly say nothing; only as to himself he solemnly declared, that he had no knowledge beforehand of, nor any concurrence in, a designed act of cruelty. I told him, however, that he was charged with an instance of barbarity to the prisoners confined in the church at Inverness. And the account which he gave of the fact, is as follows—That there were orders issued by the Pretender's son, to strip them of their clothing, for the use of some of the highland rebels; that the warrant for executing this order was sent to him; that he did not enter the church in person, but committed the execution of it to an inferior officer; that the prisoners, at first, refused to submit, upon which there was a second order, and their clothes were taken from them; but that in the mean time, the person stiled the French ambassador represented to him, that this was an outrage, which he thought scarce justifiable by the law of nations, and the rules of war; he therefore, while the clothes lay in heaps, with proper centinels over them, in the streets of Inverness, went up to the Pretender's son, and represented the matter in the light in which the French ambassador had stated it, and according to what were his own sentiments likewise; upon which, as it was feared that such usage might make an ill impression upon the minds of the people, the clothes were again restored; and this, he averred to me, was the whole of the truth, as far as it ever fell under his knowledge.

"For myself, I must do this unhappy criminal the justice to own, that he never appeared, during the course of my attendance upon him, to be of any other than a soft, benevolent disposition. His behaviour was always remarkably mild and temperate. I could discern no resentment, no disturbance or agitation in him. This indeed I feared, (as persons in his melancholy circumstances are generally apt to think, that they ought to have the preference in cases of reprieve or pardon) when I was first in-

formed of lord Cromartie's reprieve; and therefore in the morning before I waited on him, I prepared myself to quiet and mollify his mind. But one of the first things he said to me was, that he was extremely glad that the king's mercy had been shewn to lord Cromartie. My lord, says I, I hope you do not think you have any injustice done to you?—His answer was, 'Not the least: I have pleaded guilty, I entirely acquiesce in the justice of my sentence, and if mercy be extended to another, I can have no reason to complain, when nothing but justice is done to me. I do not believe, that my not being reprieved is owing to any defect of clemency in the king, who, by all the accounts I ever received, is a very merciful prince; nor that it springs from any particular resentment or prejudice against me, either in his majesty or in the duke; but from some distinction that they thought there was in the circumstances of lord Cromartie's guilt and mine, or else from the public demand for justice, which made it unfit that two out of three should be reprieved.' From this way of thinking and discoursing, he never, to my knowledge, varied to the last.

"I must add here another, and I think a great and unquestionable instance of lord Kilmarnock's ingenuity. He had been charged, and he imagined without a just foundation, with having uttered a falsehood, when he said in his speech at the bar of the House of Lords, that it was very easy for him to have escaped. This he still thought was true upon the rebel army's first giving way, as the greatest part of that body actually did escape, with whom he was joined. But after he had separated himself from them, and was advanced any considerable way towards the king's troops, he believed that his escape was not practicable. But though he hoped that this would clear him from the imputation of having wilfully prevailed in the instance already mentioned; yet he owned, that in another, induced by the love and strong desire of life, he had grossly falsified. The case, as he represented it to me, was thus:—he had asserted in his speech, that though he could have escaped, he did not chuse it, because the consequences, in an instant, appeared to him more terrible, more shocking, than the most painful or ignominious death: and therefore he chose to surrender and commit himself to the king's mercy, rather than to throw himself into the hands of a foreign power, the natural enemy to his country; with whom to have merit, he must persist in continued acts of violence to his principles, and of treason and rebellion against his king and country: but the real truth was, that he had no intention at all to surrender, and that his only view was to facilitate his escape; for that he thought the body towards which he advanced, were not the king's, but Fitz-James's horse; and that if he could reach them, by mounting behind one of the dragoons, his escape would have been more certain, than, as he was then on foot, it appeared to him in his

present situation to be; though he did not find his strength or spirits in any considerable degree impaired. This, he thought, as it related to his inward intention only, could not be discovered but by his own confession, nor known to any but God and his own conscience. But he was willing to unburden his soul, and purge it of its most secret guilt; and therefore pressed it upon me in a particular manner, and especially on the very day before he was executed, not to forget to publish to the world this circumstance; because, as he had solemnly uttered, before so august an assembly as the House of Lords, a direct and known untruth, he thought, if he should die without a retraction of it, and a public acknowledgment of his offence, he must be considered as one, who presumed to appear before the tribunal of God with a lie in his mouth. And here I cannot help thinking myself bound, in justice to lady Kilmarnock, to declare (and it is most proper to do it in this place, because it will probably find more credit, after such a striking instance of the late lord Kilmarnock's conscientious regard to truth,) that he said to me, though she was bred in different sentiments, that he thought her now more inclined to Whiggish than Jacobite principles. And the reverend and honourable Mr. Home, and Mr. Ross, his lordship's solicitor, desired me to inform the world of another thing, which he had expressly mentioned to them, viz. That instead of exciting him to, she had dissuaded him from entering into the late wicked and horrid rebellion.

"As the public will, in all probability, be curious to know what were lord Kilmarnock's sentiments concerning death, and the particular kind of death which he expected, in pursuance of his sentence, would be inflicted on him; I shall relate the substance of the discourses that passed between us, upon these great, and, to the generality of the world, most terrifying subjects.

"On Monday, August 11th, general Williamson desired me, in the gentlest terms I could use, to let him know that he had received the order for his and lord Balmerino's execution. I at first declined this ungrateful office, and told him that I was so shocked at it, that I could not think of delivering the message myself, but would endeavour to prepare the unfortunate lord, by divesting him as far as I could of all hope of life, for his informing him of it when he came to discharge me from my attendance. And indeed to suppress all glimmerings of such hope was the main drift and bent of my discourse; and I intended to go no further: but finding him in a resigned and calm temper, I told him, as the general was coming up, that he would see the vast importance, nay, the absolute necessity, of attending seriously to what I had been saying about his diligent and constant preparation for death, by what, as I apprehended, he would soon hear. He immediately asked me, Whether the warrant for his execution was come down? I told him it was, and that the day fixed was the Monday following.

And as, upon this, the general immediately entered the room, I acquainted him, that lord Kilmarnock knew already what he intended to inform him of; that he was therefore at present under no necessity of saying any thing further about it; because the once relating such a melancholy circumstance was fully sufficient.

"Lord Kilmarnock received this news with the outward behaviour of a man, that knew and felt the importance of the scene of death, but without any marks of disorder, without any unbecoming anxiousness or terror. And to establish and support him in his present quietude of mind, I told him, That all mankind were really under sentence of death, though they knew not the manner or precise time when it would be executed; it might be to any one as soon or sooner than his own; that they not expecting it, nor having such timely and certain notice of it, might die wholly unguarded and unprepared; while he had warning, and the most awakening motives to fit himself in the best manner possible for this grand and decisive event. He said, That he had never been a libertine in principle, during all the time that he was most inconsiderate and licentious in his conduct; that he had always firmly believed the great truths of God's being, and providence, and a future state of rewards and punishments for virtue and vice; and that he had not been involved in the fashionable scepticism of the times with respect to Christianity; that he was therefore naturally concerned, and chiefly concerned, about the consequences of death, in comparison of which he thought the thing itself a trifle; that as to the particular manner of his death, he thought he had no great reason to be terrified, for that the stroke appeared to be scarce so much as the pain of drawing a tooth, or the first shock of the cold bath upon a weak and fearful temper. And when general Williamson, upon the Saturday preceding his execution, gave him a minute detail of all the circumstances of solemnity and outward terror that would accompany it, he heard it with as much shew of composure, as a man of a tender, compassionate spirit would read the account of it, in an instance where he was not personally concerned. He was told, That on Monday, about ten in the morning, the sheriffs would come to demand the prisoners, who would be delivered them at the gate of the Tower; that from thence, if their lordships thought proper, they should walk on foot to the house appointed on Tower-hill for their reception, where the rooms would be hung with black, to make the more decent and solemn appearance, and that the scaffold also would be covered with black cloth; that his lordship might repose and prepare himself, in the room fitted up for him, as long as he thought it convenient, remembering only, that the warrant for the execution was limited to, and consequently expired at one o'clock; that because of a complaint made by the lord Kenmure, that the block was too low, it was ordered to be raised to the height of two feet; that

it might be the more firmly fixed, props would be placed directly under it, that the certainty or decency of the execution might not be obstructed by any concussion, or sudden jerk of the body. All this lord Kilmarnock, without the least visible emotion, expressed his satisfaction in: but when the general told him, that two mourning hearses would be provided, and placed close by the scaffold, that when the head was struck off, the coffins might soon be taken out to receive the bodies; he said, That he thought it would be better for the coffin to be upon the scaffold, for by that means the bodies would be still sooner removed out of sight. And being further informed, that an executioner was provided that would perform his work dexterously, and that he was a very good sort of a man; my lord answered, 'General, this is one of the worst circumstances that you could have mentioned; I cannot thoroughly like, for such business, your good sort of men: for one of that character, I apprehend, must be a tender-hearted and compassionate man, and a rougher and less sensible temper might perhaps be fitter to be employed.' After this lord Kilmarnock desired, That four persons might be appointed to receive the head, when it was severed from the body, in a red cloth, that it might not, as he had been informed was the case in some former executions, roll about the scaffold, and be thereby mangled and disfigured: for that though this was, in comparison, but a small circumstance, he was not willing that his body should appear with any unnecessary indecency, after the just sentence of the law was satisfied. I could not perceive, but that he talked of all these particulars with ease and freedom, though the relation of them, I remember, made me tremble; chiefly because I feared that they would produce in him some perturbation and distress of mind. It is proper for me to add, that when he was told his head would be held up to the multitude, and public proclamation made that this was the head of a traitor; he replied, That this he knew to be usual on all such occasions, and spoke of it as a thing that was of no significance in the affair at all, and did not in the least affect him: and I never heard, either before or after he was delivered into the custody of the sheriffs, that he intimated the least concern to have this part of the dismal ceremony dispensed with. All lord Kilmarnock's friends, who attended him in his last moments, are ready to concur with me in making the same declaration, that we never expected it would have been, and wondered it was omitted.—After the conversation above-mentioned between lord Kilmarnock and general Williamson, I thought it proper to advise him, to think frequently on the outward apparatus and formalities that would attend his death; that these circumstances, striking to sense, might impress his mind with horror, and disarm him of part of his resolution, if he was not by reflection thoroughly prepared for the scene; but that if they were habituated to the

mind, they would in a great measure lose their influence, and be considered as no more than the appendages of a subject vastly more great, and worthy his contemplation. And he declared, on the morning of his execution, That he had taken this method with himself, and hoped that these things would discompose him but little, nor create any weakness or indecency in his behaviour. He allowed, with me, That they were nothing so terrible in themselves, as the dying after a dispiriting and lingering distemper, in a silent, melancholy, darkened room, with languid and exhausted spirits, and his friends standing round him, with lively marks of sorrow and anguish in their countenances, expecting and deploring his fate.

"I now come to the conclusion of this dismal scene, his behaviour on the day of his execution. I attended him in the morning about eight o'clock, and found him in a most calm and happy temper, without any disturbance or confusion in his mind, and with apparent marks of ease and serenity in his aspect. And that the world may the better judge of the propriety of his behaviour from that time to the time of his death, I shall first declare, what his professed sentiments were concerning himself, and the manner in which he chose to die; and then briefly point out what, in my opinion, was the utmost decency of conduct in one in his circumstances, under the impression of such sentiments and principles. I had observed to him, that to affect to brave death, when he justly suffered for his crimes, could have no show of a true decorum in it; and that to manifest no concern at all, where the consequence was so awful, and the stake infinite, was, in some degree, unbecoming even in the best of men; that not to fear at all, where there was great reason to fear, was altogether as absurd, as to be extremely dejected and pusillanimous where there was ground of hope; and that true penitence was always humble and cautious, and not bold and arrogant. He assented to all this, and told me further, That for a man who had led a dissolute life, and yet believed the consequences of death, to put on such an air of daringness and absolute intrepidity, must argue him either to be very stupid or very impious. He also told me, That, though he entirely acquiesced in the justice of his sentence, and thought it his duty wholly to resign himself to the wise and equal disposals of Providence, he had still this clog upon his mind, that he could not be sure his repentance was sincere, because it had never been tried. I answered him, That, if he aimed at certainty in this grand point, he might unnecessarily perplex and distress his mind; because, for the very reason which he had assigned, *i. e.* for want of proper opportunities to try and prove the truth of their repentance, such a certainty was not attainable by any persons in his condition: I advised him therefore to search seriously and strictly into himself, not suffering himself to be amused and imposed upon in an affair of such infinite importance;

and if he found, after making this enquiry, that he had more ground to hope that his repentance was sincere, than he had to fear that it was insincere, the consequence would be, that he must, upon the whole, have more reason to hope than fear: and this, in my opinion, was the highest pitch to which I could attempt to raise him. Let us see now, what kind of behaviour was most just and decent in a person, who, upon this foundation, professed himself to have a preponderance of hope, but mixed with diffidence and fear. It must surely be resigned, but awful; free from an extreme of dejectedness, but not eager and rapid to meet death. Such a considerate, calm humility, and tenderness of spirit, would be the only fit behaviour, after having made the professions above-mentioned, in one that was but personating a feigned character: the contrary would be condemned in a mere fictitious representation, and therefore cannot be approved in the real scene of death.

"And this, which I have shewn was the only decent, was, in fact, the true deportment of lord Kilmarnock. He continued all the morning of his execution in the same uniform temper, unruffled, and without any sudden vicissitudes and starts of passion. This remarkably appeared, when, soon after I had, at his own desire, made a short prayer with him, general Williamson came to inform him, that the sheriffs waited for the prisoners: for, at receiving this awful summons to go to death, he was not in the least startled, but said, (calmly and gracefully) 'General, I am ready; I will follow you.' At the foot of the first stairs he met and embraced lord Balmerino, who greatly said to him, 'My lord, I am heartily sorry to have your company in this expedition.*' From thence he walked, with the usual formalities, to the Tower-gate, and, after being delivered into the custody of the sheriffs, to the house provided on Tower-hill, with a serenity, mildness, and dignity, that greatly surprised and affected the spectators. And as one of the things that passed there, most worthy the public notice, was the short interview he had with lord Balmerino; I shall relate the whole substance of their conversation, to the best of my remembrance, without addition or diminution; and, as far as I can possibly recollect, in the very words themselves.

"*Balm.* My lord, I beg leave to ask your lordship one question.

"*Kilm.* To any question, my lord, that you shall now think it proper to ask, I believe I shall see no reason to decline giving an answer.

"*Balm.* Why then, my lord, did you ever see or know of any order, signed by the prince, [meaning the Pretender's son] to give no quarter at the battle of Culloden?

"*Kilm.* No, my lord.

"*Balm.* Nor I neither: and therefore it

* "These particular words I myself did not hear, but was informed of them by Mr. Jameson."

seems to be an invention to justify their own murder, or murderous scheme (one of the two expressions I am certain was made use of).

"*Kilm.* No, my lord, I do not think that this inference can be drawn from it; because, while I was a prisoner at Inverness, I was informed by several officers, that there was such an order, signed George Murray; and that it was in the duke's custody.

"*Lord George Murray!* replied lord Balmerino, why then they should not charge it upon the prince.'—After this he took his leave, embracing lord Kilmarnock with the same kind of noble and generous compliment as he had used before, but in words somewhat different: 'My dear lord Kilmarnock, I am only sorry, that I cannot pay all this reckoning alone; once more, farewell for ever!' I have consulted Mr. Home, Mr. Ross, and Mr. Jameson, who were all present at this conference; and are ready to attest, if required, that this is a true account of it.

"I then desired lord Kilmarnock, that he would allow me to declare in his name to the assembly, and all persons there present, the substance of the professions and acknowledgments which he had so often repeated to me; and which were more largely contained in a paper, that he had left to be published after his death: and my declaration was in words to this effect: Lord Kilmarnock acknowledges king George to be the only rightful and lawful king of these realms; that he engaged in the late wicked and unnatural rebellion against his conscience; he confesses the great guilt of it with deep shame and contrition; and asks pardon, for his offence, of God, his king, and country; and declares it to be his sincere resolution to pray for the prosperity of king George, the establishment of his royal house, and the peace and welfare of his country, with his dying breath. To this the unfortunate lord gave his assent, and signified to the sheriffs, that the only genuine paper, that he had left behind him, was lodged with me, and committed to my care. The time being now pretty far advanced (as I hinted to his lordship by the sheriff's desire), I told him, that after having taken a few minutes to compose himself, I thought it would be proper to allow me to pray with him, and then proceed to the scaffold. After this I addressed myself to the spectators of this mournful scene, to join with me fervently in this last solemn office, and in recommending the soul of an unhappy person, who gave so many lively marks of his sincere penitence for the crime of his rebellion, to the mercy of God; with which request they all readily complied. I need add nothing more, but that as lord Kilmarnock had often protested, that he would, in his last moments, pray for his king and country, towards the conclusion of my prayer for him, I offered up the following petitions to that purpose; which he had before, in the Tower, expressed his entire satisfaction in. 'And we now, from our hearts, and at the particular desire of thy servant, upon whose account especially we

'presume at this time to address thy throne, and offer up our united fervent prayers, that thou wouldst preserve, bless, and honour our only rightful sovereign lord king George; that thou wouldst crown him with glory and renown; that in his reign there may be abundance of peace; that his royal progeny may long sit, with lustre and dignity, upon the throne of these kingdoms, undisturbed by rebellions, and the tumults of seditious and violent men; and that our holy religion, and inestimable British liberties, may be transmitted down secure and sacred to our posterity, even to the latest generations.' After prayer was ended, lord Kilmarnock took his last farewell of the gentlemen who attended him, in a very affectionate manner; and went out of the room, preceded by the sheriffs, and accompanied by his friends. And I am informed of the following particular by Mr. Home, that as he was stepping into the scaffold, notwithstanding the great pains he had taken to familiarise the outward apparatus of death to his mind, nature still recurred upon him: so that being struck with such a variety of dreadful objects at once, the multitude, the block, his coffin, the executioner, the instrument of death, he turned about, and said, "Home, this is terrible!" This expression, so suitable to the awful occasion, must, to all who know the human heart, appear to be nothing else than the language of nature, and was far from being a mark of unmanly fear; being pronounced with a steady countenance and firmness of voice, indications of a mind unbroken and not disconcerted. His whole behaviour was so humble and resigned, that not only his friends, but every spectator was deeply moved; even the executioner burst into tears, and was obliged to use artificial spirits to support and strengthen him. After having talked with his lordship a considerable time, to support him in his penitence and resignation, I embraced, and left him in the same calm disposition, having quitted the scaffold some minutes before his execution. And as to his behaviour afterwards, I refer to the following account, in which, I think, I may thoroughly confide, which was communicated to me by Mr. Jameson, who attended him to the last.

"Spectators at a distance, not knowing the true cause why the stroke was retarded for some minutes longer than they expected, ascribed it to pusillanimity: But, in reality, that delay was owing to a few trivial circumstances which might have been omitted, had it not been necessary to mention them, in order to vindicate the behaviour of that noble penitent, which was uniformly conducted by the rules of just decorum, from all imputation of unmanly fear in the critical moment. My lord's hair having been dressed in a bag, it took some time to undo it, and put it up in his cap. The tucking his shirt under the waistcoat, that it might not obstruct the blow, was the occasion of some further small delay. But as soon as these preliminaries were adjusted, his lordship gave the executioner notice what should be the

VOL. XVIII.

signal, took out a paper containing the heads of his devotion, went forward to his last stage, and decently kneeled down at the block. Whether it was to support himself, or as a more convenient posture for devotion, he happened to lay his hands with his head upon the block; which the executioner observing, prayed his lordship to let his hands fall down, lest they should be mangled, or break the blow. Then he was told, that the neck of his waistcoat was in the way; upon which he rose up, and with the help of one of his friends (Mr. Walkinshaw of Scotston) had it taken off. This done, and the neck made bare to the shoulder, he again kneeled down as before. And what sufficiently shews that he enjoyed full presence of mind to the last, Mr. Home's servant, who held the cloth to receive the head, heard him direct the executioner, that in two minutes he would give the signal. That dreadful interval, to his friends, who were then upon the rack, appeared much longer, but those who measured found it just about two minutes. This time he spent in most fervent devotion, as appeared by the motion of his hands, and now and then of his head. Having then fixed his neck on the block, he gave the signal, his body remained without the least motion, except what was given it by the stroke of death, which he received full, and was thereby happily eased at once of all his pain.

"Thus deservedly fell, though humble and relenting, the late lord Kilmarnock, a sacrifice to the justice of his country.—JAMES FOSTER."

"P. S. I think myself obliged, in justice to general Williamson, and at his desire, to declare, that lord Kilmarnock often testified to me, that he had behaved towards him in a very civil and obliging manner; that upon the general's having desired, two days before his death, that when he took his leave of him on Monday, he would do it in such a manner, as would be an evidence to all present, that he was satisfied with his behaviour; his lordship answered, 'That I will, general, you may depend upon it, and in such a way too, as is becoming a gentleman, and a man of honour;' and that Mr. Williamson had, from the first, spoke of lord Kilmarnock to me with great esteem and humanity."

To the KING's Most Sacred Majesty:

The Humble PETITION of WILLIAM late Earl of KILMARNOCK,

"Sheweth; the petitioner having met with the condemnation justly due to his crime, presumes, throwing himself at your majesty's feet, to implore your majesty's royal clemency, and, though very sensible that nothing can excuse or mitigate his crime, hopes he may be considered, in your majesty's eye, as an object of compassion and pity.

"His family's constant attachment to the Revolution interest and that of your illustrious house, his father's zeal and activity in support of both, when attacked by your late royal fa-

ther's enemies in 1715, his own appearing in arms (though then but young) under his father, the whole tenor of his conduct since that time, and the sentiments of duty and loyalty in which he has educated his eldest son, who now has the honour of bearing your majesty's commission, though no diminution of his guilt, may yet let in a presumption, that he has offended more from rashness and the designs of wicked and ill-disposed persons, than from any principle of disaffection to your majesty.

"The petitioner humbly begs leave to acquaint your majesty, that he influenced neither tenant nor follower of his to assist or abet the rebellion; but, on the contrary, that between the time of the battle of Preston, and his unhappy junction with the rebels, he went to the town of Kilmarnock, influenced its inhabitants, as far as he could, and by their means their neighbouring boroughs, to rise in arms for your majesty's service; which had so good an effect, that two hundred men of Kilmarnock appeared very soon in arms, and remained so all the winter at Glasgow, or other places, as they were ordered. And even in the midst of his greatest delusion, when in arms against your sacred majesty and your authority, it was the petitioner's constant care (as far as in his power) to protect your faithful subjects from injury in their persons or estates. He extended his care to such of your majesty's troops as had the misfortune of falling into the hands of the rebels, both officers and private men finding better usage, and their condition being rendered more supportable through his means, than it would otherwise have been; as many of them can, and the petitioner believes will, testify when called upon.

"The petitioner was not taken, but surrendered himself at the battle of Culloden, having left those he was joined with, when they were got so far, that most (if not all) of them escaped, except himself, who from thence turned down to the ground where the dragoons were drawn up at a considerable distance, and this at a time when he might easily have made his escape, being near nobody, nor any in pursuit of him. He chose submission, as far preferable to obstinacy in rebellion. His first principles revived in his breast. He determined rather to run the risk of an ignominious death, as the atonement of his treason, than to recur to, and become dependent upon a foreign power, that power especially being the natural enemy of his country, and your majesty the father of it.

"Under these circumstances, Sir, it is, that the unhappy petitioner (more so from remorse of having violated his allegiance to your majesty, than from the sentence he lies under) dares to approach your throne, and implore your royal mercy, and which he hopes for, as he cannot reproach himself with any guilt precedent to this fatal breach of his duty."

Petitions to the like effect were presented to the prince of Wales and the duke of Cumberland.

Extract of the late Earl of Kilmarnock's Letter to his Son lord Boyd: dated, Tower, 17th August, 1746.

"Dear Boyd;

"I must take this way to bid you farewell, and I pray God may for ever bless you and guide you in this world, and bring you to a happy immortality in the world to come. I must likewise give you my last advice. Seek God in your youth, and when you are old he will not depart from you. Be at pains to acquire good habits now, that they may grow up and become strong in you. Love mankind, and do justice to all men. Do good to as many as you can, and neither shut your ears nor your purse to those in distress whom it is in your power to relieve. Believe me, you will find more joy in one beneficent action, and in your cool mornings you will be more happy with the reflection of having made any one person so, who without your assistance would have been miserable, than in the enjoyments of all the pleasures of sense (which pass in the using,) and of all the pomps and gaudy show of the world. Live within your circumstances, by which means you will have it in your power to do good to others. Above all things, continue in your loyalty to his present majesty, and the succession to the crown as by law established. Look on that as the basis of the civil and religious liberty and property of every individual in the nation. Prefer the public interest to your own, wherever they interfere. Love your family and your children, when you have any; but never let your regard for them drive you on the rock I split upon, when on that account I departed from my principles, and brought the guilt of rebellion and civil and particular desolation on my head, for which I am now under the sentence justly due to my crime. Use all your interest to get your brother pardoned and brought home as soon as possible, that his circumstances, and bad influence of those he is among, may not induce him to accept of foreign service, and lose him both to his country and his family. If money can be found to support him, I wish you would advise him to go to Geneva, where his principles of religion and liberty will be confirmed, and where he may stay till you see if a pardon can be procured him. As soon as commodore Barnett comes home, enquire for your brother Billie, and take care of him on my account. I must again recommend your unhappy mother to you. Comfort her, and take all the care you can of your brothers: and may God of his infinite mercy preserve, guide, and conduct you and them through all the vicissitudes of this life, and after it bring you to the habitations of the just, and make you happy in the enjoyment of himself to all eternity!"

PAPER delivered by the late Earl of KILMARNOCK to Mr. FOSTER, Sunday 17th August, 1746.

"As it would be a vain attempt in me to speak distinctly to that great concourse of people, who will probably be present at my execution, I chuse to leave this behind me, as my last solemn declaration, appealing, for my integrity, to God, who knows my heart.

"I bless God, I have little fear of temporal death, though attended with many outward circumstances of terror: the greatest sting I feel in death is, that I have deserved it.

"Lord Balmerino, my fellow-sufferer, to do him justice, dies in a professed adherence to the mistaken principles he had imbibed from his cradle. But I engaged in the rebellion in opposition to my own principles, and to those of my family; in contradiction to the whole tenor of my conduct, till within these few months that I was wickedly induced to renounce my allegiance, which ever before I had preserved and held inviolable. I am in little pain for the reflections which the inconsiderate or prejudiced part of my countrymen (if there are any such, whom my suffering the just sentence of the law has not mollified) may cast upon me for this confession. The wiser or more ingenuous will, I hope, approve my conduct, and allow with me, That next to doing right, is, to have the courage and integrity to own, that I have done wrong.

"Groundless accusations of cruelty have been raised and propagated concerning me, and charges spread among the people, of my having solicited for, nay actually signed orders of general savage destruction, seldom issued among the most barbarous nations, and which my soul abhors. And, that the general temper of my mind was ever averse from, and shocked at gross instances of inhumanity, I appeal to all my friends and acquaintance who have known me most intimately, and even to those prisoners of the king's troops to whom I had access, and whom I ever had it in my power to relieve; I appeal in particular, for my justification as to this justly detested and horrid crime of cruelty, to captain Master of Ross, captain lieutenant Rexon, and lieutenant George Cuming of Alton.

"These gentlemen will, I am persuaded, as far as relates to themselves, and as far as has fallen within their knowledge or credible information, do me justice; and then, surely, my countrymen will not load a person, already too guilty and unfortunate, with undeserved infamy, which may not only fix itself on his own character, but reflect dishonour on his family.

"I have no more to say, but that I am persuaded, if reasons of state, and the demands of public justice, had permitted his majesty to follow the dictates of his own royal heart, my sentence might have been mitigated. Had it pleased God to prolong my life, the remainder of it should have been faithfully employed in

the service of my justly offended sovereign, and in constant endeavours to wipe away the very remembrance of my crime.

"I now with my dying breath beseech Almighty God to bless my only rightful sovereign king George, and preserve him from the attempts of public and private enemies. May his majesty, and his illustrious descendants, be so guided by the Divine Providence, as ever to govern with that wisdom and that care for the public good, as will preserve to them the love of their subjects, and secure their right to reign over a free and happy people to the latest posterity."

AN ACCOUNT OF THE BEHAVIOUR OF WILLIAM LATE EARL OF KILMARNOCK, AND ARTHUR LATE LORD BALMERINO, FROM THE TIME OF THEIR BEING DELIVERED INTO THE CUSTODY OF THE SHERIFFS OF LONDON, TO THE TIME OF THEIR EXECUTION. WITH EVERY REMARKABLE INCIDENT THAT HAPPENED DURING THAT TIME, AND PARTICULARLY THE CONFERENCE BETWEEN THOSE TWO LORDS. AS TAKEN DOWN BY A GENTLEMAN THEN PRESENT.* BY AUTHORITY OF THE SHERIFFS.

Monday, August 18, 1746.

THE sheriffs of London and Middlesex having received the usual writs for the execution of the lords Kilmarnock and Balmerino this day, between the hours of nine and one; they, accompanied with the two under-sheriffs, and attended by the other proper officers, at 10 o'clock went in procession to the outward gate of the Tower; and having there received of the deputy-lieutenant of the Tower the bodies of those lords, they then proceeded with them on foot to the late Transport-office near the scaf-

* *To the Public.* As I officiated for one of the under-sheriffs the day of the execution of the lords Kilmarnock and Balmerino, I had an opportunity of minuting down every thing that passed, worthy of observation, upon that melancholy occasion.—This I did at that time for my own curiosity only, and the following is a faithful relation as taken from those minutes; and which, at the importunities of many gentlemen, I have consented to the publication of, in order to silence the many erroneous accounts that have been published, and to take off several cruel aspersions that have been thrown out touching the behaviour of those unhappy lords.—I have made little or no observations on the narration, much less shall I do it here; being satisfied that those whom the one will not, the other cannot convince. T. FORD.

Aldermanbury, Aug. 22, 1746.

fold, Mr. Foster and the Rev. Mr. Hume accompanying my lord Kilmarnock, and the chaplain of the Tower and another minister accompanying my lord Balmerino: where, upon their arrival, the two lords were conducted into separate apartments, and their friends admitted to see them.

My lord Kilmarnock spent his retirement here in a manner suitable to his unhappy circumstances, Mr. Foster frequently comforting his lordship with seasonable exhortations; his lordship seemed truly sensible of his guilt, shewed the utmost signs of a sincere repentance, and all that were present admired the composure of his lordship's mind. His lordship, in particular, recommended it to the sheriffs' observance, 'that he declared himself a Protestant, and 'thoroughly satisfied with the legality of his 'majesty king George's title to the throne of 'these realms; that he himself was educated 'in these principles, and had constantly adhered to them, till after the breaking out of 'the rebellion, which he heartily repented he 'ever engaged in; and that he prayed for the 'good of his country, and for the continuance 'of the crown in his majesty and his descendants till the latest posterity.'

His lordship then spent a few moments in conversing with his friends, and having refreshed himself with a bit of bread and a glass of wine, he declared to the sheriffs, 'that he 'had within this week taken the Sacrament 'twice in evidence of the truth of his repentance.'

His lordship moreover recommended it to the sheriffs' notice, 'that what papers he intended should be communicated to the public, 'he had left in the hands of Mr. Foster only.'

About eleven o'clock my lord received a message from my lord Balmerino, desiring an interview with his lordship; which being consented to, my lord Balmerino was introduced into my lord Kilmarnock's apartments; where my lord Balmerino, after addressing himself to his lordship, and thanking him for the favour of this conference, asked his lordship, 'If he 'knew of any order being made before the 'battle of Culloden, for giving no quarter to the 'duke's army;' at the same time declaring, 'That he himself knew nothing of any such 'order.' To which my lord Kilmarnock replied, 'That he knew nothing of any such 'order, but that since the battle of Culloden 'he had been informed that there was some 'order to that effect, signed George Murray, 'and that it fell into the hands of the duke immediately after the battle.' My lords Kilmarnock and Balmerino having then saluted each other, my lord Balmerino bid my lord Kilmarnock an eternal happy adieu, and with a cheerful countenance added, 'My dear lord, I 'wish I could alone pay the reckoning, and 'suffer for us both;' to which my lord Kilmarnock replied, 'It was exceedingly kind and 'generous in his lordship.'

About half an hour after eleven, my lord Kilmarnock with the whole company kneeled

down to prayers, Mr. Foster performing the office; after which my lord having again sat down a few moments to refresh himself with a bit of bread and a glass of wine, he about twelve o'clock rose, saluted his friends, and proceeded to the scaffold, his friends still accompanying him there.

As soon as his lordship ascended the scaffold, it was easily to be observed what impression his graceful deportment made upon the minds of the spectators, to whom his lordship made no speech, but much better employed his time with Mr. Foster in his devotions; upon the conclusion of which Mr. Foster told his lordship, 'He wished he had a voice loud enough 'to inform this large assembly with what sentiments his lordship left the world.'

My lord then, with a countenance perfectly serene and composed, embraced his friends, and took his final leave of them.

After that, the executioner was introduced to his lordship for his forgiveness for the painful office allotted to him; which his lordship readily granted, and gave him a purse of gold, desired him to have courage, and acquainted him, that 'the signal for the stroke should be the 'dropping of a handkerchief.'

His lordship then prepared himself for the block, and having with the assistance of his servant taken off his coat, and the bag from his hair, his lordship then put his cap on, and under it tucked up his hair; but his lordship afterwards perceiving the cap was too large to bind up his hair, and fearing lest by that means the blow might be intercepted, he requested a gentleman, who was near him, to pin it closer; during which, that gentleman having wished his lordship the continuance of his resolution till he should meet with eternal happiness, his lordship thanked him, and with great tranquillity added, 'that he found himself perfectly 'easy and resigned.'

His lordship then kneeled down at the block, and having with great fervency prayed for about six minutes, submitted himself, and dropping the signal, the executioner at one blow severed his head from his body; the head was received into a piece of scarlet baize, and with the body deposited in a coffin, and delivered to his lordship's friends; on which coffin was the following inscription, *Willielmus Dominus de Kilmarnock decollatus 18 die Augusti, 1746. Ætatis sue 42.*

After the execution was over, it was remarked by several persons, that the head was not held up and exposed by the executioner; it was my lord's particular request it might not be so, and the law does not require it.—The only reason that can be assigned for exposing the head (as has been frequently but not always the case) is to satisfy the people that the execution has been done; but in order to give them a greater satisfaction, the sheriffs directed that every body upon the scaffold should kneel down, that they might see the execution itself performed, a ceremony never practised before.

During this time the scaffold was put in

order for the execution of the lord Balmerino. The under-sheriff that attended during the first execution went to my lord Balmerino's apartments, as a notice to his lordship that his time was come; upon whose entrance his lordship said, 'I suppose my lord Kilmarnock 'is no more;' and having asked how the executioner had performed his duty, his lordship upon receiving the account said, 'Then it was well done; and now, gentlemen,' said his lordship, 'I will detain you no longer, for I desire 'not to protract my life:' his lordship then saluted the company in a manner so cheerful, as drew tears from every eye but his own, and hastened to the scaffold.

But before we view his lordship upon the scaffold, it is but just to the memory of that great, but unhappy man, to acquaint the public what was his deportment in his retirement here: it was graceful without affectation, cheerful but not presumptuous; he conversed freely with his friends, twice refreshed himself with a bit of bread and a glass of wine, and desired the company to drink to him 'ain de-grae ta haiven;' but, above all, he called frequently upon God, and seemed both willing and prepared to die.

When his lordship mounted the scaffold, he did it with so undaunted a step as surprised every spectator that was unacquainted with the greatness of his soul: his lordship appeared there in the very same regimentals he wore at the battle of Culloden; and so far was he from having the least concern himself at the fear of death, that he frequently reproved his friends that were about him for shewing any: his lordship walked round the scaffold, bowed to the people, read the following inscription upon his coffin; *Arthurus Dominus de Balmerino decollatus 18 die Augusti, 1746, Ætatis sue 58*; said it was right, and with seeming pleasure looked at the block, which he called his pillow of rest.

His lordship then took a paper out of his pocket, which he read to the few about him, and delivered to the sheriff to do with it as he should think proper.

Whatever may be offered in excuse for his lordship's making that speech in his last moments, nothing but the highest authority can justify the publishing it.

His lordship to the last professed his entire ignorance as to the order for giving no quarter to the duke's army; and added, 'that he 'would not (knowingly) have acted under such 'order, because he looked upon it as unmilitary, and beneath the character of a soldier.'

Nor is it to be here omitted, that though his lordship, from his unhappy political principles, disowned any allegiance to his majesty; yet he, from his moral ones, acknowledged 'him 'to be a prince of the greatest magnanimity 'and mercy.'

His lordship then called for the executioner, who being introduced to him, was about to ask his lordship's forgiveness; but my lord stopped him, and said, 'Friend, you need not ask

'me forgiveness; the execution of your duty 'is commendable.' His lordship then presenting the executioner with three guineas, said, 'Friend, I never had much money, this is all 'I have, I wish it was more for your sake, 'and am sorry I can add nothing else to it, but 'my coat and waistcoat;' which his lordship instantly took off, and placed on his coffin for the executioner.

His lordship then prepared himself for the block by putting on a flannel waistcoat that had been made for the occasion, and a plaid cap upon his head; after which his lordship went to the block, in order to shew the executioner the signal for the blow, which was the dropping down of his arms.

His lordship then returning to his friends, took his last farewell of them; and having once more taken a view of the great number of spectators, his lordship said, 'I am afraid 'there are some who may think my behaviour 'bold;' and speaking to a gentleman near him, added, 'Remember, Sir, what I tell you, it 'arises from a confidence in God, and a clear 'conscience.'

His lordship then observing the executioner with the axe in his hand, took it from him, and having felt the edge, returned it him again, at the same time shewing him where to strike the blow, and animating him to do it with resolution: 'For in that, friend,' (said his lordship) 'will 'consist your mercy.'

His lordship then, with the same surprising countenance, kneeled down at the block, and having with his arms extended said this short prayer, 'O Lord, reward my friends, forgive 'my enemies, and receive 'my soul,' submitted, and gave the signal to the executioner; and I wish I could conclude, that his head had been taken off at one blow: but the executioner was so terrified at his lordship's intrepidity, and the suddenness of the signal, that notwithstanding he struck his lordship in the part directed, yet the force of the blow was not sufficient to sever the head from the body, though (happily) sufficient to deprive him of all sensation. After the first blow, his lordship's head fell back upon his shoulders, but being afterwards severed at two more gentle blows, was then received into a piece of red baize, and with his body deposited in his coffin, and delivered to his friends.

There were several pamphlets published at this time, relating to the different behaviour of these two lords, and some advertisements against Mr. Ford's account; but as there was no name put to them, they did not gain much credit. But one of these pamphlets, intitled, *Seasonable Reflections on the dying Words and Deportment of that great but unhappy man, Arthur Lord Balmerino*, in a letter to Mr. Ford, concludes thus in an appendix: "There is a gentleman of undoubted veracity, who attended the execution of lord Balmerino, positively affirms, and is ready to corroborate his affirmation by the most solemn proof, that

when his lordship kneeled down at the block, and submitted to the stroke of justice, he made no prayer whatever; but this will be better expressed in the gentleman's own words in writing, to the original whereof (now in the hands of the publisher) his name is subscribed, viz.

'I attended the execution of the late lord Balmerino, and was one of those who held the cloth to receive lord Balmerino's head, and am ready to make oath, if required, that I heard no prayer made by lord Balmerino, as is inserted in Mr. Ford's account; and that if there had been any prayer, I must have heard it, as well as any other person present, &c.'

"It is to be observed, this gentleman avers that he himself kneeled down so near the block, when he held the cloth, that if any thing had been spoken by his lordship, it was impossible but he must have heard it; that it was he who, after the second blow, took the lord by the arm, and drew up his body, to set the head in a position for the executioner's completing his work. He adds further, (in manifest contradiction to Mr. Ford) that his lordship came upon the scaffold, in a flannel waistcoat and shirt, and did not put either on after he was there; but pulled off the waistcoat, and had only the shirt on, when he laid his head on the block."

On these publications, Mr. Ford advertised in the public papers, as followeth:

To the Public.

The Account I published of the behaviour of the rebel lords at their execution, was for your satisfaction only, beyond which I neither had or expected any advantage; yet from that bare relation with truth and impartiality, several nameless pamphleteers and advertisers have, through faction, or worse motives, presumed to draw several unwarrantable inferences as to my political principles.

The authors being concealed, are unworthy of other notice, since nothing is easier to an ingenuous and unprejudiced mind, than to distinguish between the subject and the man: my lord Kilmarnock was happily educated in right principles, which he deviated from and repented; whereas the great, though unhappy, lord Balmerino, was unfortunate in his;—but as he lived,—he died.

Aldermanbury.

T. FORD.

Copy of the PAPER which was read by ARTHUR, Lord BALMERINO, upon the Scaffold at Tower-Hill, and delivered by him to the Sheriffs of London, just before his Execution, on Monday, Aug. 18, 1746.*

I WAS brought up in true, loyal, and Anti-

* We insert this Speech, without the treasonable part; as there are some anecdotes in it, not taken notice of in Mr. Ford's account, and which the public (probably) are strangers to. *Former Edition.*

Revolution principles, and I hope the world is convinced that they stick to me.

I must acknowledge I did a very inconsiderate thing, for which I am heartily sorry, in accepting of a company of foot from the princess Anne, who I know had no more right to the crown than her predecessor, the prince of Orange

To make amends for what I had done, I joined the (Pretender) when he was in Scotland in 1715; and when all was over, I made my escape, and lived abroad till the year 1734.

In the beginning of that year, I got a letter from my father, which very much surprised me. It was to let me know, he had a promise of a remission for me: I did not know what to do; I was then (I think) in the canton of Berne, and had nobody to advise with: but next morning I wrote a letter to the (Pretender) who was then at Rome, to acquaint the (Pretender) that this was done without my asking or knowledge, and that I would not accept of it without his consent.

I had, in answer to mine, a letter written with (the Pretender's) own hand, allowing me to go home; and he told me his banker would give me money for my travelling charges, when I came to Paris, which accordingly I got.

When (the Pretender's son) came to Edinburgh, I joined him, though I might easily have excused myself from taking arms on account of my age; but I never could have had peace of conscience if I had stayed at home,

I am at a loss when I come to speak of the (Pretender's son.) I am not a fit hand to draw his character, I shall leave that to others.—(Here he gives a fulsome character of the Pretender's son.)

Pardon me, if I say, wherever I had the command, I never suffered any disorders to be committed, as will appear by the duke of Buccleugh's servants at East Park; by the earl of Findlater's minister, Mr. Lato, and my lord's servants at Cullen; by Mr. Rose, minister at Nairn (who was pleased to favour me with a visit when I was prisoner at Inverness); by Mr. Stewart, principal servant to the lord president, at the house of Culloden, and by several other people. All this gives me great pleasure now that I am looking upon the block, on which I am ready to lay down my head: and though it had not been my own natural inclination to protect every body, it would have been my interest to have done it; for (the Pretender's son) abhorred all those who were capable of doing injustice to any

I have heard, since I came to this place, that there has been a most wicked report, spread and mentioned in several of the news-papers, that (the Pretender's son), before the battle of Culloden, had given out

orders that no quarter should be given to the enemy. This is such an unchristian thing, and so unlike (the Pretender's son), that nobody (the Jacobites) that knows him, will believe it. It is very strange, if there had been any such orders, that neither the earl of Kilmarnock, who was colonel of the regiment of foot-guards, nor I, who was colonel of the second troop of life-guards, should ever have heard any thing of it; especially, since we were both at the head quarters the morning before the battle. I am convinced, that it is a malicious report industriously spread to

Ever since my confinement in the Tower, when major White or Mr. Fowler did me the honour of a visit, their behaviour was always so kind and obliging to me, that I cannot find words to express it; but I am sorry I cannot say the same thing of general Williamson: he has treated me barbarously, but not quite so ill as he did the bishop of Rochester; and had it not been for a worthy clergyman's advice, I should have prayed for him in the words of David, Psalm cix. from the 6th to the 15th verse.

I forgive him, and all my enemies.

I hope you will have the charity to believe I die in peace with all men; for yesterday I received the holy eucharist from the hands of a clergyman of the church of England, in whose communion I die, as in union with the episcopal church of Scotland.

I shall conclude with a short prayer.—
(Here a prayer is mentioned, much the same as in Mr. Ford's account.)

THE CASE OF GEORGE EARL OF CROMERTIE, AS PRINTED IN 1746, AND SAID TO BE PRESENTED TO HIS MAJESTY.

THE Earl, from his infancy, was educated and brought up in the principles of the established church of Scotland, to which he always adhered till his late misfortune; inasmuch that he has, upon several occasions, received the thanks of the general assembly of that church, for the substantial proofs he gave, from time to time, of his sincere attachment to their interest.

The Earl intermarried in a family, whose zeal and affection to the present royal family was warm and remarkable upon all occasions; and particularly, during the rebellion in the year 1715, many of them used their utmost efforts in support of this happy constitution; none of them were neutral, or joined in that rebellion; and they acted the same part in the present rebellion, to the utmost of their power.

The Earl has issue of his marriage nine children, and his wife is now with child; and these have been brought up strictly in the same principles: and as to his eldest son, he imbibed those principles from his parents, and from three successive preceptors, who are all now ministers of the church of Scotland, under the

eye of Mr. Dundas his uncle, who had the honour to serve his late majesty as his advocate for Scotland, and was appointed by his present majesty one of the judges of the supreme court there.

Soon after the breaking out of this rebellion, when his majesty's troops, under the command of sir John Cope, arrived at Inverness, in the end of August last, the Earl immediately waited upon him, and, agreeable to his principles and inclinations, as well as his duty, made a tender of all his power and influence in suppressing this rebellion; but, to his great misfortune at this day, such assistance was not then judged necessary.

After the action at Preston-Pans, when commissions were issued for raising independent companies, under the direction of Mr. Forbes, president of the court of session in Scotland, application was made for a company for his son the lord M'Leod; and as he had reason to hope for success, he directed the gentlemen whom he intended to be subalterns in the company, to levy the men; and the levies went on accordingly; and the Earl's zeal for the present government continued unshaken until this period: and for this he appeals to sir John Cope, Mr. Forbes, and to the attestations of eight Presbyterian ministers in the hands of his grace the duke of Newcastle.

But when it was known that the subalterns in lord M'Leod's company were to be named by the lord Fortrose, and the subalterns that the earl had in view were disappointed, he was immediately beset by designing men, and they used all their art and cunning upon the Earl to seduce him from his duty; but no reason whatsoever could have had this effect, if he had not been intoxicated with liquor; and he no sooner recovered his understanding, but he reflected with horror upon what he had done; and for this he appeals to Mr. Brodie, lord Lyon's declaration, in the hands of the duke of Newcastle, and to the knowledge of the other members of both Houses of Parliament in the Earl's neighbourhood.

This unhappy lord, soon after engaging in this rebellion, went to Perth, and continued there a month, entirely in a private capacity; for he assisted at none of the reviews of the rebels, mounted none of their guards, bore no arms, issued no orders, but employed his time chiefly in the company of his majesty's officers, who were prisoners there, and laboured night and day to procure them all manner of indulgences; and the only use he made of his credit in the rebel army, was to make their captivity easy, in which he was fortunate enough to succeed in most cases; and he appeals to those gentlemen in this respect.

He did, indeed, afterwards, accept of a command to levy the cess, excise, and other contributions in the shires of Fife and Kinross, to the amount of 15,000*l.* but he preserved such discipline among the soldiers under his command, that though he intimated his orders, upon pain of military execution, agreeable

to the terms in which they were delivered to him, yet he avoided all methods of enforcing them, and returned without levying one shilling, which, in a great measure saved his majesty's faithful subjects from those exactions; and during his stay in those countries, the inhabitants were uninjured in their persons, and protected in their properties; and he gave up that command, that he might not be an actor in, or a witness to the severities which he then thought to be unavoidable; and for this he appeals to certificates from peers and commoners of Fife and Kinross, in the duke of Newcastle's hands.

Upon his return from this command, he went, attended only by his own domestics, to a gentleman's house, where he resided for some time in a private way, without command or commission, and without taking upon him any concern, but the continuance of all the good offices he could exert for the ease and protection of his majesty's subjects.

The action of Falkirk gave him a fresh, but melancholy opportunity of doing all the acts of humanity in his power to his majesty's troops, that were either taken or wounded in that conflict; and he extended his cares even to many of the unfortunate persons who lost their lives in his majesty's service.

When the name of his royal highness the duke obliged the rebel army to march north, he continued without any command.

When he arrived at Inverness, a command was again imposed upon him, to repair to the counties of Ross and Sutherland, and there to raise all the men in that country in arms, levy large sums of money by contribution, and large quantities of meal; and with strict orders, that in case those demands were not complied with, to use all manner of military execution, by burning houses, destroying cattle, and other severities: but so averse was he to these methods of violence, that he levied no men in those parts, and even his own tenants in that neighbourhood continued peaceable at home; and he also granted protections to all who asked them, and he supported his protections by parties, and he preserved the house of air Robert Munro, and of his brother Culcairn, which were particularly doomed for destruction by the rebels; nor would he trust this protection to others, but went himself, and took the proper measures for their preservation; and he used the same tenderness and care towards the

house and family of the earl of Sutherland, for which he appeals to that noble lord. And upon the whole of this article, though the unfortunate earl notified the orders he had from the Pretender, with all the severe injunctions they contained, yet he executed none of those severities; and his delays were in some measure salutary, as they prevented the full execution of them, by those who were sent in his place.

At the same time his house was a sanctuary to the effects of his majesty's loyal subjects, and particularly of those employed in his majesty's service under lord Loudoun.

He received his majesty's most gracious pardon.

Under date August 9th, 1746, Dr. Birch informs the honourable Philip Yorke (afterwards the second earl of Hardwicke) in a letter now [1813] in possession of the present earl, that "Mr. Wray finds in the books of the Exchequer, that the lords Kilmarnock and Lovat were paid their pensions of 400*l.* a year in the beginning of September last. The two earls in the Tower have desired the attendance of two of the most eminent of the dissenting ministers, Mr. Foster and Mr. Chandler, but I hear nothing of Balmerino's ghostly assistance. However lord Cromarty's will now be at leisure, for I find he has already received a pardon, though his companions it is said will suffer on Wednesday."

Mem. It appears by the Lords' Journal of July 28, 1746, that before the Lords proceeded to judgment in the preceding case,

"The lord bishop of London, for himself and the rest of the bishops, delivered a Protestation; which they desired might be entered:

"And the same was read as follows:

"The Lords Spiritual of the House of Peers do desire leave of this House, to be absent when Judgment is given upon the earl of Kilmarnock, the earl of Cromartie, and the lord Balmerino; saving to themselves and their successors, all such right in Judicature, as they have by law, and of right ought to have."

"Then he asked leave that they might withdraw; which being agreed to, they immediately withdrew accordingly."

519. The whole Proceedings in the House of Peers, upon the Impeachment exhibited by the Knights, Citizens, and Burgesses, in Parliament assembled, in the Names of themselves, and of all the Commons of Great Britain, against SIMON LORD LOVAT,* for High-Treason. The Proceeding in Westminster-Hall being begun on Monday the 9th Day of March, and continued on Tuesday the 10th, Wednesday the 11th, Friday the 13th, Monday the 16th, Wednesday the 18th, and Thursday the 19th Days of March: 20 GEORGE II. A. D. 1746-7.

Die Jovis, 11 Decembris, 1746.

A MESSAGE was brought from the House of Commons, by sir William Yonge, and others, to acquaint this House, That they, having matters to communicate to their lordships, of great importance to the king and kingdom, do desire that their lordships will continue sitting for some time.

To which the House agreed.

And the Messengers were called in again; and acquainted by the Lord Chancellor, That the Lords will continue sitting for some time, as desired.

The House was adjourned during pleasure.

The House was resumed.

A Message was brought from the House of Commons, by sir William Yonge, and others, as follows:

My lords; The Commons of Great Britain, in parliament assembled, having received information of divers treasons committed by a peer of this realm, Simon lord Lovat, have commanded me to impeach the said Simon lord Lovat of High Treason: And I do here, in their names, and in the names of all the Commons of Great Britain, impeach the said Simon lord Lovat of High Treason: And I am further commanded to acquaint your lordships, That they will, with all convenient speed, exhibit Articles to make good the charge against him.

Die Mercurii, 17 Decembris, 1746.

A Message was brought from the House of Commons, by sir William Yonge, and others,

* See his Case for Treason and other crimes, vol. 14, p. 349.

"Dalrymple," [Sir John] "ascribes the revolt of Mackay's people before the battle of Killiecrankie to the management of Lovat, on the authority of his MS. Memoirs; his Memoirs have been since published, but they contain no allusion whatever to the fact. Laing's History of Scotland, vol. 4, p. 220."

As to Lord Mar's conduct in 1715, see 4 Laing, 385.

VOL. XVIII.

who said, he was commanded by the House of Commons to deliver to this House Articles of Impeachment of High Treason against Simon lord Lovat.—He said, He was also commanded by the Commons to acquaint their lordships, That they are ready to maintain their charge: And he delivered in the said Articles.

Which Articles being read:

The duke of Newcastle acquainted the House, That the said lord Lovat is already under commitment for high treason in his majesty's Tower of London.

Then the following Order was made:

Whereas the Commons, assembled in parliament, have this day exhibited to this House Articles of Impeachment of High Treason against Simon lord Lovat; it is ordered, by the Lords spiritual and temporal, in parliament assembled, That the said lord Lovat be brought to the bar of this House to-morrow at two of the clock in the afternoon, to hear the said Articles read; and to abide such further order, as this House shall think fit to make concerning him.

To Charles lord Cornwallis, Constable of his majesty's Tower of London, and, in his absence to the lieutenant of the said Tower, or his deputy.

Die Jovis, 18 Decembris.

The Order being read, for bringing Simon lord Lovat to the bar of this House, to hear the Articles of Impeachment of High Treason exhibited against him yesterday by the House of Commons, read unto him:

The said lord Lovat was accordingly brought to the bar, by the deputy-gentleman-usher of the black rod: Where he kneeled until the lord chancellor directed him to rise.—Then

The said Articles of Impeachment were read unto him: Which done, the lord chancellor asked him, What he had to say thereunto; and informed him, That, if he had any thing to request of the House, this was his proper time.

Whereupon he acquainted the House with his infirmities occasioned by old age, and particularly alledged his deafness, that he could not hear what the contents of the said Articles

2 M

were: Wherefore, having a Petition prepared to make known to the House his requests, he desired the same might be read: Which being delivered in, was read by the clerk, and is as follows; viz.

To the Right Honourable the Lords Spiritual and Temporal, in Parliament assembled:
The Humble PETITION of SIMON Lord FRASER of LOVAT.

Sheweth; That your petitioner, by reason of his great age, labours under many infirmities and weakness; and, being entirely ignorant of the forms of law, and method of proceedings in this august court, is unable to make any defence, or give in a proper answer to the Articles of Impeachment exhibited against him, without the assistance of able counsel and solicitors.

That your petitioner, during his close confinement in the Tower of London, for now near five months, has not been able to obtain one shilling either out of his estate or otherwise; which has been occasioned, as your petitioner has been informed, by some grants of a very extraordinary nature, and which your petitioner hopes, shall never again, in this island, be drawn into precedent; authorizing and empowering other persons, strangers to your petitioner, to take possession of his estate, and to levy the rents thereof; while such as had in their hands any money or effects of your petitioner's, were prohibited and restrained from paying any part thereof to your petitioner, or his order.

That your petitioner applied several times to one of his majesty's principal secretaries of state, complaining of the hardships your petitioner suffered by means of such proceedings; and your petitioner is informed, that two several orders were made thereupon, in order to remove the said prohibitions and restraints, and to recal the said powers so granted as above: But notwithstanding thereof, your petitioner is still in the same deplorable circumstances, without any money even to procure him the common necessities of life, and is wholly indebted to general Williamson for his support.

That your petitioner, when he was apprehended by a party of his majesty's troops in Scotland, had, in his strong-box, money and jewels to the amount of 700*l.* and upwards, which they seized, and retain; insisting the same is lawful prize.

Your petitioner therefore humbly prays, that your lordships, moved by your innate goodness, may be pleased to assign your petitioner such and so many counsel and solicitors as your lordships shall think proper: that your petitioner may have a copy of the Articles of Impeachment; and may not be ordered by your lordships to begin and enter upon his defence, while he remains stripped and deprived of all the necessary means which the law allows him for his defence and support; but that such a reasonable time may be allowed

your petitioner to prepare and put in his Answer, that he may be enabled to receive money sufficient to retain and fee his counsel and solicitors; without which, your petitioner apprehends, he cannot have their assistance and advice: And that, for that purpose, the money and jewels contained in the strong-box, and unjustly taken as above, may be immediately restored to your petitioner, by your lordships' order. And your petitioner shall ever pray,
&c. LOVAT.

The counsel that lord Lovat desires may be assigned are, Mr. Starkie, Mr. Forrester and Mr. Ford, and Mr. Wilmott: And the solicitors are, Mr. George Ross, Mr. Hugh Fraser, and Mr. Goostrey.

The Petition being read, the said lord Lovat was asked by the lord chancellor, if he had any thing further to offer.

To which he answering in the negative;

He was directed to withdraw.

And the House taking the requests of the said Petition into consideration;

Ordered, That the said lord Lovat may have a copy of the said Articles of Impeachment exhibited against him: And that he do put in his Answer thereunto, in writing, on or before Tuesday, the 13th day of January next: And that Mr. Starkie, Mr. Forrester, Mr. Ford, and Mr. Wilmott, the counsel mentioned in the said Petition, be assigned to assist him in preparing his Answer, and likewise in his defence, in matters of law: And that Mr. George Ross, Mr. Hugh Fraser, and Mr. Goostrey, be also assigned solicitors for him: And that such counsel and solicitors may have access to him at all seasonable times: And that the said lord Lovat have liberty to cause search to be made, and copies of records and journals to be taken out, in order to his defence: And that he shall have summons issued for such witnesses as he shall send in the names of, to be by him made use of at his trial; which witnesses shall have the protection of this House for their safe coming and going, during the time of the said trial.

Ordered, That the lord chancellor do acquaint the lord Lovat, that it is expected by their lordships, that he would send in the names of such witnesses as he shall desire to be summoned, as soon as conveniently he can; and that, in case he do not, he must not expect to be indulged with any further delay on that account.

Ordered likewise, That the said lord Lovat be permitted to receive the rents and profits of his estate, by his factors or agents, in like manner as if he was not under an accusation of high treason: And that his majesty's advocate for Scotland do take the proper methods to carry this order into execution.

Then the said lord Lovat was called in again: And the lord chancellor acquainted him with what the House had ordered.

And then he was a second time directed to withdraw.

Ordered, That lord Lovat do stand committed to his majesty's Tower of London, to be there safely kept in order to his trial, till he shall be thence delivered by due course of law: And that no person shall have access to him without the special leave of the House.

Ordered, That the lord chancellor do write letters to all the lords who have not been present in the House either this day or yesterday, in the usual manner, requiring their attendance on the service of this House (all excuses set apart), on Wednesday, the 21st day of January next, on occasion of the proceedings now depending in this House against Simon lord Lovat, who stands impeached by the House of Commons of high treason.

Die Martis, 23 Decembris, 1746.

A Petition of Simon lord Fraser of Lovat was presented, and read; praying, that he may be allowed to the 1st day of February for answering the Articles of Impeachment exhibited by the House of Commons against him; within which time he hopes, that the care and diligence of his agents in Scotland will, notwithstanding the season of the year, furnish him with the papers and materials necessary for that end.

And thereupon Mr. George Ross, one of the petitioner's solicitors, being called in, and heard at the bar, touching the contents of the said Petition;

He was directed to withdraw.

Ordered, That the said Petition be rejected.

Ordered, That the lieutenant of the Tower of London, or his deputy, do bring the said lord Lovat to the bar of this House, on Tuesday, the 13th day of January next, at two of the clock in the afternoon, in order to the putting in his Answer to the Articles of Impeachment of High Treason exhibited against him by the House of Commons.

Die Martis, 13 Januarii, 1746-7.

The order of the day being read, for bringing Simon lord Lovat to the bar of this House, in order to the putting in his Answer to the Articles of Impeachment of High Treason, exhibited against him by the House of Commons, he was brought to the bar accordingly: Where he kneeled, till the lord chancellor acquainted him he might rise. He then delivered in his Answer to the said Articles: and the same was read.

Then the lord Lovat was asked by the lord chancellor, if he had any thing further to offer. Whereupon he acquainted the House, he had caused to be prepared two Petitions to their lordships, which he conceived did concern the justice as well as the honour of the House. And his lordship delivering in the said Petitions, the same were severally read:

The first complaining, That the Order of this House of the 18th of December last, relating to the factory or receivership of the petitioner's rents, had not been obeyed so as to be made effectual to him; nor had the contents

of the strong-box taken from him, and now in captain Ferguson's possession, been delivered to his agent, as had been promised him: and praying, that obedience to the said Order might be compelled, and an immediate restitution of the money taken out of the said box; or that such order might be made concerning this matter, as to the House should seem meet.

The other Petition setting forth, That Mr. William Fraser, writer to the signet, who for many years had acted as his chief agent, and had the management of his estate in Scotland, was by his direction come to town; but could not have access to him without the permission of this House: and praying, that the said Fraser might have liberty to come to the petitioner at all seasonable times.

Then the lord Lovat was directed to be taken from the bar.

Which done; the first Petition was again read: and, after debate, and reading the said Order, relating to the receipt of the rents and profits of the said lord Lovat's estate,

Ordered, That the said Petition be rejected.

Then the other Petition being likewise read;

Ordered, That the said William Fraser be permitted to have access to the petitioner at all seasonable times, between the hours of ten of the clock in the forenoon, and two of the clock in the afternoon, in the presence of such officer belonging to the Tower of London, as the constable thereof shall appoint.

Ordered, That a copy of the Answer of the said lord Lovat to the Articles of Impeachment of High Treason, exhibited against him by the House of Commons be prepared: and that, when the same has been carefully examined by the clerk, it be sent by a Message to the House of Commons, and left with that House.

Ordered, That the said lord Lovat be conveyed back to the Tower of London, by the lieutenant of the same, or his deputy, to be there kept in safe custody, until he shall be thence delivered by due course of law.

Die Veneris, 16 Januarii, 1746-7.

A Message was brought from the House of Commons by sir William Yonge, and others, to acquaint this House, that they have considered the Answer of Simon lord Lovat to the Articles of Impeachment exhibited against him by the knights, citizens, and burghesses, assembled in parliament; and do aver their Charge against the said Simon lord Lovat for High Treason, to be true; and that the said Simon lord Lovat is guilty in such manner as he stands impeached: and that the Commons will be ready to prove their Charge against him at such convenient time as shall be appointed for that purpose.

Die Jovis, 22 Januarii, 1746-7.

A Petition of Simon lord Lovat, suing himself Simon lord Fraser of Lovat, was presented, and read; praying, that Mr. William Fraser may be appointed one of his solicitors, in the room of Mr. Hugh Fraser, he being necessarily required to go into the country.

Ordered, That the said Mr. William Fraser be assigned the petitioner's solicitor, in the room of the said Mr. Hugh Fraser, as desired: and that the said Mr. William Fraser may have access to the petitioner at all reasonable times.

Ordered, That Monday, the 23d day of February next, be, and is hereby appointed for, the Trial of Simon lord Lovat, in Westminster-hall, upon the Articles of Impeachment exhibited against him by the House of Commons for High Treason.

And a Message was sent to the House of Commons, by Mr. Spicer and Mr. Edwards, to acquaint them therewith.

Then the House appointed a committee to inspect the Journals of this House, relating to former cases of impeachments; and to consider of the proper methods of proceeding on the Impeachment against Simon lord Lovat; and to report to the House what they shall think proper thereupon.

Die Lunæ, 2 Februarii, 1746-7.

The earl of Warwick reported from the lords committees appointed to inspect the Journals of this House, relating to former cases of impeachments; and to consider of the proper methods of proceeding on the Impeachment against Simon lord Lovat; and to report to the House what they shall think proper thereupon;

That the committee had met, and inspected the Journals of this House, in former cases of impeachments; and had considered the matters to them referred; and had come to several resolutions: which his lordship reported. And thereupon several orders were made, touching the course of proceeding to, and at the ensuing Trial, and for preserving the peace; and amongst them as follows; viz.

Ordered, That an humble Address be presented to his majesty, to acquaint his majesty, that this House hath appointed the Trial of Simon lord Lovat, upon the Articles of Impeachment of High Treason exhibited against him by the House of Commons, to begin in Westminster-hall on Monday, the 23d day of this instant February: and humbly desire, that his majesty will be pleased to appoint a lord high steward, to continue during the said Trial.

Ordered, That the said Address be presented to his majesty by the lords with white staves.

Ordered, That the counsel assigned the said lord Lovat may be present when he is at the bar, in order to be heard touching any point or matter of law,* if any such shall arise during the said Trial.

* The Statute 7 W. 3, c. 3, under which persons indicted for high treason, whereby any corruption of blood may be made to such offenders or their heirs, or for misprisions of such treason, were admitted to make their full defence by counsel, did not extend to cases of impeachments, but shortly after this Trial of

Ordered, That the witnesses, which shall be produced by the lord Lovat to be examined in his defence, shall be examined upon oath; which oath shall be administered in the like form as an oath was directed by this House to be administered to any witnesses, who should be produced by the earl of Wintour^a at his Trial.

Ordered, That the lord great chamberlain be desired to take care and give order, that accommodations be made in the scaffold already erected in Westminster-hall for the Commons, as hath been used in Trials in Westminster-hall upon impeachments.

Die Mercurii, 4 Februarii, 1746-7.

The Lord Steward reported, That the lords with white staves had (according to order) presented to his majesty the Address of this House of Monday last, for the appointment of a lord high steward, to continue during the Trial of Simon lord Lovat; and that his majesty had been pleased to give orders accordingly.

Ordered, That the said Commission for appointing a lord high steward shall be in the like form as that for the Trial of the lord viscount Stafford, as entered in the Journal of this House the 30th of November, 1680, except that the same be in the English language.

Die Mercurii, 18 Februarii, 1746-7.

A Petition of Simon lord Fraser of Lovat was presented and read; setting forth, That upon the appointment of his Trial, he immediately dispatched one of his solicitors to summon the petitioner's material witnesses, who are at great distances from each other, inhabiting in the counties of Inverness and Ross; but by reason of the inclemency of the weather, the badness of the roads, and other unavoidable accidents, none of them are yet arrived, nor can possibly be got to London by the time of trial; and praying, that this House will appoint some more distant time for that purpose.

And thereupon William Fraser and William Goostrey, two of the petitioner's solicitors, were called in, and heard at the bar, to verify the truth of the allegations of the said Petition: and being withdrawn,

Ordered, That the time appointed for the petitioner's Trial be, and is hereby, enlarged till to-morrow fortnight, the 5th day of March next.

Ordered, That a Message be sent to the House of Commons, to acquaint them, that upon the humble Petition of Simon lord Lovat,

lord Lovat, (viz. Wednesday, May 6, 1747,) a Bill (moved for by sir William Yonge) was brought into the House of Commons for allowing persons impeached of high treason, whereby any corruption of blood may be made, or for misprision of such treason, to make their full defence by counsel. It received the royal assent on the 17th of June. It is the statute 20 G. 2, c. 30.

^a See his Case, vol. 15, p. 806.

for putting off his Trial to a further day, for the reasons therein alleged, the Lords have enlarged the time appointed for the Trial of the said lord Lovat till Thursday the 5th day of March next.

And a Message was accordingly sent to the House of Commons, by Mr. Holford and Mr. Bennet, to acquaint them therewith.

Die Lunæ, 2 Martii, 1746-7.

A Petition of Simon lord Fraser of Lovat, with an Affidavit of Hugh Fraser thereto annexed, were presented to the House, and read, as follows:

To the Right Hon. the Lords Spiritual and Temporal, in Parliament assembled: The Humble PETITION of SIMON LORD FRASER of LOVAT,

Sheweth; That your lordships having appointed your petitioner's Trial for the 23rd of February, your petitioner did lately take the liberty humbly to represent the impossibility he was under to prepare so soon for trial, in respect his witnesses, from the badness of the road, were not then arrived; and your lordships were pleased to indulge your petitioner with a delay till Thursday next.

That Hugh Fraser, whom your petitioner had directed to serve your lordships' summons upon your petitioner's witnesses, arrived in town, with sundry of them, late on Friday night, having duly served your lordships said order upon several other persons, who were all material witnesses for your petitioner.

That Thomas Fraser of Struy, and Donald Fraser, alias Down, two of the witnesses, served as aforesaid, were prevented, by sickness, from setting out as early as some of the rest; but had declared to the said Hugh Fraser their willingness to obey your lordships' summons as soon as they were able to travel; which your petitioner hopes may soon be the case.

That William Fraser of Belloan, Alexander Fraser of Belnain, Thomas Fraser of Garthmore, Alexander Fraser of Beloloyne, and the reverend Mr. Donald Fraser, minister at Killoarnan, who are all material witnesses for your petitioner, and without whose testimony your petitioner cannot safely proceed to trial, have absolutely refused to attend, though regularly served with your lordships' summons, as by affidavit annexed appears; and that the persons, named as aforesaid, are material and necessary witnesses, your petitioner is ready to make affidavit of; but being strictly confined in the Tower, and no person having access to him without your lordships' order, he has no opportunity so to do.

That under these circumstances, and that your petitioner, without your lordships' interposition, cannot compel the said persons to attend his Trial, he is under a necessity to apply to your lordships for relief, without which he must, as to the charge in some of the aforesaid

Articles, remain defenceless, should your lordships in the interim proceed to trial.

Your petitioner therefore humbly prays, your lordships would be pleased to appoint a more distant day for his Trial; and that your lordships would be pleased to compel the said William, Alexander, Thomas, Donald, and Alexander Frasers, to attend your petitioner's Trial at such time as your lordships shall think fit; or to grant him such other relief, as to your lordships, in your great wisdom, shall seem meet. And your petitioner shall ever pray.

LOVAT.

In the House of Lords.—Upon an Impeachment for High Treason against Simon Lord Lovat:

Hugh Fraser, of Grays Inn, in the county of Middlesex, gentleman, maketh oath, that he this deponent did, on the 10th day of February last, personally serve Thomas Fraser of Struy, and on the 12th day of the said month of February, did also personally serve William Fraser of Belloan, Alexander Fraser of Belnain, Thomas Fraser of Garthmore, Alexander Fraser of Beloloyne, and Donald Down, alias Fraser, with an Order of this honourable House, bearing date the 16th of January last past: whereby it was ordered, that the said several persons, and others named in such order, should attend this House as witnesses for the said Simon lord Lovat, who stands impeached of high-treason by the House of Commons, by delivering to each of them a true copy of the said order, and, at the same time, shewing to each of them the said original order. And this deponent further saith, that the said William Fraser of Belloan, Alexander Fraser of Belnain, Thomas Fraser of Garthmore, and Alexander Fraser of Beloloyne, though served with the said order as aforesaid, absolutely refused to obey the said order; and this deponent verily believes will not attend the said Trial: and the said Thomas Fraser of Struy, and Donald Down, alias Fraser, were both at the time of such service sick, and unable to travel; and declared themselves incapable of complying with the said order.

HUGH FRASER.

Sworn the 2d day of March, 1746, before me, at the Court of Requests.

M. THURSTON.

Afterwards the said Hugh Fraser, and Mr. Goostrey, one of the prisoner's solicitors, were called in, and examined at the bar: and being withdrawn,

Ordered, That the said Petition be rejected.

Ordered, That the lieutenant of the Tower of London, or his deputy, do bring to the bar of this House, in Westminster-hall, on Thursday next, at ten of the clock in the forenoon, Simon lord Lovat, in order to his trial upon the Impeachment of High Treason exhibited by the House of Commons against him.—Then,

A Message was sent to the House of Commons by the former messengers, to acquaint them that the Lords will be ready to go down

into Westminster-hall, at the time above mentioned, in order to the Trial of the said lord Lovat.

Die Martis, 3 Martii, 1746-7.

A Petition of Simon lord Fraser of Lovat, with the Affidavits of Mr. George Ross, and Mr. William Fraser, thereto annexed, were presented and read as follows :

To the Right Honourable the Lords Spiritual and Temporal in Parliament assembled ;
The Humble PETITION of SIMON LORD FRASER of LOVAT :

Sheweth ; That nothing but the utter impossibility the petitioner and his agents are under, of preparing his defence against Thursday the 5th of this instant March, could have induced him to trouble your lordships with this second application for some days further time.

But none of your petitioner's witnesses coming to town till late on Friday night last ; and one of your petitioner's agents having received an account by last night's post, that two other persons, who were summoned as witnesses for your petitioner, set out from Edinburgh on the 24th and 25th of last month, and are not yet arrived in London, but expected here by the end of this week, your petitioner cannot possibly be prepared to take his Trial before Monday next.

The petitioner begs leave further to represent to your lordships, that in the present unhappy situation of his affairs, he has no means of furnishing himself with money, either for applying to counsel, bearing the charge of his witnesses, or other necessary expence, but from the supply afforded him by his agents, who have already advanced him considerable sums for the above purposes, which are already expended ; that the solemnity, and unavoidable length of the proceedings, making further sums of money still necessary, the petitioner is afraid that his defence may suffer on that account, unless your lordships are pleased, in compassion to his present difficulty, to give some kind of encouragement to his agents, to hope they shall be repaid what they already have, or may hereafter disburse on the petitioner's account ; it being, by the loss of the petitioner's moveables, out of his own power to give them any kind of indemnification.

The petitioner also prays your lordships to assign Mr. Charles Hamilton Gordon to be one of his counsel, in place of Mr. Starkey, who, on account of the bad state of his health, has declined giving the petitioner his assistance.

May it therefore please your lordships in consideration of the premises, to put off the petitioner's Trial until the next Monday ; and to make such other order upon this application as to your lordships shall seem meet. And your petitioner shall ever pray, &c. LOVAT.

In the Impeachment of the Commons of Great-Britain against Simon lord Fraser of Lovat :

George Ross, one of the solicitors assigned by the right honourable the House of Lords

to the said Simon lord Fraser of Lovat, maketh oath, That since his appointment, he has at different times laid out and expended upwards of 600*l.*, out of his own pocket, in seeing of his lordship's counsel, bringing up his witnesses, and other charges attending the several steps already taken, towards preparing for the said lord's defence, without receiving any money or security whatsoever for his indemnification. GEORGE ROSS.

Sworn at the public office, 2d March, before W. KINASTON.

In the Impeachment of the Commons of Great-Britain, against Simon lord Lovat.—In the House of Lords :

William Fraser, writer to his majesty's signet, maketh oath, That last night he received advice from Edinburgh, that Thomas Fraser of Struy, and Mr. Donald Fraser, two of the witnesses summoned on the behalf of lord Lovat, are now upon the road, and will be here by Saturday or Sunday next : which information this deponent believes to be true.

WILL. FRASER.

Sworn at the public office, 3d March, 1746, before THO. BENNET.

Ordered, That the Trial of the petitioner be put off to Monday next, as desired.

A Message was sent to the Commons, by Mr. Burroughs and Mr. Allen, to acquaint them, that this House, upon the Petition of the said lord Lovat, for the reasons therein contained, hath enlarged the time of his Trial upon the Impeachment of High-Treason exhibited against him by the House of Commons, to Monday next, at 11 o'clock in the forenoon ; and that their lordships will be ready to go down into Westminster-hall at the time above-mentioned, in order to his Trial.

Ordered, That the lieutenant of the Tower of London, or his deputy, do bring the said lord Lovat to the bar of this House in Westminster-hall, at 10 o'clock in the forenoon, on Monday next, in order to his Trial upon the said Impeachment.

Monday, March 9, 1746-7.

The Lords met in the House of Lords in their robes ; and, after prayers, adjourned into Westminster-hall.

FIRST DAY.

About 11 o'clock, the Lords came from their own House into the Court erected in Westminster-hall, in the manner following :

The lord high steward's gentleman attendants, two and two.

The clerks assistant to the House of Lords ; and the clerk of the parliament, with the clerk of the crown in the court of Chancery, bearing the king's commission to the lord high steward.

The masters in chancery, two and two.

The judges, two and two.

The peers eldest sons, two and two.

Peers minors, two and two.

York and Windsor heralds.

Four serjeants at arms with their maces, two and two.

The yeoman usher of the House.

Then the Peers, two and two, beginning with the youngest baron.

Then four serjeants at arms with their maces, two and two.

The serjeants at arms attending the great seal, and purse bearer.

Then Garter king at arms, and the gentleman usher of the black-rod, carrying the white staff before the lord high steward.

Philip lord Hardwicke, lord high chancellor of Great Britain, lord high steward, alone; his train borne.

The Lords having taken their places in the court, according to their degrees, the Lord High Steward being upon the uppermost wool-pack; and the Commons, and their Managers, being also in the seats respectively prepared for them;

The clerk of the crown in Chancery having his majesty's Commission to the Lord High Steward in his hand, standing before the clerk's table with his face towards the state, made three reverences, the first at the table, the second in the midway, and the third near the wool-pack; then kneeled down, and on his knee, presented the Commission to the lord high steward; who delivered the same back to him; who, rising, made three reverences, and returned with it to the table: And then proclamation was made for silence; in this manner:

Serjeant at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Lord High Steward stood up, and spoke to the peers.

Lord High Steward. His majesty's Commission is about to be read: your lordships are desired to attend to it in the usual manner; and all others are likewise to stand up, uncovered, while the Commission is reading.

All the peers uncovered themselves; and they, and all others, stood up uncovered, while the commission was read; which is as follows: viz.

GEORGE R.

George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to our right trusty and well-beloved counsellor Philip lord Hardwicke, baron of Hardwicke in our county of Gloucester, our chancellor of Great Britain, greeting. Whereas Simon lord Lovat, before us in parliament, by the knights, citizens, and burghesses, in our parliament assembled, in the name of the said knights, citizens, and burghesses and in the name of all the Commons of our kingdom of Great Britain, is and stands impeached and accused of High-Treason, by him the said Simon lord Lovat committed and

perpetrated; we, considering that justice is an excellent virtue, and pleasing to the Most High, and being willing, that the said Simon lord Lovat should, before us in our present parliament, according to the law and custom of this our kingdom of Great-Britain, and according to the custom of parliament, be heard, sentenced, and adjudged, touching and concerning the said High-Treason whereof he stands impeached and accused, as aforesaid, and that all other things, which are necessary in this behalf, should be in due manner done and executed; and forasmuch as the Lords spiritual and temporal in our present parliament assembled, have most humbly besought us, that we would vouchsafe to appoint a Steward of Great-Britain for this time; we, very much confiding in your fidelity, prudence, provident circumspection, and industry, have for this cause, ordained and constituted you Steward of Great Britain, to bear, execute, and exercise, for this time, the said office, with all things to the same office in this behalf due and belonging; and therefore we command you, that you diligently set about the premises, and, for this time, do exercise and execute, with effect, all those things, which belong to the office of Steward of Great-Britain, and which are required in this behalf. In witness whereof, we have caused these our letters to be made patent. Witness ourself at Westminster, the 9th day of March, in the 30th year of our reign.—By the king himself, signed with his own hand.

YORKE and YORKE.

Serj. at Arms. God save the king.

Then Garter, and the gentleman usher of the Black Rod, after three reverences, kneeling, jointly presented the white staff to his grace the Lord High Steward: and then his grace, attended by Garter, Black Rod, and the purse-bearer (making his proper reverences towards the throne), removed from the wool-pack to an armed chair, which was placed on the uppermost step but one of the throne, as it was prepared for that purpose; and then seated himself in the chair, and delivered the staff to the gentleman usher of the Black Rod on his right hand, the purse-bearer holding the purse on the left.

Cl. of the Cr. Serjeant at Arms, make proclamation.

Serj. at Arms. Oyes, Oyes, Oyes! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

L. H. S. Is it your lordships' pleasure, that the judges have leave to be covered?

Lords. Ay.

Then another proclamation was made, as follows:

Serj. at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner to the bar, according to the order of the House of Lords to you directed.

Then Simon lord Lovat was brought to the bar by the deputy-governor of the Tower, hav-

ing the axe carried before him by the gentleman gaoler, who stood with it on the left-hand of the prisoner, with the edge turned from him. The prisoner when he approached the bar, made three reverences, and then fell upon his knees at the bar.

L. H. S. Your lordship may rise.

Then the prisoner rose up, and bowed to his grace the Lord High Steward, and to the House of Peers: which compliment was returned him by his grace and the Lords.

And proclamation being again made for keeping silence, the Lord High Steward spake to the prisoner as follows:

Lord High Steward. Simon lord Lovat, you stand impeached of High-Treason by the knights, citizens, and burghesses in parliament assembled, in the names of themselves, and of all the Commons of Great Britain; and your lordship is now brought to the bar of this House to receive your Trial upon that impeachment.

The weight of this accusation, the solemn manner of exhibiting and prosecuting it, and the awfulness of this supreme judicature, the most illustrious in the world, are circumstances, that may naturally strike your mind with anxious and alarming apprehensions. Reasonable and well-grounded must those apprehensions be, if they proceed from that greatest of all terrors, a consciousness of guilt. But if your lordship is innocent; if you have really preserved yourself untainted with the heinous crimes laid to your charge, as you have averred by your Answer; these very awful circumstances, when duly considered, ought to have a contrary effect, and to afford you support and consolation.

Your lordship can never doubt of the greatest fairness and candour in the management of a prosecution carried on by the House of Commons, intrusted and highly concerned to preserve the rights and liberties of their fellow-subjects. Neither can you entertain the least doubt of a just and impartial Trial, where the law of the land, and the custom and usage of parliament (an essential part of that law), constitute the rule of proceeding; and the decision and judgment rest in the breasts of these noble lords your peers, who are to try you upon that honour, which is inseparable from them, and to judge you by that law, which is the great security of themselves and their posterity.

It is my duty to put your lordship in mind of some things, which may be of use to you in the conduct of your defence; but in this I shall be the shorter, since, at your own request, counsel have been already assigned you, with whom you must be presumed to have advised.

Your lordship must give due and patient attention to the reading of the Articles of Impeachment, and what shall be said by the Managers for the House of Commons, or offered in evidence against you, without giving any interruption: but when the Managers shall have finished the examination, on their part, of

any witness produced by them, you will have liberty to cross-examine that witness.

When the Managers for the Commons shall have gone through their evidence, and closed what they shall think fit to offer by way of charge, then will be your lordship's time to make your defence. In doing this, you and your witnesses will be heard with the greatest attention and equity.

But your lordship must take notice, that your counsel are not to examine or cross-examine any witness, nor to give you any assistance, while matter of fact only is in question; but, if any point or matter of law shall arise during this proceeding, they will, according to the known rules in such cases, be heard to it in your behalf; and, for that purpose, are permitted to be present whilst your lordship is at the bar.

The witnesses produced in your defence, must be examined upon oath, pursuant to a very just and wise provision made by act of parliament in the first year of the late queen Anne, and according to the form established by their lordships in former cases of impeachments.

By command of their lordships, I am further to acquaint you, and all other persons, who shall have occasion to speak to this Court, that they are to address themselves to the lords in general, and not to any lord in particular.

Before I conclude, I must beg the indulgence of the House to add one thing more. If your lordship shall desire to have the use of pen, ink, and paper, to take notes in order to your defence, I presume it will be permitted; and if, in the course of your Trial, you should happen to omit any advantage which in law and justice ought to be allowed to you for your defence, such is the candour of my lords your judges, that I trust I shall meet with their approbation in giving you notice of it.

The Articles of Impeachment, and the lord Lovat's Answer thereunto, as also the Replication of the Commons to the said Answer, were (by command of the Lord High Steward) read, and the same are as follow:

ARTICLES OF IMPEACHMENT OF HIGH TREASON AGAINST SIMON LORD LOVAT.

Whereas the imperial crown and government of these kingdoms have been long, duly, and happily established, in the royal family of his present most sacred majesty, upon principles equally conducive to the honour and safety of the crown, and to the protection and liberty of the subject; whereby settled laws are made the common measure of justice to both, and a prerogative wisely calculated to promote the greater good of the people, and answer the exigencies of government, has been ascertained and secured:

And whereas the reigns of his present majesty, and his royal father, have given the strongest and most illustrious proofs of the

happy effects of those principles, in the exercise of their legal, mild, and equal administration, under which every subject, from the highest to the lowest, has had his religion, his person, and his property, fully protected by the most inviolable observance of the laws, which have had their free course, without the least interruption on the part of his majesty, or of his royal father :

Notwithstanding which, there have been found many wicked and ungrateful persons, who have themselves enjoyed all these blessings in common with the rest of their fellow-subjects, and yet have been weak and desperate enough, from time to time, to contrive the subversion of this happy establishment, in order to introduce popish bigotry and superstition, instead of the Protestant religion, and an arbitrary, tyrannical power, instead of a free government ; and as the only means of establishing and perpetuating those great evils, to place the Pretender to his majesty's crown upon the throne of this kingdom ; and, the more easily to obtain these ends, have, from time to time, taken advantage of the distresses, which, in the course of human affairs, have happened to their native country, to set on foot and prosecute their traitorous designs :

And whereas divers of the said traitors to his majesty have laid hold of the opportunity arising from the just and unavoidable, but difficult and expensive wars, in which this nation has been for some time engaged, to renew their treasonable conspiracies, for the bringing their wicked purposes to effect, by the assistance of troops and money from his majesty's enemies abroad, and by raising a rebellion at home :

And whereas, by the instigation of, and in concert with the said traitors, a great number of French troops, accompanied by the eldest son of the said Pretender, were ready, and had in part embarked, and actually set sail, to invade this kingdom, in the year one thousand seven hundred and forty-three ; but were then prevented from accomplishing their design by the wise precautions of his majesty, and the good providence of Almighty God :

And whereas the same traitors, restless and indefatigable in the prosecution of their said wicked and traitorous purposes, hoping that the French, by the great superiority of their numbers in Flanders, might be able to invade this kingdom, and, at the same time, to prevent the return of his majesty's troops from abroad, for the defence of the nation, did, in the year one thousand seven hundred and forty-five, encourage the said eldest son of the Pretender to his majesty's crown, to land, at that critical juncture, in this kingdom, who, in pursuance of such encouragement, did actually land in Scotland, and put himself at the head of a large body of armed traitors, and commence and carry on, for a considerable time, a cruel, unnatural, and bloody war against his majesty, within this realm, which has at last been happily suppressed :

VOL. XVIII.

ARTICLE I.

Simon lord Lovat, being a subject of his said majesty, one of the said traitors and rebels, and conspiring and joining with them in their said traitorous designs, and having withdrawn that due obedience, fidelity, and allegiance, which, as a loyal subject, he owed, and of right ought to bear, to his said present most sacred majesty, the only true, lawful, and undoubted sovereign of this kingdom, his true and natural lord, did, upon the 31st day of December, in the year of our Lord 1743, in the shire of Inverness, and, on the 28th day of October, in the year 1745, in the same shire, and at divers other days, times, and places, wickedly, maliciously, falsely, and traitorously, compass and imagine the death of his said majesty.

ARTICLE II.

And for accomplishing his said wicked and traitorous purpose, he, the said Simon lord Lovat, upon the said 31st day of December, in the said year 1743, in the shire of Inverness aforesaid, did traitorously correspond with the said Pretender, obtain and accept a commission from the said Pretender, to be a lieutenant-general of his forces, and another commission from the said Pretender to be general of the Highlanders ; and did also accept from the said Pretender, a patent or grant, importing to create him the said Simon lord Lovat duke of Fraser ; and then and there did traitorously conspire and enter into an association with many other traitors, in order to raise a war and rebellion against his majesty, within this realm, and to obtain troops, money, and succours from France, for that purpose.

ARTICLE III.

And the said Simon lord Lovat did further falsely and traitorously, at the times and place before particularly mentioned, and at divers other times and places, assemble himself, with divers other false traitors and rebels, against our said sovereign lord the king, being armed and arrayed in a warlike manner, and did raise, and caused to be raised and assembled, great numbers of armed men, his majesty's subjects, for the service of the said Pretender, and his said son ; and arrayed, and caused them to be arrayed, in a warlike manner against his majesty, and did traitorously levy, and cause to be levied, a cruel and unnatural war against his majesty, within this realm, at the times and place aforesaid, in favour of the said Pretender.

ARTICLE IV.

And for the more effectual bringing his said treasons and traitorous designs to effect, he the said Simon lord Lovat did, in the month of November, in the said year 1745, traitorously compose, write, and send, and cause to be composed, written, and sent, a treasonable letter to the said eldest son of the said Pretender, then in arms within this kingdom, and joined by, and

at the head of great numbers of his majesty's subjects, false traitors and rebels against his majesty, then also in arms and rebellion against his majesty within this kingdom; in which letter he the said Simon lord Lovat, among other things, expressed the great pleasure it would give him to end his days in the service of the said Pretender's said son; that he was resolved to send to him his the said lord Lovat's eldest son, to venture his life in his service, and deliver up his clan to him; and further expressed and represented his own great zeal and attachment to the said Pretender, and his said son, and their cause and interest, and the service he had done, was doing, and intended to do, for the said Pretender and his said son, with intent, and in order to confirm, animate, and encourage him the said Pretender, his said son, his adherents, and all the other said traitors, in the prosecution of their said treasons, and traitorous designs.

ARTICLE V.

And the said Simon lord Lovat, in further prosecution of his said treasons, did, at the times and place before-mentioned, and at divers other times and places, after the said war and rebellion began, and while the same was carrying on, traitorously compose, write, and send, and cause to be composed, written, and sent, divers other treasonable letters and papers to divers false traitors, then openly in arms in this kingdom against his said majesty, and to divers others of his majesty's subjects, and other persons, to assure them of his own zeal and firm attachment to the cause and interest of the said Pretender, and his said son, and to confirm, solicit, excite, and persuade them to engage in, continue, and prosecute the said war and rebellion, and to promise and assure them of his assistance therein.

ARTICLE VI.

And the more effectually to attain the end of his said treasons, and treasonable designs, the said Simon lord Lovat did, at the said times and place, and at divers other times and places, traitorously aid and assist the said Pretender's said son, and the said other false traitors and rebels, in the carrying on the said treasons, war, and rebellion, and furnish and provide them with great quantities of arms, ammunition, implements of war, clothes, and other things useful and necessary for that purpose; and also sent his eldest son, and many of his name, family, and dependents, to the assistance of the said Pretender's eldest son, and the said other rebels; and also gave them advice, directions, and instructions, in the prosecution of the said rebellion.

ARTICLE VII.

And the said Simon lord Lovat farther, at the times and place aforesaid, and at divers other times and places, did unlawfully and traitorously hold, entertain, and keep intelligence and correspondence, both in person and by

letters and otherwise, with the said eldest son of the said Pretender, well knowing him to be so; and also with divers other persons, who were employed by the said Pretender's said son; and particularly with John Murray of Broughton, esq. Donald Cameron the elder, of Lochiel, Donald Cameron the younger, of Lochiel, Alexander MacLeod, advocate of Edinburgh, John Roy Stuart, doctor Archibald Cameron, and divers others: all which persons were employed by the said eldest son of the said Pretender in this kingdom, in the said rebellion, the said Simon lord Lovat well knowing they were severally employed.

All which said treasons and crimes above-mentioned were contrived, committed, perpetrated, acted, and done, by the said Simon lord Lovat, against our said present sovereign lord the king, his peace, crown, and dignity, contrary to the duty of his allegiance, and against the laws and statutes of this kingdom.

Of all which said treasons and crimes, the knights, citizens, and burgesses, in parliament assembled, do, in the name of themselves, and all the Commons of Great Britain, impeach the said Simon lord Lovat.

And the said Commons, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any other accusation of impeachment against the said Simon lord Lovat; and also of replying to the Answer which he shall make to the premises, or any of them, or to any impeachment or accusation that shall be by them exhibited, according to the course and proceedings of parliament; do pray, That the said Simon lord Lovat be put to answer all and every the premises: and that such proceedings, examinations, trial, and judgment thereupon, may be had and used, as shall be agreeable to law and justice.

THE ANSWER OF SIMON LORD FRASER OF LOVAT, TO THE ARTICLES OF IMPEACHMENT OF HIGH-TREASON EXHIBITED AGAINST HIM, BY THE NAME OF SIMON LORD LOVAT, BY THE KNIGHTS, CITIZENS, AND BURGESSES, IN PARLIAMENT ASSEMBLED, IN THE NAME OF THEMSELVES, AND ALL THE COMMONS OF GREAT BRITAIN.

The said lord, saving and reserving to himself all benefit and advantage of exception to the uncertainties and insufficiencies in the said Articles contained, and also all advantages and privileges belonging to him as a peer of this realm, in answer to the afore-mentioned Article says, That being as fully sensible as any British subject of the many blessings these kingdoms have enjoyed under his present and late majesty's mild and equal administration; and having, in the rebellion of 1715, given the strongest proofs of his zeal for, and attachment to, his late majesty, and the succession of the

crown in his illustrious family, against such as had undertaken the destruction of both; he cannot but lament his misfortune, to have his fidelity questioned at the end of his days; and himself when near worn out with age and infirmities, charged with intending the subversion of a government he had, in the strength and vigour of his age, exerted his utmost power and address to support. Under this heavy pressure, attended with many other calamities and misfortunes, particularly his own inability to manage his defence, his only resource is in your lordships' justice, who will, he is well assured, regard only plain facts, not as aggravated by skill and oratory, but as clearly and manifestly proved by the testimony of credible and unexceptionable witnesses.

Under this firm persuasion, therefore, the said lord, in answer to the first and second Articles, denies that he did wickedly, maliciously, falsely, and traitorously, compass or imagine the death of his said present majesty, or correspond with the Pretender, obtain or accept any commission or commissions, grant, or letters patent, from the said Pretender, or traitorously conspire, or enter into any association whatsoever, for raising a war or rebellion against his said majesty, within this realm, or from obtaining troops, money, or succours, from France, for that purpose, in manner and form as by the said Articles is alledged.

To the third Article, the said lord denies, That he did assemble himself with any traitors or rebels; or raise, or cause to be raised or assembled, any armed men, for the service of the said Pretender, or his eldest son; or array, or cause to be arrayed, any person or persons whatsoever against his said majesty; or levy, or cause to be levied, any war against his said majesty, in this realm, in manner and form as in this Article is charged.

To the fourth Article, the said lord denies, That he did compose, write, or send, or cause to be composed, written, or sent, any letter, paper, or writing whatsoever, to the said Pretender's eldest son, to any such purport or effect as by the said Article is supposed, or to any other purport or effect whatsoever.

To the fifth Article, he denies, That he did compose, write, or send, or cause to be composed, written, or sent, any letter or letters, paper or papers, to any person or persons, to such purport or effect as by the said Article is alledged.

To the sixth Article, he denies, That he ever did furnish or provide the said Pretender's eldest son, or any traitors or rebels, with any arms, ammunition, implements of war, or other things useful or necessary, for the purpose in the said Article mentioned: nor did he send his eldest son, or any of his name, family, or dependents, to the assistance of the said Pretender's eldest son, or any rebels whatsoever; nor encourage, advise, direct, or instruct any of them, in the prosecution of the said rebellion.

To the seventh Article, the said lord denies, That he ever did hold, entertain, or keep, any

intelligence or correspondence with the said Pretender's eldest son, either in person or otherwise; nor did he entertain or keep any correspondence with any other of the persons mentioned in the said Article, or with any other person employed by the said eldest son of the Pretender, in the said rebellion, knowing any thing of them to be so employed.

And as to all other matters and things in the said Articles contained, and which is not herein particularly answered (if any such there be), the said lord avers, That he is not guilty of them, or any of them, in manner and form as laid in the said Articles, or in any other manner or form whatsoever: and humbly submits himself to your lordships' judgment.

REPLICATION OF THE COMMONS TO LORD LOVAT'S ANSWER.

Die Veneris, 16^o Januarii, 1746-7.

A Message was brought from the House of Commons, by sir William Yonge, and others, to acquaint this House, that they have considered the Answer of Simon lord Lovat to the Articles of Impeachment exhibited against him by the knights, citizens, and burgeses, assembled in parliament: and do aver their Charge against the said Simon lord Lovat for High-Treason, to be true: and that the said Simon lord Lovat is guilty, in such manner as he stands impeached: and that the Commons will be ready to prove their Charge against him, at such convenient time as shall be appointed for that purpose.

L. H. S. The distance of this place from the bar is so great, that I am obliged to ask your lordships' leave to come down to the table, for the convenience of hearing.

Lords. Ay, ay.

Which was done accordingly.

L. H. S. Gentlemen of the House of Commons, You will be pleased, now to proceed.

Sir William Yonge. My lords; As I was commanded by the House of Commons to lay before your lordships the Articles of Impeachment of High Treason against the noble lord at the bar, which have been just read,

So it now becomes my duty to open the general charge to your lordships, together with some of the inducements which prevailed with the Commons to think this accusation necessary.

In the first place, my lords, I cannot omit observing, That as every impeachment is said to be in the name of all the Commons of the land, so this may most emphatically be declared to be so, as I am confident there is not a single subject of the united kingdom of Great Britain, who has not demanded justice against this notorious offender; excepting a few miscreants, who may still be intestine enemies to his sacred majesty on the throne, his royal family, and by necessary consequence, to the religion and liberties of their native country.

The crime of High-Treason has at all times been considered, in the most civilized and in the most free countries, as an offence of the blackest dye; and as such, the severest punishments have been inflicted on such offenders; and this, my lords, with the greatest reason and justice.

Government was instituted for the happiness and security of mankind, to rescue them from the rapine and disorder, the murders and destructions, which must be the consequences of anarchy and confusion.

Treason tends to destroy all government, whether monarchical, or that of a commonwealth of any denomination; to introduce confusion and bloodshed: and if he that murders one man, is by the laws of God and man to be punished with death, how much more every rebel, every fomentor and abettor of rebellion, who is a murderer of thousands?

By our law, He that but imagines the death of the king (in whose person all the bands of society are united), and discovers his wicked imagination by any overt act, is a traitor: if this be proved against the prisoner (as I doubt not it will be to your lordships' full satisfaction), the noble lord at the bar is then a traitor.

Raising rebellion, and levying war, is another species of treason by our law, or rather the plainest and most notorious overt act of imagining the death of the king: and we doubt not to prove the noble lord at the bar to be a rebel.

It is high-treason by statute, to correspond with the Pretender to his majesty's crown, or with the sons of the Pretender, or those employed by them.

But we shall amply prove it to your lordships, That the noble lord at the bar has boasted, that he received a patent as duke from the Pretender; an authority as commander in chief of the highlands; is a general officer in the Pretender's service; and that he has openly corresponded with the son of the Pretender, and his followers, then in open war against his majesty within this realm, and given them harbour, encouragement, and assistance.

Your lordships have, I am persuaded, given due attention to the preamble, as well as to the Articles that have been read.

The Commons have there asserted, That, most unfortunately for this nation, we have amongst us an obstinate, bigotted, restless faction, who are not, and will not be, contented with the enjoyments of liberty, peace, and prosperity:

But who are perpetually watching for every favourable opportunity to overturn our constitution, and the present happy establishment.

This is not only their principle, but has been their constant endeavour, at different times, from the late glorious revolution to the present hour,

By plots and conspiracies, by fomenting frequent rebellions, by inviting our enemies to in-

vade us, and by that detestable crime of assassination.

These facts require no proof. Our annals will afford, and your lordships' memories will furnish, numerous instances of some or other of these attempts.

But, my lords, we shall, in the course of our proceedings, make it appear, That the noble lord at the bar, so long as seven or eight years ago, joined in an association with other traitors, under their hands and seals, for dethroning his present majesty, and placing the Pretender in his stead.

Not contented with this, the association so signed and sealed was transmitted by a faithful hand to the cardinal, then prime minister of France,

In order to excite those our natural enemies to give their assistance, and to invade this country with a foreign force, even at a time when we were in actual peace with that kingdom;

His lordship, and the other conspirators, justly imagining, That this might be a favourable conjuncture, a war with Spain at that time being commenced;

Wisely concluding, That when we were engaged with one branch of the House of Bourbon, the other would not long be neuter.

So early was his lordship in fomenting a rebellion at home, and inviting an invasion from abroad!

Nor was he only early in promoting, and active in supporting, but zealous in endeavouring to prevent the extinction of the late rebellion;

For, when the rebels were broken, and their chiefs fugitives from the victory of Culloden, his lordship found means to be present at a sort of council of war held by those chiefs;

Where he earnestly encouraged them to re-assemble the remains of their scattered troops, and to revive the war:

Which was resolved on, and might have happened, had not the vigilance of his royal highness the duke prevented its taking effect, thereby shewing his own superior abilities in using, as eminently as his courage and conduct in obtaining, victory.

The noble lord at the bar was, at the time of this victory, within fourteen miles of Inverness.

What would have been the conduct of any loyal subject on this occasion? Would he not have hastened thither, to congratulate his royal highness on the success of that glorious day?

What was the conduct of the prisoner at the bar?

He received the young Pretender, flying from his defeat; embraced him with open arms; assisted him in his flight.

And the next news we hear of his lordship is, that he fled from justice himself, and appeared at the meeting of the rebel chiefs I have just now mentioned.

This is the substance of our charge. And

when I have said thus much, your lordships will not be at a loss for the strongest inducements to the Commons to impeach. But, my lords, there are other inducements.

The Commons look upon it not only as their duty, but as a duty of the greatest importance to this nation, to take this opportunity to let the world know, by the unanimous voice of the representatives of all the commons of Great Britain, their sincere and hearty abhorrence of every attempt to disturb his majesty's auspicious government, either from abroad, or at home:

To convince all the world, That we are determined to be a free people, under our own king:

That we are determined to continue a Protestant nation;

And that we never will suffer an arbitrary government, or popish superstition, to be imposed on us by any power whatsoever:

That we will give convincing proof to all Europe, that we are not that dissatisfied, disaffected, turbulent people, they have been vainly made to believe,

By having adopted as truths, all the seditious, discontented, and traitorous libels, which have at different times, and on various occasions, been industriously scattered through the nation;

And that our enemies did foolishly and ignorantly imagine these libels and calumnies to be the general sense of the people.

Permit me, my lords, to put you in mind, that that scandalous Declaration of the young Pretender published at Edinburgh, which your lordships, with the hearty concurrence of the Commons, ordered to be burnt by the common hangman, was but a short abstract of those very libels.

This belief of our enemies was their folly. The relying on it has proved, thanks be to God, their destruction.

Had they not been thus infatuated, would such a nation as France have attempted, or thought it possible, to over-run, much more to conquer, a brave and warlike people, with a handful of men, so poorly provided at first, and throughout so weakly supported?

To convince mankind of these false and vain imaginations, was one of the inducements which prevailed with the Commons to vindicate the people they represent from these vile aspersions, in the most solemn manner, in presence of your lordships and this great assembly.

But, my lords, the body of the people themselves, from the highest to the lowest, have vindicated their own loyalty and honour.

After a small body of the regular troops had received a check, when it was apprehended the rebels would venture to march southward, what a noble spirit immediately arose throughout the nation!

Not an artificial false clamour for liberty, but the true old British spirit of liberty, the true Revolution spirit, that exerted and signified itself, out of hatred to Popery and arbitrary power.

And, thanks be to God, it still remains in its full vigour amongst us: it cries aloud in our streets for justice against those that would have made them slaves and Papists; it cries aloud for justice against the prisoner at the bar.

Calumnies of the like nature preceded the great rebellion in the year 1715; and most justly may our present gracious king now say, in the words of his royal father, of glorious memory, to both Houses of Parliament:

"My greatest comfort is, That I cannot reproach myself with having given the least provocation to that spirit of discontent and calumny that has been let loose against me, or the least pretence for kindling the flame of this rebellion. Let those whose fatal counsels laid the foundation of all those mischiefs, and those whose private discontents and disappointments, disguised under false pretences, have betrayed great numbers of deluded people into their own destruction, answer for the miseries in which they have involved their fellow-subjects."

I have chosen to make this quotation, because it will appear to your lordships, that the noble lord at the bar, since his being taken, has frequently declared,

That one of the causes of his late behaviour was revenge to the ministry, for having taken from him the command of an independent company, which he enjoyed.

Now, my lords, if there is such a principle, that men must be paid for being loyal, and hired to live free and happy,

Whom no sense of religion, or love to their country, can engage,

Whom no ties of conscience, oaths, or abjurations, can bind:

If there is such a principle, it is the lowest, the basest, and the meanest, as well as the most mischievous and wicked, that can enter into the heart of man.

My lords, the Commons have still further inducements for impeaching this particular criminal.

Your lordships have already done national justice on some of the principal traitors, who appeared in open arms against his majesty, by the ordinary course of law.

But this noble lord, who, in the whole course of his life, has boasted of his superior cunning in wickedness, and his ability to commit frequent treasons with impunity,

Vainly imagined, that he might possibly be a traitor in private, and a rebel only in his heart,

By sending his son, and his followers to join the Pretender, and remaining at home himself, to endeavour to deceive his majesty's faithful subjects:

Hoping, he might be rewarded for his son's services, if successful; or his son alone be the sufferer for his offences, if the undertaking failed. Diabolical cunning! Monstrous impiety!

My lords, secret criminals of this sort, and of all others, it is the peculiar business of the Commons to explore and to bring to justice.

This is the first and great offender: But should hereafter other concealed criminals appear, who encouraged and supported the late rebellion; but who, either through the cowardice of their hearts, or fondness for their estates and riches, durst not join the rebels,

I make no doubt, but the zeal and loyalty of the Commons will prompt them with equal ardour, to bring them to condign punishment.

Having thus opened to your lordships the nature of the crimes of which the noble lord at the bar is accused, and several inducements the Commons had for this accusation, it is needless for me to awaken your lordships' attention, by enumerating the miseries which the late rebellion occasioned, or the utter ruin which must have attended its success.

It is too fresh in your lordships' memories to need any aggravation: And I pray to God, that your lordships, this great assembly, and the whole nation, may for ever remember it.

It has too often been the misfortune of this country to have been involved in civil wars: A calamity of all others the most to be dreaded.

In ancient times these unhappy divisions have arisen from contests between princes and great men, without the least view to the liberties, or the benefit, of the people:

Let who would be victors, they were sure to be slaves, and only fought for different masters.

The power and imperiousness of Rome they were sure to submit to, while each contender exerted his interest there, for the continuation of his title.

Henry the 7th united the two branches of the contending families: During his reign, and those that followed, the commons began to grow rich, and consequently powerful; they became jealous of their liberties, and of their property.

When they had something of their own to lose, they were too wise to risk their fortunes, or their lives, in vain quarrels of the powerful and the great: They shook off the yoke of Rome; laws were enacted to limit the power of the crown, and the days of freedom began to dawn.

Still there was another struggle, when the crown began to encroach upon those laws, and exert despotic power: These virtuous struggles at first soon degenerated into faction; civil war and anarchy ensued, and ended (as it always will) in the most absolute tyranny.

The Restoration re-established the form of our government; and new privileges were gained for the people.

But, in the next reign, the impatient lust of power, and the abject bigotry of the prince, produced the happy Revolution. The glorious prince of Orange came to our rescue: The people received him with open arms; and then, and not till then, was established our present free constitution.

Pardon, my lords, this short deduction, and be pleased to reflect, how odious and detestable the late unprovoked rebellion must appear.

A rebellion calculated to overturn this constitution, so hardly acquired, and so carefully preserved, by all the succeeding princes to this very hour!

A rebellion against our present indulgent sovereign, whose study has been the happiness of his people; under whom the boldest rebel cannot complain of the least violence or oppression!

The laws of the land have had their full and free course, except where their rigour has been restrained by the royal mercy.

Under such a prince, and for the destruction of such a constitution, has the noble lord at the bar conspired and rebelled.

Be pleased then to remember the depredations, the bloodshed, that spoiled and stained those countries through which the rebels passed.

Let us remember the distress of public credit, the stagnation of trade, the loss of our manufacturers, the reasonable, yet dangerous apprehensions, which seized on the minds of all the loyal inhabitants of these great and opulent cities of London and Westminster.

Let us remember the loss of the lives, the blood, and the limbs, of those gallant and brave officers and soldiers, who conquered, for our sakes, in the famous battle of Culloden. They are, and will be, a perpetual memorial for whom, and by whom, they suffered.

Let us all remember these calamities, and endeavour, as it is our duty, to prevent the like evils for the future, by doing justice on criminals; by putting a stop to the growth of popery, that bloody religion; by preventing the education of our youth in those principles, which the prisoner at the bar has instilled into his son; and by lessening the power in those hands, which have ever been ready to disturb this government.

These, or such other provisions, as the wisdom of the legislature shall suggest, are necessary to prevent the future mischiefs which may arise from the frequent disturbance of government.

While we are in this state, it is in vain for this country to hope to make the figure she ought to do, or retain her due dignity among the states of Europe, or to preserve the peace, or hold the balance, among foreign powers.

If, while her armies are employed abroad to humble the pride of an assuming nation, her fleets to protect our trade, or to annoy our enemies,

If then our troops are to be called home to preserve domestic peace, and our fleets to prevent invasions invited by these patricides,

What ally can depend on our assistance? Or what pretence can we have to be umpires in the common cause of Europe?

Britain, united within herself, may, from her situation, her wealth, her naval power, and the bravery of her troops, justly claim that title;

But divided, torn to pieces by civil discord, must fall under the ancient reproach of this

country, and, while we are contending among ourselves, become an easy prey to our most inveterate enemies.

Let us now, my lords, turn our thoughts from these gloomy reflections, which the time and circumstances of the late unhappy rebellion of necessity must furnish : And

Let us then call to mind, with thankfulness, the good providence of God, which put an end to these calamities, and a glorious period to our terrors.

Let us acknowledge, with duty and gratitude, all his majesty's labours for the safety and happiness of his people.

And let us remember, with honour and praise, his royal offspring, who, by his courage and conduct, has secured and established his majesty's throne, your lordships' honours, our liberties and privileges, and the Protestant religion.

Thus ended this wicked and unnatural rebellion, of which the noble lord at the bar will appear to your lordships to be one of the first contrivers and promoters, and a very considerable support.

All I have said, I know, will avail nothing with your lordships, unless the evidence we shall bring against the noble lord at the bar, be clear and full, as we doubt not it will appear to be.

In cases where life is concerned it is painful to be a judge ; it is uneasy to be the accusers : but there is a duty incumbent on both.

I know such is the generous compassion of your lordships noble hearts, that you will acquit with pleasure, but condemn with reluctance.

And as I am persuaded, from the fulness of our proofs, the latter will be your lordships' judgment, give me leave to add a few words to lessen that concern, which your lordships may feel as judges, and we as accusers.

When I look on his lordship at the bar, I pity his age and infirmities ; but, when I consider that, at his years, pride, vanity, avarice, or ambition, are so rooted in his heart, as to tempt him to risk his honour and estate, to sacrifice the religion and liberty of his country to those mean passions, that pity is mixed with indignation.

But when I reflect on his having been already pardoned for this very crime ;

That he has been amply rewarded by his majesty's royal father, and entrusted by his present majesty in preserving the peace of those highlands where he rebelled ; I own I feel the strongest resentment of such heinous ingratitude.

The bringing his grey hairs with sorrow to the grave seems to be a distress to human nature ; but when we consider how different the distress when that expression was first used, and that the prisoner at the bar is not brought into that wretched circumstance by the misfortune or loss of a darling child, but by sacrificing his eldest son to his own ambition ; and by endeavouring to save his own

worthless life by his son's destruction, it must almost harden the most tender breast.

One word more, and I have done.

When your lordships look towards the bar, you will please to reflect, that had the design of the noble lord, who stands there, had its effect,

It would probably have happened to many of your lordships' noble body, who should not have perished in the defence of your country, to have stood in that very place ;

While his lordship, with a number of mock peers, had sat in judgment on your lordships, for the very crime for which he is now accused.

Thus far, my lords, I have gone, in pursuance of the trust reposed in me by the Commons. I am now, my lords, for myself, humbly to implore your lordships' indulgence for any errors I may have been guilty of, either in matter, or in words. If I have omitted any thing material, I am sure it will be supplied by the great abilities of those who are to follow me, and who will lay before your lordships the particular evidence to support our charge.

Lord Coke. My lords ; I am likewise commanded by the House of Commons to assist my honourable friend in maintaining the Articles of Impeachment against the noble lord at the bar : and, my lords, if I commit any errors in what I shall offer to your lordships, I hope I shall meet with your lordships' indulgence, and, in return, I promise you they shall not be wilful. It is a business, my lords, to which I am an entire stranger ; nor should I have undertaken it in a case of so high importance, if I did not think, that my duty to my country, as well as my allegiance to his majesty, to which I shall ever be faithful, equally called upon me to be instrumental, if I could, to find out concealed treasons, and to bring the contrivers of them to justice, as to have ventured my person and fortune, if necessary, when the rebels were in the field. What I shall chiefly endeavour to prove to your lordships, is, that the last rebellion was not the effect of chance only, entered into by a few rash, inconsiderate men, without thought or previous design, but the result of long-considered and well-weighed consultations, and of schemes not so ill concerted, as to make the success either impossible, or without some degree of probability in them : and, my lords, the reason why I choose to mention this general design to your lordships is, that, though I am not very old, I have twice seen this country in very great danger from the disbelief of Jacobitism prevailing in it. In 1743, I, with grief, remember, when a Message was sent from the king to a certain place in this kingdom, that an invasion was projected from France ; what popular declamations were made to shew, that the scheme was impracticable, and that it ought to be looked upon only as a terror thrown out by the ministry ; because, as there was neither the

colour nor appearance of truth in it, there could be no reality. And, in the beginning of the last rebellion, there was a disbelief prevailed even among those who ought to have been more certain of the truth: but that was not the case of the prisoner at your bar: he did believe it; he sent one of his chief agents into Lochaber, to the young Pretender, to go and receive his commands, and ordered him to express the greatest satisfaction at his being come over. He did not content himself with beginning the rebellion then; but in 1736, an association was sent by him to Rome, signed and sealed by many of the people of that country, to invite the Pretender then to come over; and that was afterwards carried to Paris, and shewed to the cardinal; and, I believe, met with approbation at both those places.

My lords, I say nothing to aggravate the case of the prisoner at your bar: he is already oppressed with misfortunes enough, and it is not in my nature, I hope, to add to them. Nor should I, my lords, make the following observation, did I not think myself obliged, in justice to an unfortunate young man, whom this noble lord has forced into the rebellion: he did write a letter, that he was afraid the disobedient behaviour of his son, would bring down his grey hairs with sorrow to the grave; and therefore it will not appear astonishing to you, that when he had forgot that tenderest tie of human nature, the love of a father to his child, so far as to desire to save the wretched remains of a life almost worn out, by the destruction of his own son, that he should forget his allegiance to the son of a king who saved his forfeit life; the remainder of which he has since employed in endeavouring to overturn and destroy his family, and the government established in him. I shall therefore conclude with my honourable friend, in saying, that we are ready to make good our charge against the prisoner at the bar.

Att. Gen. (Sir Dudley Ryder.) My lords, I have likewise the commands of the House of Commons to assist in the prosecution of the noble lord at the bar.

The Charge hath been fully stated and opened by the Managers who have spoken before me. The prisoner has denied every part of it, and thereby put the proof upon us to be made out; not, as he rightly says in his Answer to the Articles, by facts aggravated by skill and oratory, but by credible and unexceptionable witnesses, in a plain and legal way; against which he will have the full benefit of any just defence he can make.

I shall therefore avoid dwelling upon those many circumstances of aggravation, either in respect to the rebellion in general, or to the noble prisoner's own particular conduct in it, which will necessarily occur in the progress of this prosecution: the honourable managers, who have preceded me, have very properly pointed them out to your lordships. They have had their effect already; all that effect

which your lordships' wisdom and justice would suffer them to have; all that the Commons would wish them to have: they have awakened your lordships' attention, if that could possibly be wanting in the least degree on such an occasion: they have balanced that compassion, which the age, appearance, and quality of the noble prisoner, must naturally raise in your lordships' humane breasts; that is, they have cleared the way for that justice which the nation calls for, and the Commons of Great Britain in behalf of themselves, and the people whom they represent, now demand at your lordships' bar.

All therefore that I shall offer for your lordships' consideration, will be a plain narrative of facts, with the nature of the evidence to prove them, and some short observations, to shew the force of those facts to maintain the charge, which the Commons of Great Britain have undertaken to make good.

The facts will be very numerous, to be proved by a variety of witnesses and writings; and therefore must necessarily, in the course of the evidence, lie intermixed. I shall, therefore, in the opening, endeavour to disentangle them: and, that your lordships' attention may be the more easily fixed, and the facts, as they shall arise in the evidence, be the more readily applied to the several parts of the charge, I shall divide them into three distinct periods of time.

Those which happened precedent to the Pretender's son's landing.

What happened after that time, and before the battle of Culloden.

What arose since that happy event.

And within each of these periods, your lordships will find many things, which it will much concern the prisoner at the bar to give a satisfactory answer to.

The first will open to your lordships a wicked and traitorous scheme begun and carried on for many years, for bringing over the Pretender, by the assistance of a foreign force, in which his lordship will appear to have had a principal hand.

The second will include the more immediate scene of action in the late wicked rebellion, and the particular parts which the prisoner took in it.

The third will shew him in the circumstance of a defeat, and the measures he then thought proper to take; and, in every part of this whole scene, he will appear plotting, associating, and supporting all the steps that were taken for subverting this happy establishment, dethroning his majesty, and substituting a Popish Pretender in his room.

To begin with the first of these periods: and here I shall be under a necessity of going some years back, in order to lay before your lordships a view of those traitorous schemes that have been set on foot, and prosecuted for some time past, in order to prepare the way for, and bring on the late rebellion.

As soon as the war with Spain was declared,

the Pretender, and his agents, thought that a favourable opportunity offered to promote his interest; and a project was immediately set on foot, by several of his friends in the northern parts of Scotland, for bringing in the Pretender by the assistance of France; and seven of the chiefs of them entered into an association for that purpose. The prisoner at the bar set himself at the head of them, and himself, together with the earl of Traquair, sir James Campbell of Auchinbreck, Cameron of Lochiel the younger, John Stuart, brother to lord Traquair, lord Perth, and lord John Drummond, signed and sealed an association in writing, in which they engaged to venture their lives and fortunes, to restore, as they called it, the Pretender, whom they stiled their king, and his family. They agreed to send one Drummond, alias Mac Gregor, of Bochaladie, a relation and intimate friend of the prisoner's, to Rome, in order to have the scheme for bringing over the Pretender digested there; and from thence carried to Paris for completing the execution of it. It was there to be delivered to Cardinal Fleury, then prime minister of France, with a memorial, pressing, in the strongest terms, for her assistance.

In order to engage the French court, he was to represent the great interest and strength of the conspirators in the Highlands; to assure the Cardinal, that they could raise 20,000 Highlanders for the service, and wanted nothing but a few French troops, and some money, to secure the success. The conspirators, at the same time, sent over a list of many other heads of clans, who, they pretended, would join in the same design.

Drummond accordingly went over, and carried with him the association and list; and after he had obtained the sanction of Rome, and the Pretender, he came to Paris, where he was introduced to the cardinal by one Semple, whom they called lord Semple, an agent at that place for the Pretender. He delivered the association and list to the cardinal, with an assurance, that any of the seven who had signed the association would come over, and confirm it in person, whenever he desired it.

Any scheme to disturb the peace of this nation is but too acceptable to that court at all times. The cardinal received it with great attention and encouragement, and promised their assistance, as soon as the conspirators could shew a reasonable prospect of success. Drummond continued at Paris, and kept a constant correspondence with those who had joined in the association. Nothing, however, appears to have been finally resolved on, till about the latter end of the year 1742, or the beginning of 1743, when the court of France, finding how necessary it was to their views of oppressing Europe, to take off the weight of our assistance from our allies upon the continent, thought it worth their while (though then at peace with us) to enter seriously into this design; and Drummond was, about that time, sent over hither by the cardinal, to assure the

VOL. XVIII.

conspirators, and the rest of the Pretender's friends in Scotland, that if they could procure encouragement from England, they might depend upon being assisted by France with an invasion the autumn following.

Drummond came accordingly over to Edinburgh, where he had a meeting with the earl of Traquair, Lochiel the younger, and Cluny, and gave them an account of his negotiations, and particularly of his last message and promise from the cardinal. Upon this it was agreed, that the earl of Traquair should go immediately to London, and try what encouragement he could meet with there. The earl went accordingly, and Drummond accompanied him. The earl, after some time spent in England, returned to Edinburgh, and assured his friends there, that the people here were well inclined to the Pretender, and would join in the design, provided they could depend upon assistance from France.

About the same time Drummond went over to Paris, to satisfy the cardinal of the success of his negotiation; and he gave him such satisfaction, that a project for an invasion was soon after agreed on. The plan was, that the French should send over 3,000 men, under the command of earl Marshal, who were to be joined with large bodies of Highlanders, which the conspirators had undertaken to raise. 1,500 of the French were to go directly to Inverness, where the prisoner at the bar was to join them with his clan of Frasers; the remaining 1,500 were to land in the west, near sir James Campbell's, who was to go to the isle of Mull, and raise the clans there, who all together were to march and join the Frasers, and the other body of French. At the same time 12,000 French, under the command of count Saxe, were to march to the coast of Flanders and France, and from thence embark, and land in England, within two or three days march of London.

As soon as this scheme was agreed upon, Drummond, about the middle of the summer 1743, wrote letters to the earl of Traquair, to inform him of the resolution that had been taken; to direct him to acquaint his friends of it; and to assure them, that it would very soon be put in execution. The earl communicated this intelligence to John Murray of Broughton, Lochiel, and several others, who immediately sent the same Mr. Murray to France, in order to settle matters beforehand for the execution of it. He went over accordingly; but the death of the cardinal, about that time, suspended the prosecution of it for a little while. As soon as he arrived at Paris, he was assured by Drummond of the cardinal's good intentions and zeal for the Pretender's cause; and that nothing but his death could have prevented the immediate execution of it; and that the cardinal's first design was, that the army under the command of Maillebois should be employed in it; but that some persons about the king of France had prevailed upon him to order that army to march towards Hanover, Murray of

2 Q

Broughton was then introduced to cardinal Tencin, and afterwards to M. Amelot, who assured him of the late cardinal's sincerity in the proposed invasion; and that the French king had ordered him to acquaint the gentlemen who had entered into the association, that he had the Pretender's interest very much at heart, and would certainly execute the scheme which had been settled, as soon as his affairs would permit. M. Amelot at the same time entered into a discourse concerning the number of Highlanders that might be expected to join them.

With these assurances Murray returned to Edinburgh, and made a report of his proceedings to the earl of Traquair, lord Perth, and others of the Pretender's friends. Drummond was sent at the same time with the like assurances to the Pretender at Rome, in order to engage him to send the young Pretender to come and put himself at the head of the expedition. Drummond soon after came back to Paris, and from thence to London, in order to settle matters here for the intended invasion, and returned again to Paris; from whence he acquainted the earl of Traquair, by letter, that the French court had now settled every thing for the invasion; that it would be executed immediately; and that the Pretender's son was come from Rome to accompany it.

This was in January 1743; and in February following an invasion was attempted by a large embarkation from Dunkirk, where a great number of transports were got ready; many of the troops actually embarked, with a design to have come up the river of Thames; and a fleet of men of war actually sailed from Brest to support the descent, or to divert our fleet, while an army of 12,000 men might land without interruption.

Nobody can have forgot how that expedition was happily disappointed, by the good providence of God, and the vigilance of his majesty; nor what terror it struck while it was depending, at a time that our own troops were necessarily engaged on the continent, in the defence of our own and the liberties of Europe, and consequently, when we had so few left to defend ourselves at home.

After this disappointment, no letters appear to have come from France for a considerable time; which made the conspirators, and their friends here, very uneasy; and the earl of Traquair engaged Murray to go again to Paris, in order to know in what situation their affairs stood there: but before he was actually gone, a letter came from Semple, to account for, and excuse the miscarriage of the invasion, and desiring that fresh assurances might be sent from the Pretender's friends both in England and Scotland, in order to engage the French court in a new one.

This did not prevent Murray's intended journey; and in June 1744, he went over, to Paris, where he was introduced to the Pretender's eldest son, at the house of one Mac Donald a banker, and had soon after a second

meeting with him. The young Pretender then assured Murray, that the French had been very serious in the invasion, which had been disappointed by nothing but wind and weather, and other inevitable accidents: But, however, he had the strongest promises, both from the French king, and the ministry, that the scheme should be put in execution the then next summer, in the year 1745. And as for himself, whether it was or not, he was determined to come over, if he brought but a single footman with him: And though Murray represented to him the rashness and danger of such an attempt, he was so fully satisfied of assistance from the Highlands, whenever he appeared in person, that he would, in all events, come over at that time.

Murray returned to Scotland from Paris, and communicated what passed to the earl of Traquair, Lochiel, lord Perth, and others of the Pretender's friends; and at the same time brought along with him several letters from the Pretender's son, but with blank addresses, in order to be delivered to such as it should be thought proper, when Murray came over; and they were accordingly soon after delivered to such as it was apprehended would make the best use of them.

The time, however, running out, and no preparations yet appearing in France for an invasion, the Pretender's friends, who were acquainted with the design, began to fear the French would deceive them; and in June 1745, Murray received a letter from the Pretender's son, in which, without taking notice of any invasion from France, he informs Murray, that he was determined himself to come to the northern part of Scotland immediately; and desired his friends might be informed of it, and ready to join him, with all the forces they could raise. He tells him, that it would be the latter end of that same month; and appoints the place where he designed to land, together with the signals that were to be given and taken.

This letter was immediately communicated to the Pretender's friends in the north, and, amongst the rest, to the noble lord at the bar. So unexpected a resolution, without mentioning any assistance from France, much surprised them. They thought it, as was natural, rash, precipitate, and dangerous, to come without force; and therefore determined, most of them, if they could not prevent his landing, to advise him to return, and wait till he could be better prepared. About a fortnight after, the Pretender's son actually arrived, and landed in the north-west part of Scotland, upon the 25th of July, 1745.

Your lordships will permit me now to make a little stand. I have stated these facts as a short view of the commencement and progress of several wicked and treasonable correspondences, plots, and schemes, contrived and carried on from the year 1740, for bringing over the Pretender, by the assistance of the power of France.

I have hitherto, my lords, but just named

the noble prisoner at the bar in the account I have given of them; and I have avoided it on purpose, that when your lordships should have before your eyes, in one view, the general plan of that series of treasons which have been contriving, and, in part, executing, for so many years, I might the more easily point out to your lordships, as it were in a map, the particular, precise parts which the noble lord acted in them; which is what I shall now apply myself to.

And in order to do this the more clearly, and agreeable to the evidence which will be produced, I shall be under the necessity of going back to some yet earlier parts of his life; and which, my lords, I should not do, if your lordships would not necessarily, in the course of the evidence, see the prisoner himself taking pains to connect the early with the latter parts of his life, in order to prove the uniformity and consistency of his conduct, all tending to, and uniting in, one great centre, the overturning the Protestant Succession, excluding or dethroning his majesty, and his royal father, and setting up the Pretender to their throne in their room.

So long ago as the reign of queen Anne, when the nation was involved in a war with France, and invasions from thence were continually set on foot, and it became material for the Pretender's service to arm his friends in the northern part of the island, the prisoner, who had been from his youth bred to war, accepted of a commission from the Pretender of a general officer. It must be owned, that it does not appear, that the prisoner made any particular use of it; and the first time any opportunity did offer, when the rebellion broke out on the death of queen Anne, the noble lord at the bar did important services to his late majesty. He himself will likewise admit, that he was amply rewarded for them. But he seems very soon to have repented of those services, even while he was in the full possession of the reward of them.

In 1719, when a Spanish invasion was undertaken in favour of the Pretender, and Spanish forces were actually landed in the north, the prisoner thought proper to engage in it; and, while the earl of Seaforth was raising his men to assist in it, the prisoner himself wrote a letter to that earl, with a promise to join him with his clan; but before he had actually done it, that attempt was defeated.

From that time till the year 1736, the managers don't take upon themselves to state to your lordships any thing concerning his conduct, but that general account, which your lordships will find him giving of himself in his own letters, that he had, ever since he had the use of his reason, been the most faithful and zealous subject to the person and interest of the Pretender.

But in that year, when one Roy Stewart, who had escaped out of prison, to which he had been committed for high-treason, and been afterwards harboured in the prisoner's house,

then high-sheriff of the county where he had been imprisoned, was going to the Pretender to Rome, the noble lord sent by him an assurance to the Pretender of his constant fidelity even to death; and desired a commission from him to be lieutenant-general of the Highlands, and to have a patent of dukedom, which he had before solicited, expedited, and which he claimed as a matter of right for the services he had done that cause.

In the year 1740, when an invasion was projected, the noble lord was not only one of those that signed the association, and corresponded with the persons that negotiated it beyond sea, but himself proposed it, and seems to have been the original projector.

In the year 1743, when the invasion was actually resolved, and a person of figure and interest was necessary to conduct it in the Highlands, the prisoner was pitched upon as the most proper for that purpose, and accepted two commissions from the Pretender at Rome in December 1743, one to be lord-lieutenant of all the counties north of Spey, and the other to make him a lieutenant-general. He likewise, about the same time, obtained the patent, which he had been long soliciting, for creating him duke of Fraser.

And though the disappointment of that expedition prevented his immediate use of those powers, they did not lie idly by as a private ornament to his person, and to gratify his vanity only: They were made use of only by him to propagate the principles of treason and rebellion; to sow the seeds of disloyalty to his present majesty and his government; to discipline his dependents in the service of the Pretender, and make them ready, whenever his master's projects were ripe for execution.

He was, as your lordships will see him expressing himself in his letters, always the most zealous and active partisan that the Pretender had in those parts. He was, in his own words, the life and spirit of the Pretender's affairs in that country: he made it, as he says, his sole business to keep up the hearts of his king's friends, though it was both fatiguing, troublesome, and expensive; and appeals for the truth of it to the knowledge of all the gentlemen in the Pretender's interest in the north. He did, as he expresses himself in another letter, more service to the Pretender's cause, than any one of his rank in Britain.

He constantly made it his business, as he says in another, to promote his master's interest, and to engage faithful subjects to him; so that he had done, as he expresses in a still higher strain of language, more against this government than would hang fifty lords, and forfeit fifty estates.

I have now pointed out to your lordships the particular share the noble lord will appear to have had in the steps towards the late rebellion; in which you must have observed him to be a most active friend to it: I shall now open to your lordships a state of the facts that affect the prisoner, since the young Pretender's land-

ing, which was, as I mentioned, upon the 25th of July 1745.

Notice was immediately sent of it to the chiefs of the clans known to be in his interest; and the prisoner at the bar was one of the first to whom it was communicated. The conspirators, who expected an attempt at the head of a French army, were surprised at his coming in a single ship, without soldiers, and without any material friends, or even many servants accompanying him; and were at first shocked at the danger of a design so prematurely executed. However some of the clans came in soon; and the prisoner at the bar seems to have early determined to have done so too, not indeed at first in person, which he excused from his age, and supposed infirmities, but by sending his son, at the head of his clan.

For that purpose, he directed the master of Lovat his son, who was then at, or but just come from, the university of St. Andrews, to get ready: he likewise directed the inferior heads of the clan of Frasers to send in lists of their numbers and names; with severe threats on such as neglected, or gave him incorrect ones.

He ordered the arms which he had in his house to be cleaned and mended, bell-tents and camp-colours to be made, and the arms of the Frasers family to be painted on them: he appointed his son the colonel, and directed his tenants and dependents to follow him, exhorted them to be true to the Pretender's cause, and encouraged them with an assurance of success.

The men were brought together, and twice rendezvoused; officers were appointed, who were entertained in his house and at his table; where he used to call the Pretender's son by the name of Royal Prince, and Prince Regent, and drank to his success. He ordered the Pretender's Declaration to be read; and when the person whom he had commanded to do it, declined it, he declared it was high-treason to refuse it. He provided the men with arms, meal, provisions, and money; sent for ribbands to make white cockades for them; and had tailors and other workmen in his house, to make them caps, bonnets, and brogues. He went still further; and as some of his dependents were unwilling to engage, he ordered the fiery cross, as it is called, to be sent about his country to force them. This is the last and most extreme customary, though illegal and cruel sort of process, if I may so call it, that the Highland chiefs use, to compel their dependents to perform their arbitrary commands; and is a general public denunciation of plunder, fire, and sword, on all that do not obey; and several were actually forced into the rebellion, by taking away their plaids, beds, and cattle, and turning their wives and children out of doors.

While he was using threats to some, he tempted others, by the promises of rewards to their wives, and commissions to themselves.

Soon after the last rendezvous of the men, the earl of Cromartie's clan marched near the pri-

soner's house, in their way to the Pretender's son: the earl, his son, and some of the officers called at the house, where they were entertained as friends: and the prisoner told the earl, that his clan should follow soon after, laying the blame at the same time upon his son, the master of Lovat, that they were not yet ready.

The prisoner, however, did not think fit, as yet, either by himself, or his son, actually to join the Pretender. The rebels were now but beginning to march southward; the king's troops were endeavouring to intercept them; and till they met, the event, he thought, might be doubtful. The rebels, however, escaped them; and upon the 17th of September, got possession of the capital of that part of the united kingdom; and in a few days afterwards, the unfortunate battle of Preston-Pans seemed, in the opinion of those deluded people, to turn the scale in their favour.

At that time, one Hugh Fraser, who had about a year before been secretary to the prisoner, was at Edinburgh, where William Fraser, a relation of the noble prisoner's, happened then likewise to be: They had both heard of his design of sending the master of Lovat into the rebellion, and both were desirous of preventing it: for which purpose William Fraser thought of an expedient for getting the master of Lovat out of the way, by sending him to Holland to complete his education; the expence of which he was willing to be at. With this message Hugh Fraser went to the prisoner, and made him the offer. My lord Lovat at first seemed to yield to it; but at last told him, he was too far engaged; and was resolved, that the master should go with his clan to the young Pretender.

The prisoner had early notice of the battle of Preston-Pans, and Barrisdale, one of the heads of the rebellion, came to his house, and told him, he was going to raise more of the Highlanders for the service. This battle seems to have determined his resolution; and when Hugh Fraser was to return to Edinburgh, he charged him with a verbal message to the Pretender's son, to inform him, That his age and infirmities would not permit him to travel; and therefore hoped he should be excused attending him in person; but that he would send his son, at the head of his clan, which would be a much greater mark of his loyalty. And the message was delivered accordingly.

The rebels continued at Edinburgh till the 31st of October, when they were beginning their march towards England; but the prisoner's son not having yet joined them, it was thought necessary, that John Murray of Broughton, the young Pretender's secretary, should write to the prisoner to hasten his men, and meet them at Carlisle. The letter was wrote, and sent, and soon after delivered by Hugh Fraser, who at the same time represented to him the bad condition of the rebel army, the state of his majesty's forces, and the arrival of the Dutch troops; which he did, in order to prevent the prisoner's going on with

his engagements: but the prisoner told him, it was now too late to go back; and forbid him to mention any thing to his son against it. He besides told him, that he had put his name down as a captain-lieutenant in his son's company, and ever after called him by that title.

His dilatoriness, however, had made some of the Pretender's friends uneasy, and apprehensive that he was playing a double game; and as they thought it would be of great service to their cause, if the noble prisoner would make a public avowal of his taking part with them, applied to him for that purpose; and told him that a great deal depended upon his throwing aside the mask: upon which he pulled off his hat, and threw it on the ground, saying, There it is then.

In the month of November he sent a letter to the Pretender's son, to assure him of his fidelity; and about the same time, two others to Lochiel, and Murray the secretary, both of them to the same effect.

Though the two first of these letters appear by the dates to have been wrote in November, and the latter probably at the same time, yet as the rebels were then going into England, they don't seem to have been sent till their return. The prisoner, in the mean time, went on with raising his men, till it was universally known in that country, that the master of Lovat was to go at the head of them, and join the rebels.

My lord Loudon, and the president of the session, were then at Inverness, collecting a body of men to oppose them; and were then superior to the rebels in those parts. The prisoner well knew, that the design of the master of Lovat's joining the rebels could not be unknown to them; and that they must suspect, at least, that he himself was at the bottom of it. This made him afraid for his own person, as soon as his son began to march. These apprehensions made him suspend the time of their march, till he could be better informed of the measures the lord Loudon, and the president, would take in that event, with respect to himself: and therefore, after he had once ordered them to march, and those of his country of Firth had actually begun it, and proceeded as far as Strathnahan, in the way to Perth, which the rebels were then in possession of, his courage began to fail, and he sent orders for their return; which they immediately obeyed, excepting twenty: and he thought it more prudent, before they finally marched, to send Hugh Fraser to Inverness, to sound the inclinations of lord Loudon, and the president; and to represent to them, that the intended march of his son was against his inclinations, and contrary to his commands; that his son was obstinate and disobedient; and that it would be unjust that a father should suffer for an unbecomful child.

The lord Loudon, and president, took it to be, as it really was, a pretence only, and the effect of that double part which the prisoner was acting, till he thought it worth his while

to throw off the mask in reality. They knew that a young man of nineteen years old, that had lived at the university, and but just come home, could have no power over his father's tenants and dependants, but just so far as his father gave it him; and that the prisoner was himself the most absolute superior in all the Highlands: They therefore gave Hugh Fraser to understand, there could be no safety for the father, while the son was in open rebellion.

Hugh Fraser returned with this answer to the prisoner, and delivered at the same time a letter from the president to the same effect. About the same time news came, that lord John Drummond with French troops, was landed; which seems to have determined the prisoner's resolution: and he told Hugh Fraser, that the threats of the lord president were but a bugbear; and immediately gave the master of Lovat his final orders to march; which he instantly obeyed, and marched accordingly: and lord Loudon, and lord president, found means soon after to secure the prisoner's person, who was carried a prisoner to Inverness; from whence, however, he soon after made his escape.

The master of Lovat was now got to Perth, at the head of the clan of Frasers, whither Hugh Fraser attended him, as his captain-lieutenant; and upon notice from the Pretender's son, who was then come as far as Glasgow, in his return from England, was sent thither by the master of Lovat for a supply of arms. Hugh Fraser, on his return from Glasgow, was charged by Murray, the Pretender's secretary, with a packet, in which were enclosed three letters, one from the Pretender's son to the prisoner, referring to a second, enclosed from Murray, Lochiel, and Cluie, to him likewise; and a third to the master of Lovat. There were also three commissions enclosed, two of which were dated at Rome, 23d December, 1743, from the Pretender himself; one of which was, to make the prisoner lord lieutenant of all the countries north of Spey, and the other to make him a lieutenant-general.

The rebels, as soon as they had collected all their parties together, marched towards Inverness. His royal highness the duke of Cumberland followed them, as fast as the season of the year and the nature of the country would permit, till he came up with them, and obtained that signal and complete victory, at the battle of Culloden, upon the 16th of April 1746; when all the noble lord's schemes of grandeur and power, and for a new revolution, were put an end to at once.

I am now come, my lords, to that last period of time, from the battle of Culloden. The prisoner was waiting, not very far off, the event of that important day. The night after, the Pretender's son came to Gortuleg, where the prisoner then was, and had an interview with him. The noble lord did not even then disavow his cause, but received him as his prince; excused his not joining him in person; and after

the tenderest embraces, parted from him, as a faithful subject to his royal master.

The prisoner, as well as those who had been in open arms, was now obliged to fly. He knew his guilt was the same; and therefore deserved the same treatment. The rebel army and their chiefs that escaped from the battle, were now dispersed; but some correspondence among them was kept up; and upon the 15th of May a meeting was had, at a place called Mortleg, where there were present the prisoner, Lochiel, his brother Dr. Cameron, Murray the secretary, and several others. The end of the meeting was, to consider what was proper to be done for their common safety.

The noble prisoner met them himself, not as an innocent person, to advise them to lay down their arms, confess their guilt, and beg for mercy; not as a neutral person, if neutrality, in the cause of our king, religion, liberty, and this happy establishment, can be attended with a less degree of guilt; but as one involved in the same common crime and calamity, as a chief whose age and experience entitled him to the lead; and he took it. He advised them to raise a sufficient number of men to defend themselves against the king's troops, till they could make terms for themselves; and, after computing what each of those present were capable of procuring, he proposed the number of 3,600, of which each was to raise a certain proportion: and he himself proposed, that his son should raise 400; and deared Lochiel, as he himself had not been in arms, to answer for his son. Lochiel did so; and all the company agreed to the proposal; and there having been then lately come from France, 35,000 louis-d'ors, it was likewise agreed, that each should have ten days pay for their men out of it; which was immediately distributed; and the share of the master of Lovat was paid to the prisoner's servant. In consequence of this, about 400 men, in the whole, only were raised. But the rebels made no stand afterwards.

The master of Lovat had afterwards a meeting with his father at Kilbogie, when the master proposed to surrender to his majesty; but the prisoner dissuaded him from it, and reflected upon his son as a person of mean spirit to think of so dishonourable an action; and determined to fly himself, but with a guard of about twenty soldiers, whom he took into pay for his defence. However, he was pursued and taken by a party sent by the duke, under the command of captain Ferguson, who treated him with great humanity. During the time of his being in his custody, they had frequent conversations together concerning the rebellion. He was asked by the captain, how he could act as he had done, after all the favours he had received from the government? He answered, It was not against the king, but the ministry, he had acted; that they had taken away his company: and when he was told, It was a bad revenge to endanger his own life and fortune; his answer was, Who

could have thought but that they, meaning the rebels, would have carried all before them? And that, if the young Pretender would have taken his advice, he might have laughed at the king's forces; and none but a mad fool would have fought that day; that they might have gone into the mountains, and lived on butter and cheese, and given the duke twelve months work: besides, that they were in daily expectation of assistance and money from France.

The prisoner was afterwards brought before sir Everard Falkener. He did not think then of denying his treason: on the contrary, gave the same account of the motive to it, which he had done to captain Ferguson; but with this addition, that he resented the loss of his independant company so much, that if Kouli Kan had come, he should have been for him. He talked much of the king's mercy, of the former services he had done to his royal family; and that he could still do greater than twenty such old heads as his were worth. However, concluded with the following passage out of Virgil,

In utrumque paratus,
Seu versare dolos, seu certæ occumbere morti.

I have now, my lords, gone through those three periods of time, which I proposed; in which your lordships have observed many things of great moment to the present cause. The managers have, with the greatest care, endeavoured, amongst that great extent of evidence which has come to their knowledge, to discover the truth; and I have, with the utmost fidelity, stated to your lordships no fact, but what I take to be so. I know, my lords, how unjust it would be to endeavour to mislead your lordships: I know how idle and fruitless it would be to attempt it.

I have likewise endeavoured to throw all the facts together in such an order that they may serve to give light to each other, and ease your lordships in the attention you will give to the evidence that will prove them.

I shall now, therefore, endeavour to give your lordships a short view of that evidence. It will be of two sorts, parol, and written evidence. The former will consist of a great number of witnesses, concurring in the account of the secret preparations towards the rebellion, the steps taken in it; and many, in charging the noble lord as the principal actor in both. What they say, will be supported, confirmed, and illustrated, by the written evidence.

As to the first sort, it will be tedious and unnecessary for me to give your lordships a detail of the names and characters of each witness, or the particular facts they speak to. It will be sufficient to say in general, that I don't know of one circumstance that I have opened, which will not be fully proved by some or other of them; that some of the witnesses were principal actors in the steps leading to the rebellion, as well as in the prosecuting of it; that some have been long acquainted with the

prisoner, seen his life and conversation, and had, from his own mouth, the truth of many of the facts that preceded their own time; and have attended his person, and been eye and ear-witnesses of many others; that others of the witnesses have heard and received his commands, felt the weight of his power, or been employed by him in divers of those acts of treason, wherewith he is charged; that all have had full opportunities of knowing the facts to which they will be called; and none have any imputation on their characters, but that of having some of them been accomplices in the same treason.

The written evidence which the Managers have been able to collect and produce, consists of letters from and to the noble lord. The former are of the hand-writing of Robert Fraser, one of his secretaries, dictated and signed originally by himself, though the signatures of some appear now torn off.

They were all written during the rebellion, not at the beginning, when the prisoner, surprised by the sudden appearance of the son of him, whom he had formerly called his king, might be drawn into expressions of affection and zeal beyond his real meaning, but after the rebellion was grown to a great height, and the noble lord had full time to look about him, to foresee, weigh and balance all consequences to his country, himself, and his family; and, upon the whole, had deliberately chosen the side he took.

Of this sort of letters there will be many produced to your lordships.

One of them written and sent to the Pretender's son himself, dated November 1745. The signature, and some parts of the body of it, are torn off; but that will be supplied by a copy under the same secretary's hand, taken by his lordship's own order.

Two others were written, about the same time, to Mr. Murray the Pretender's secretary, and to Lochiel.

Two of the rest were written to the prisoner's own son.

Your lordships will excuse my mentioning a few passages out of them, as a specimen of the whole. That to the Pretender's son, which is itself, in the Articles, made a distinct overt act of treason, is addressed to him by the title of Most Royal Prince: and in the conclusion calls him, his Royal Highness. It mentions the prisoner's having been made a general officer by the Pretender himself above 40 years before; excuses his incapacity of serving him in person, by his age and infirmities; and his resolution to give him the next mark of his zeal, by sending his eldest son, the bearer, to venture his life in his service, with a great number of gentlemen, and heads of families, of his clan, and 800 of his common people.

The letter to Murray is to engage him to become his son's patron at the young Pretender's court. It boasts of the same merit in sending his son and clan, and sets out his

own long services to the Pretender in the strongest light.

The letter to Lochiel complains greatly of the treachery, as he calls it, of an honourable person, in engaging on his majesty's side, and of the mischief his conduct had done to the cause; and magnifies his own clan and services to the Pretender.

His letters to his son open the secrets of his heart; acquaint him with the association he had formerly signed to venture his life and fortune to restore the Pretender; informs him of the promised assistance of France, the commission from the Pretender to make him general of the Highlands, the more favourite patent for a dukedom; and sets them all in a light that would render him, as he says, a monster of ingratitude, if he was not attached to the Pretender more than ever.

The rest of his letters are written in the same strain, and founded upon the same principles of treason and rebellion.

The letters written to the prisoner are, one from the Pretender's son himself, referring to another written to him by Lochiel, Murray and Clunie; and one from the prisoner's own son.

The two former were written by way of acknowledgment for his services, and to engage him in an open personal appearance on that side, as the best means to secure the success of their cause; and will shew the Pretender's son's employment of those persons, with whom the prisoner treasonably corresponded.

The son's letter is part of a correspondence with the father upon the subject of the rebellion, and was the occasion of the letters before-mentioned to have been written by him.

My lords, I have now done with that general view of the evidence, which I proposed to give your lordships. I would not anticipate what the noble lord may say by way of defence; but as the evidence, on the part of the Commons, will necessarily mention one sort of defence, which the prisoner formerly made use of, when he apprehended his person in immediate danger from the president and lord Loudon, on account of the Frasers rising to join the Pretender;

I can't help just taking notice of it here. His pretence to them was, that his clan was raised by his son alone, without his direction, and against his command; and that the whole conduct of the clan of Fraser was an act of disobedience in his son to him, as well as of treason to his majesty; and that it would be hard, that a peaceable father should be answerable for the guilt of his son.

If this should be any part of the noble lord's present defence, I shall obviate it only so far, as to observe to your lordships, that it is as false as it is unnatural, and will appear to be so, not only by the parol evidence we shall produce, but by every one almost of the prisoner's own letters, in which he takes to himself the whole merit of his son's services, and values himself to the young Pretender,

according to the strength and zeal of his clan.

What remains, my lords, is only to make a few observations, tending to shew, how the facts and the evidence I have been stating will maintain the particular charges, which the Commons have undertaken to make good: for which purpose it will be necessary very shortly to point out the precise nature of the charge itself.

It contains three species of treason; compassing the death of his majesty: levying war against him within the realm: and corresponding with the Pretender's son, and his agents.

As to the first of these: The wisdom of this constitution, foreseeing that the general happiness must be most intimately connected with the safety of that royal person, and providing against the remotest dangers to which it may be exposed, has made the very imagination of the heart, when directed to its destruction, an act of treason: But as the intent, by itself alone, can be known to none but the great Searcher of Hearts, it has, with equal prudence and justice, provided, that this imagination must be discovered by some external act, which, in the ordinary language of the law, is called an overt act.

The Commons have pursued, in their impeachment, the law in both respects. They have charged the prisoner with that traitorous imagination; and they have stated many facts that manifest it, such as, by the established rules of law, have, in all times, been held sufficient.

The overt acts, particularly charged, are, His entering into an association to raise a war and rebellion against his majesty, by the assistance of French troops; his corresponding with a Pretender to his majesty's crown; his obtaining two commissions from the Pretender, one to be general of the Highlands, and the other a lieutenant-general of his forces; his sending a treasonable letter to the Pretender's son, with expressions and assurances of that fidelity and loyalty to his father, which was due to his majesty alone; his sending many other treasonable letters to his fellow-subjects, to engage and persuade them to join and continue in that rebellion, which was then begun and raged in the northern parts of this kingdom; his assisting the Pretender's son with arms, and sending his own son, with his clan, into the service of the Pretender.

Your lordships will be beforehand with me, in distributing the various matter I have before opened, to these several heads: I would only observe, that, besides the evidence arising from the witnesses, which will appear in person at your lordships' bar, the prisoner's own letters are not only special overt acts of treason themselves, but will be the clearest proof of the most material of the others.

When the prisoner, in the fulness of his heart, opens himself to a son, whose parts and proficiency were his own pride, upon a subject

the most of all interesting to both, to the future as well as present happiness of his family, its honours and estate, your lordships can have no possible doubt of the reality of that association, those honours, those trusts, and that attachment to the Pretender, on which he builds and communicates the resolution he had then taken.

When he writes to the Pretender's son himself, then in the capital of one part of the United Kingdom, at the head of an army of rebels, acting the part of royalty, and subduing his majesty's faithful subjects, to boast of his former, and promising him future loyalty, your lordships must see, in the clearest manner, what side he had chosen, and whose life and throne he was striking at.

As to the treason of levying war, the prisoner seems to have thought, that nothing but an open personal appearance in arms would bring him within that sort of guilt; and, in fact, whether out of greater caution on that account, or from peculiar views of management with the Pretender, or more probably from both, he seems studiously to have avoided that particular precise mark of treason. But the law, which, in words, though not in punishment, distinguishes, in some sorts of crimes, between principals and accessaries, makes no such distinction in this of the highest nature; they are both, in treason, equally criminal; and the various acts of encouragement, persuasion and assistance, given and done by him, to those who were personally engaged, do, in the eye of the law, as indeed they do in reason, make their guilt his own.

The last species of treason charged, is founded on the breach of a late act, made in the 17th year of his majesty, on occasion of the invasion attempted from Dunkirk in that year, in favour of the Pretender, and accompanied by his eldest son. This act extends the treason made by the act of the 13th of king William, of corresponding with the Pretender the father, and his agents, to a correspondence with his sons, and their agents.

The proof of this treason will be manifest to your lordships, both from the written and parol evidence. The same letters which afford such conclusive proof of the other treasons, are direct and immediate proofs of this; besides the personal interview between the prisoner and the Pretender's son, and the many more personal correspondences with the Pretender's servants and officers.

I have now, my lords, finished all that I proposed to lay before your lordships. The great variety of matter must be my excuse for the length of it.

I am not under any apprehension, that the evidence will be insufficient to convince your lordships of the justice of the prosecution. I am more afraid, lest your lordships, and the world, should enquire, Why all this load of evidence? when one of those many facts, fully established, would be enough to convict the noble lord of this highest of crimes, and

draw down upon him, from your lordships, that heaviest of sentences which is the consequence of it. If that question should be asked, the answer I would give to it should be shortly this :

The Managers did not think it consistent with their duty to the Commons of Great Britain, whose commands they are to execute ; that regard they owe to your lordships, at whose bar they are to execute those commands ; nor to the people of Great Britain, whom the Commons represent, and who are greatly interested in the event of this impeachment ; to suppress any part of that evidence, extensive as it is, which came to their knowledge, material to the prisoner's cause.

The Commons have thought this a matter worthy their own interposition, and therefore have taken it into their own hands, not to deprive the noble lord of any legal defence : The candour of the Commons, and your lordships' justice, will secure him against any danger of that kind ; not because they wanted that evidence, which would be sufficient in the ordinary courts of justice ; for far would it be from them to throw their weight into the scale of evidence ; but because of the wide extensive part the prisoner has had in this great scene of treason, as its contriver, promoter, and finisher, so far as Providence suffered it to go.

As to your lordships, the Managers did not think it becoming them to prejudge your opinion, or deprive your lordships of that full daylight in which the crimes of this lord appeared to them, and of that greatest of all satisfactions, which every judge would wish to have, in every cause, of being certainly right in the sentence he is to pronounce.

As to the people in general, it is of no small moment, that they should be enabled to behold, in one view, the pernicious schemes that have, for many years, been concerting between Rome, France, and unnatural traitors at home, that they might see a rebellion, which they have so lately and severely felt, traced in some measure to its source ; and be fully convinced, that, whilst they are themselves enjoying, at their ease, and too often asleep, their religion, their liberties, and their properties, under the protection of the best of princes, and the influence of the wisest constitution, they have enemies both abroad, and within their own native country, who are constantly awake for the subversion of them all ; and learn this certain truth, which should be imprinted, in everlasting characters, on the mind of every Briton ; that there is no effectual security against those determined and perpetual enemies, but in a vigilant and firm union of honest men ; and be persuaded, that every attempt to prevent, weaken, or dissolve such an union, is little less than treason in its beginning, and, if it takes effect, must end in a real successful one, the worst that can happen to this kind of liberty, the total destruction of this royal family, and of this happy establishment.

VOL. XVIII.

Sir John Strange. My lords ; the Managers do not think it necessary to take up any more of your lordships' time, by way of general opening of this case ; but propose to go directly to their evidence : and the first witness we desire may be called, is Robert Chevis, of Murtoun, esq. a near neighbour of the impeached lord, but one at a very great distance from his way of thinking or acting.

Lord Lovat. My lords, I have not had the use of my limbs these three years : I cannot see, I cannot hear ; and I beg, if your lordships have a mind I should have any chance for my life, that you will allow either my counsel or solicitors to examine my witnesses, and to cross-examine those produced on behalf of the crown, and to take notes.

Lord High Steward. What your lordship says, if I understand you right, is, that, by reason of your age and infirmities, you cannot examine the witnesses yourself ; but pray, that either your counsel or solicitors might have liberty to cross-examine the witnesses against you, and to examine your own witnesses. It is my duty to acquaint your lordship with what is the known and clear law in these cases ; and I did acquaint your lordship with it, in what I mentioned to you at first, that, by the order of this House, you had counsel and solicitors assigned you, who had liberty to assist you in all matters of law that might arise in the course of your trial ; but that, by the known rules of law in proceedings of this kind, they have not liberty to assist you in matters of fact, or in the examination of witnesses. As to taking notes, I have observed, that one of your solicitors has, during the time that the Managers for the House of Commons have been speaking, taken notes ; and that has been allowed.

Lord Lovat. My lords, it is impossible for me then to make any defence, by reason of my infirmities. I do not see ; I do not hear ; I came up to your lordships' bar at the hazard of my life ; I fainted away several times, I got up so early ; I was up by four o'clock this morning ; and I am so weak, that, if I am deprived of the assistance I ask for, your lordships may do as you please ; and it is impossible for me to make any defence at all, if you do not allow my counsel or solicitors to examine the witnesses. I will therefore submit myself to the Lords.

L. H. S. Gentlemen of the House of Commons, you have heard what has been asked by my lord Lovat, with his reasons for it : have you any thing to offer on that head ?

Sir W. Yonge. My lords, it has been determined by your lordships, that the prisoner at the bar cannot, in this case, be allowed counsel to assist him, except in matters of law : and, as that is known to be part of the law of the land, whatever inclination the Managers may have to indulge the noble lord at the bar, it is not in our power to depart from the law of the land. We therefore hope your lordships will

excuse us in not consenting to what is contrary to the law of the land. We cannot do any thing of this kind without repairing to our own House.

The Witness being produced,

Lord Lovat. My lords, I object to this witness being examined, because he is a tenant of mine; and I am informed, that my tenant cannot be evidence against me.*

* Mr. Hume, in his Commentaries on the Law of Scotland, speaking of the admissibility of witnesses, says:

"The second ground of disqualification, is that of partial favour or affection to the prosecutor's cause, which may be inferred on several grounds, but chiefly that of relation to the prosecutor, or such a state of dependence on him as may naturally beget a disposition in the witness to adopt his enmities, or to favour him in his pursuits and desires. But as to the latter of these sources of partiality; happily the condition of the inhabitants of Scotland has in this century undergone such an alteration for the better, through the nurture and protection of humane and equal laws, which are easily enforced in the most distant quarters of the kingdom, as reduces this section almost to a blank; and makes it needless for me to engage in those controversies, so frequent in our older practice, respecting the competency of the prosecutor's servants and retainers, his tenants and vassals, or persons in anywise subject to his power or jurisdiction. Whatever may have been the notions of former times on questions of this sort, (and I think it would be difficult to produce an uniform or consistent train of judgments respecting them), every such inferior person is a good and unexceptionable witness now; since all the lieges, down to the lowest, are equally secured as their superiors, to whom they stand related, in the free and full enjoyment of all their rights, and against any risk of injury or oppression."

"In regard to those of the pannel," Mr. Hume says, "it admits of less doubt, and the public interest requires it, how unwelcome soever the necessity of having recourse to them, that they have no exemption of answering as witnesses against him, if the prosecutor shall see cause to call on them, for the ends of justice. In the trial of the noted major Weir, April 6th, 1670, his eldest sister Margaret swore that she found him in the fact of incest with their sister Jean. William and David Adam, were witnesses against their brother, Andrew Adam, Feb. 20th, 1710, in his trial for forgery. In the trial too of James Macnair, in the Court of Admiralty, March 4th, 14th, 15th, 1751, for sinking an insured ship, the Judge-admiral determined this question, on an objection moved by the witness for himself. 'The judge having advised the above objection, repels the same, and finds that he is compellable to give evidence against his brother.' Nay, more; for any authority that I

L. II. S. My lord Lovat, there is no rule of law for that in England.

Lord Lovat. My lords, I am told, that there is an act of parliament, that no vassal, tacksmen, or tenant, shall be a witness against his lord.

L. II. S. Your lordship will please to name that act of parliament.

Lord Lovat. My lord, I am told it is in the first year of king George the 1st, cap. 19.

can find, this rule is not subject to an absolute exception in the case even of those nearest of all relations, in whose persons nature must suffer the greatest violence, in being put to this extreme trial of their truth. I say not an absolute exception, for although we will not compel the child to bear evidence against the parent, if he feel that just reluctance to such an office, which may put him in hazard of perjury, [It is mentioned in the Lord Advocate's Report, relative to the appeal in the case of Nairne and Ogilvie, in 1766 (see it in this Collection), that he had intended to use Ogilvie's mother as a witness against him, and only abstained from fear of lengthening the trial, and in the belief that the pannels would call her in exculpation; which they declined to do]; yet is he a receivable witness, if he be willing. And here I appeal to the case of James Macmion, December 31st, 1711; whose two sons, George and James, were produced as witnesses against him, in his trial for murder under trust; though I must take notice that the pannel had confessed, and these young men were interrogated only concerning the *corpus delicti*, and their own assistance in concealing the body of the deceased. It seems not to be clear, whether, in the practice of former times, even a wife might not be called as witness against her husband. For I observe that in the trial of Hutchinson, Tenant, and others, for theft and house-breaking, use was made, without any objection having been stirred, of the testimony of Euphian Smith, the wife of Tenant, as well as of Christian Foreman, his daughter-in-law. August 10th, 1714," [Fountainhall informs us, (but this, he says, was complained of as a perversion of law at the time), that in the trial of Douglas of Mains, before the privy-council, for resetting traitors, his wife and children were made to bear evidence against him. October 14th and 15th, 1684], "though it is true that the questions put to her related chiefly to the guilt of the other pannels, which was however very nearly connected with that of her husband. In the later case of Smith and Brodie, August 27th, 1788, which was much of the same nature, the Court are said to have been of opinion on the one side, that Smith's wife, even if willing, could not be allowed to give evidence against her husband; and on the other, that she was a good witness against Brodie, who was under trial for the same fact, and on the same indictment. Thus, the situation of a wife is peculiar in the law, and different from that of any other of the pannel's

Then the Clerk, by direction of the Lord High Steward, read the title of the act of parliament passed in the first year of his late majesty king George the 1st, intituled,

"An Act for encouraging all superiors, vassals, landlords, and tenants, in Scotland, who do and shall continue in their duty and loyalty to his majesty king George; and for discouraging all superiors, vassals, and landlords, and tenants, there, who have been, or shall be, guilty of rebellious practices against his said majesty; and for making void all fraudulent entails, tailzies, and conveyances, made there, for barring or excluding the effects of forfeitures, that may have been, or shall be, incurred there on any such account; as also for calling any suspected person or persons, whose estates or principal residence are in Scotland, to appear at Edinburgh, or where it shall be judged expedient, to find bail for their good behaviour, and for the better disarming disaffected persons in Scotland."

And also the first section, whereby it is enacted,

"That if any of his majesty's subjects of Great Britain, having lands or tenements in Scotland in property or superiority, has been, or shall be, guilty of high-treason, by holding, entertaining, or keeping any intelligence or correspondence in person, or by letters, messages, or otherwise, with the said Pretender, or with any person or persons employed by him, knowing such person to be so employed, or shall, by bill of exchange, or otherwise, remit or pay any sum or sums of money for the use

near relations: in as much as the objection to her is absolute, and has no dependence on the disposition of the woman to take advantage of the declinature which the law allows her. And truly there seems to be great reason for setting her aside on such an occasion. For if she be willing to appear in the trial of her husband, it can only be from one of two motives; out of affection to him, and to save him by her perjury, or else to convict him, for the satisfaction of hatred and revenge.

"Even with respect to a wife, one exception must however be allowed, that of a prosecution at instance of the Lord Advocate, for a crime committed by the husband against the woman herself; for, in such a case, she may be a necessary witness. Accordingly, January 1694, in the trial of Elliot, Nicolson, and Maxwell, for a forgery, conspiracy and attempt to poison, directed against the wife of Nicolson and her sister; though these two persons did not depose as witnesses, to the special assize on the trial; yet it does appear that the deposition of the sister, and the declaration of the wife respecting the falsehood of the receipt for poison, had been emitted in presence of the Court, and the forty-five assizers, on the 22d of January; and that these writings were produced, and given in evidence in the trial, on the 29th of the same month."

or service of the said Pretender, knowing such money to be for such use or service; and that whether the said facts or things be done within or without this realm, or has been, or shall be, adherent to the said Pretender in this realm, giving him aid or comfort in this realm, or elsewhere; every such offender, who shall be thereof duly convicted and attainted, shall be liable to the pains, penalties, and forfeitures for high-treason. All and every vassal and vassals in Scotland, who shall continue peaceable, and in dutiful allegiance to his majesty, his heirs and successors, holding lands or tenements immediately of the crown, shall be vested and seized, and are hereby enacted and ordained, to hold the said lands or tenements of his majesty, his heirs and successors, in fee and heretage, for ever, by such manner of holding, as any such offender held such lands or tenements of the crown at the time of the attainder of such offender: and where lands or tenements, belonging to any such peaceable and dutiful subjects to his majesty, his heirs and successors, lie within any regality or constabulary in Scotland, the same shall be, and they are hereby, dissolved from every such regality or constabulary for ever: and, in like manner, all and every tenant and tenants in Scotland, who shall continue peaceable, and in dutiful allegiance to his majesty, his heirs and successors aforesaid, bruicking and occupying any lands, milns, mines, woods, fishing, or tenements, as tenant or tenants, tacksman or tacksmen, from and under any such offender, shall, and they are hereby ordained to bruck and occupy all and every such lauds, mines, milns, woods, fishings, and tenements, for the space of two years, or crops, to be accounted from and after such attainder, freely, without payment of any rent, duty, or service, for the said two years or crops: and the Court of Exchequer in Scotland is hereby authorized and required, on production of any such attainder, to revise, compound, and pass signatures, and that without paying any composition, in favours of every such vassal or vassals, and his, her, or their heir or heirs, of the said lands and tenements above-mentioned respectively to be holden of his majesty, his heirs and successors, in fee and heretage, for ever, and by such holdings as is above-mentioned, with clauses of *Novo Damus*, and (where such lands or tenements hold ward or few *cum maritagio*, or with clauses irritant) with change of holdings from waird to taxed-waird, according to the rules now observed in the Court of Exchequer in Scotland, dispensing with recognition and clauses irritant in favours of the crown in time coming, in the most ample and best form, to the end that chartours and infeftments may be thereupon duly exped."

And also the ninth section; whereby it is

"Provided always, and be it enacted, by the authority aforesaid, that no person or persons, who may reap, or have any benefit or advantage by the attainder, conviction, or forfeiture,

of any person or persons, by virtue of this act, shall be capable of being a witness or witnesses, against any person or persons, by whose attainder, conviction, or forfeiture, any benefit shall or may accrue to such witness or witnesses."

L. H. S. My lord Lovat, are those the clauses your lordship means? or will you have any other clause read?

Lord Lovat. My lord, that is what I mean.

L. H. S. What your lordship insists upon seems to me to be, that, by this act of parliament, as you understand it, a person who is a tenant or tacksman to any lord, if his lord is convicted of rebellion, and such tenant remains peaceable, the tenant is discharged from two years rent of the lands held by him. And by the ninth section, no person can be a witness, who may reap or have any benefit by the attainder of the person he is to be a witness against. I am not now going to give any opinion upon that section, neither is it proper that I should; but it is necessary for me to inform your lordship, that it is incumbent upon you to lay a foundation of fact, to shew, that the person produced as a witness is a tenant or tacksman under your lordship, within the description of this act of parliament: and your lordship may either prove this fact, by calling witnesses of your own, for that purpose; or by putting the question to the person now produced by the managers. Has your lordship any witness to prove this fact; or will you examine the gentleman produced upon a *Voire Dire*?

Lord Lovat. I will ask it of this gentleman.

L. H. S. Gentlemen of the House of Commons, Have you any objection to my lord Lovat's asking the question of this witness?

Att. Gen. My lords, we have no objection to having that question asked of the witness.

L. H. S. As the question is to the competency of the witness, and he is to be examined touching that, he is not now to be sworn as a witness in chief; but the oath is to be administered upon a *Voire Dire*.

Then the witness was sworn by the following oath:

"You shall true answer make to all such questions as shall be demanded of you; and you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

L. H. S. My lords, as my lord Lovat's voice is low, whatever questions his lordship has to ask of this gentleman, your lordships, I presume, will (as you did upon a former occasion) let my lord Lovat propose the question, and let the clerk repeat it to your lordships, and to the witness. My lord Lovat, you will now propose the question, and the clerk will repeat it to my lords, and the witness.

Lords. Ay, ay.

Then one of the clerks was sworn to make true report of what should be said by the prisoner.

Lord Lovat. My lords, I beg this witness may be asked, Whether he holds any lands of me, or within my regality, either by tack, lease, or otherwise?

Cheris. I hold my lands of the crown: I never had a tack of land of my lord Lovat.

L. H. S. Do you hold any lands, either by vassalage, lease, or tack, from my lord Lovat?

Cheris. I never had a tack of land from my lord Lovat.

L. H. S. You are to answer to the whole of the question, whether you hold any land, either by vassalage, lease, or tack, of my lord Lovat?

Cheris. I never had a lease from my lord Lovat: I was in possession of a farm of his there, which, by his own consent, was given to other people; but I never had a lease from him.

L. H. S. Did you hold that land of my lord Lovat?

Cheris. The farm belonged to my lord Lovat.

L. H. S. How did you hold it of him; by tack, or lease, or how?

Cheris. It was ceded to me by other people, who were in possession before me.

L. H. S. Did you hold it by lease, or tack, or in what manner?

Cheris. I never had any lease, or tack, from the lord.

Att. Gen. Do you now hold any lands from my lord Lovat.

Cheris. No, I hold none of him.

Att. Gen. Have you held any lands of him since the beginning of the rebellion?

Cheris. I have held none since the beginning of the rebellion; nor been in possession of a feu of land under him.

Att. Gen. My lords, I should be glad to know of this witness, whether he holds any lands within the regality of Lovat.

Cheris. No, I hold no lands of my lord Lovat there: I had that small farm I before mentioned.

Lord Cholmondeley. My lords, the question put to the witness, at first, was, whether he held any lands of my lord Lovat, either as vassal, tenant, or tacksman, according to the description mentioned in the act of parliament? And if he does, then he comes within the description there mentioned. He has told your lordships, that he does not hold any lands, by tack or lease, from my lord Lovat. My lords, I pray that the question may be now asked him, whether he holds any lands of my lord Lovat, either by vassalage, tack, or lease?

L. H. S. Sir, you hear the question proposed by the noble lord. Do you hold any lands under my lord Lovat, as vassal?—*Cheris.* No.

L. H. S. Do you hold any lands under my lord Lovat, as tenant?—*Cheris.* No.

L. H. S. Do you hold any lands under my lord Lovat, as tacksman?—*Cheris.* No.

Lord Talbot. My lords, I desire this witness may be asked, whether he apprehends he can receive any benefit under this act of parliament, by my lord Lovat's being convicted of high-treason?

L. H. S. Sir, you hear the question asked by the noble lord.

Chevis. I never heard the act of parliament mentioned till this day : I know of no benefit I am to receive under it.

L. H. S. Do you know of any benefit that you are to receive ; or do you apprehend, that you can receive any benefit from the conviction of my lord Lovat ?—*Chevis.* No.

L. H. S. Do you hold any lands at all within the regality of Lovat ?—*Chevis.* No.

Proclamation for silence.

Lord Lovat. My lords, I beg this witness may be asked, whether he owes me any money ?

Att. Gen. My lords, on behalf of the Commons, we do object to that as an improper question, because I must submit it to your lordships, that no question is proper to be asked, but what tends to the discovery of something material to the point in controversy. Now, my lords, the question proposed to be asked, be it answered one way or the other, cannot tend to prove any thing material to the present purpose.

Lord Lovat interrupting,

L. H. S. My lord Lovat, you are not to interrupt the gentlemen of the House of Commons : You shall be fully heard in your turn.

Att. Gen. My lords, I say your lordships will not permit a question to be asked, which is totally immaterial to the present purpose : And, I apprehend, this question is totally immaterial, because the questions now to be put to the witness are only for the purpose of disqualifying him to be an evidence, which this question does not in the least relate to ; and be it answered the one way or the other, it cannot tend to disqualify the witness : Whether it be answered Yea or No, it cannot tend to disqualify the witness.

Lord Lovat. My lords, I beg, that the witness may be asked, whether he receives any rents, or other profits, from those lands lying within the regality of Lovat ?

Att. Gen. My lords, if this amounts to a question, to bring the witness under the description of the act of parliament, it is a question that has been already put by your lordships ; and answered particularly and precisely. If the question tends to any other matter, I cannot conceive to what purpose it is to be asked. But, my lords, it is incumbent on the noble lord at your bar, to mention what he intends to shew by the question he asks.

L. H. S. My lord Lovat, the witness on this examination hath sworn, that he holds no lands or tenements under your lordship, either as vassal, tenant, or tacksman ; and your lordship would now have him asked, whether he receives any rents, or other profits, from any lands lying within the regality of Lovat ? As what the witness has already sworn does fully answer all the disqualifications mentioned in the act of parliament which your lordship has

quoted, what do you intend by the present question ?

No answer being made by the prisoner, Robert Chevis, of Murtoun, was sworn in chief.

Sir John Strange. My lords, I desire this witness may inform your lordships, how long he has been acquainted with the noble lord at the bar.

Chevis. From about the year 1733.

Sir John Strange. Whether he has been acquainted with him ever since the year 1733 ?

Chevis. Ever since.

Sir John Strange. Do you live near the noble lord at the bar ?

Chevis. I live within two miles of him.

Sir John Strange. Whether he has not been often in his company since the year 1733 ?

Chevis. A great many times.

Sir John Strange. Whether he went to his house frequently ?—*Chevis.* Yes.

Sir John Strange. Whether he has had any conversation, and what conversation, with him, in relation to public affairs ?

Lord High Steward to the witness (perceiving him to have a paper in his hand),

L. H. S. What paper is that in your hand ?

Chevis. Notes of my own.

L. H. S. Are they of your own handwriting ?—*Chevis.* Yes.

L. H. S. To what purpose did you take them ?—*Chevis.* Only to refresh my memory.

L. H. S. Was that the only reason you took them for ?—*Chevis.* The only reason.

Sir John Strange. My lords, I beg this witness may be asked, What was the general turn of the conversation of the noble lord at the bar ?

Chevis. The general turn of his conversation was in favour of the Pretender, and his family.

Sir John Strange. Whether the witness speaks of the conversation so far back as the year 1733 ?—*Chevis.* Yes.

Sir John Strange. Whether the witness had ever any conversation with the noble lord at the bar, in relation to the year 1719 ?

Chevis. I had.

Sir John Strange. My lords, I beg he will give an account, What the noble lord at the bar has said to him, in relation to what was going to be done in the year 1719 ?

Chevis. My lord Lovat told me of a letter he had written to the late lord Seaforth ; and that he had sent it by his own lieutenant to lord Seaforth, to encourage and desire him to come down with his men ; and that he, lord Lovat, would join him with all his, in favour of the Pretender.

Notice being taken by some lords, at the upper end of the Court, that they could not well hear the witness, the Lord High Steward directed the clerk to repeat the answers of the witness as he delivered them : Which was done accordingly.

Sir John Strange. Whether the noble lord at the bar acquainted him with his having sent such a letter?

Chevis. He told me he had sent such a letter by his lieutenant.

Sir John Strange. My lords, I beg he may be asked, Whether he ever knew, from the noble lord at the bar, that that letter was delivered, or not?

Chevis. Lord Lovat told me, that the letter was delivered.

Sir John Strange. To whom did he say the letter was delivered?

Chevis. He said the letter was first shewn to Chisholm of Knockford; and after that it was delivered to my lord Seaforth.

Sir John Strange. I shall be glad to know, whether my lord Lovat said any thing to the witness, in relation to any affidavit that had been made concerning that letter?

L. H. S. Gentlemen of the House of Commons, The transaction now enquired of happened in the reign of his late majesty; and there is no charge, in the Articles of Impeachment, of any high-treason committed against his late majesty: you will therefore open to my lords, how you would apply the evidence which you are now examining to.

Sir John Strange. My lords, Your lordships will please to observe, that, in the Answer of the noble lord at the bar, he does particularly mention his great duty and affection for his late majesty, and his behaviour from time to time, in that respect; and we are now introducing this particular evidence, in regard to that matter, by first taking it up so long ago as the year 1719, to shew what was then the disposition, behaviour, and conduct, of the noble lord at the bar.

My lords, We say, that, in the year 1719, there was that letter written, with a view to assist the Spanish invasion then intended, in favour of the Pretender: That that letter was sent; but before it was delivered to the person to whom it was addressed, there was a communication of it, in the manner the witness hath mentioned; and that person gave proper notice, and made affidavit of it, which was sent up to the government, giving an account of it: and, by the great dexterity of the prisoner at the bar, he got the letter back again.

My lords, The use we make of this is to shew, that this is no new matter, arising from the present rebellion: but, by deducing it from the year 1719, we shall make the noble lord's conduct to be one continued act of treason, consistent with the article of the charge.

L. H. S. Then I apprehend you apply this piece of evidence, to encounter and contradict the allegation in my lord Lovat's Answer, which you have mentioned.

Then the Lord High Steward repeated to the House that allegation, out of the prisoner's Answer.

Sir John Strange. My lords, That is what we propose to shew by this evidence. The

witness has gone so far as to acquaint your lordships, that that letter, before it was delivered to the person to whom it was addressed, was shewn to one Chisholm of Knockford. My lords, I desire he may inform your lordships, what the noble lord at the bar said was done, in consequence of that communication.

Chevis. Chisholm made affidavit of it, which was sent up to court.

Sir John Strange. Did lord Lovat acquaint you whether he heard of such affidavit being transmitted?—*Chevis.* He did.

Sir John Strange. Did he tell you what he did upon that occasion?

Chevis. That he went immediately to court, and got himself introduced there. And lady Seaforth being then in London, she applied to him to do something in favour of her son; which he then absolutely refused, till her son should return him that letter; which being done, he shewed it to a certain friend, who read the letter, and who told him, That there was enough to condemn thirty lords there; and threw it into the fire.

Sir John Strange. My lords, I desire he will give an account whether the noble lord at the bar said any thing at that time, whether he had signed and sealed the letter.

Chevis. He said he had not signed it; and therefore they could not fix him with it.

Sir John Strange. I desire this witness may inform your lordships, whether, when the noble lord at the bar told him, that he had not signed it, he said any thing further to him upon that occasion, than that he had not signed it?

Chevis. He said, That he could not be fixed with it; and that that was the way he intended to get off, by its not being signed.

Sir John Strange. I desire you will please to inform their lordships, whether you remember the time when Roy Stuart broke out of Inverness gaol?—*Chevis.* Yes; it was in 1736.

Sir John Strange. Who was sheriff at that time?—*Chevis.* My lord Lovat.

Sir John Strange. After Roy Stuart had escaped out of Inverness gaol, where did he go to live? By whom was he entertained?

Chevis. He came to my lord Lovat's house, and was entertained there.

Sir John Strange. How long was he entertained there?

Chevis. Much about six weeks, to the best of my remembrance.

Sir John Strange. Were you often at my lord Lovat's during these six weeks?

Chevis. Frequently.

Sir John Strange. Were you ever there when lord Lovat and Roy Stuart were together?

Chevis. Very often.

Sir John Strange. Do you remember whether Roy Stuart was going abroad about that time?

Chevis. He was going abroad then; and the ship was prepared for him before he left lord Lovat's house; and he went in my lord Lovat's chaise or chariot.

Sir John Strange. I desire you will inform

their lordships, whether any message was sent from the noble lord at the bar by Roy Stuart, and to whom?

Chevis. I heard the noble lord at the bar charge him with a message to the Pretender.

Sir John Strange. What do you mean by charging him with a message?

Chevis. To assure the Pretender, whom he called his king, of his fidelity; and that he was determined to live and die in that cause.

Sir John Strange. I beg that he may inform your lordships, whether there was any thing said at that time in relation to any commission or patent.

Chevis. He charged him to expedite his sending his commission of lieutenant-general of the Highlands, and his patent of a duke.

Sir John Strange. I beg he may inform your lordships, whether, at any other time or times, he heard the noble lord at the bar say any thing whether he had, or had not, succeeded in what he had sent for?

Chevis. About 1742, he owned to me, That he got his commission, and patent to be a duke.

Sir John Strange. What commission did he tell you he had got?

Chevis. A commission of lieutenant-general of the Highland clans.

Sir John Strange. From whom did he say he had received this commission, and patent to be a duke?

Chevis. From his lawful sovereign king James the eighth.

Sir John Strange. Pray recollect yourself. Did he make use of that expression which you have now repeated, that he had it from his lawful sovereign king James the eighth? Are you certain he did?—*Chevis.* Yes.

Sir John Strange. Did he tell you any thing what he would do, now he was invested with that command, and had got such a commission and patent?

Chevis. He said, that he was in a condition thereby to humble his neighbours.

Sir John Strange. Have you at any other time heard him speak of this patent, or of this commission?—*Chevis.* Several times.

Sir John Strange. Is it often that you have heard him?

Chevis. Often.—He has told me, That he had a right to it by his services for that family; and that he had the like commission from the Pretender's father from St. Germain's.

Sir John Strange. I desire the witness may inform your lordships, whether, during the time that the noble lord at the bar and Roy Stuart were together, they diverted themselves with composing any thing, and what.

Chevis. They did, in composing burlesque verses, that, when young Charles came over, there would be blood and blows.

Sir John Strange. You have not mentioned it in a poetical manner: pray, can you recollect the lines?

Chevis.

When young Charley does come o'er,
There will be blows and blood good store.

Sir John Strange. I beg that you will acquaint their lordships, whether this verse that you mention, is a translation, or whether this is the original language in which it was composed?

Chevis. It was framed in Erse; and this is the substance of one verse.

Sir John Strange. I beg this witness may inform your lordships, whether he has at any time heard the prisoner say any thing in relation to any association?—*Chevis.* I have.

Sir John Strange. Please to tell the time you heard this discourse, and what the noble lord at the bar said.

Chevis. It was between 1737 and 1740.

Sir John Strange. What did you hear the noble lord at the bar say then?

Chevis. That there was an association of the Highland clans in favour of the Pretender, whom he called his lawful sovereign king James the eighth; and that he had entered into that association, and would live and die in that cause.

Sir John Strange. I beg he may be asked, whether, at the time he is speaking of, one Drummond of Bochaldie was at lord Lovat's house.

Chevis. Drummond of Bochaldie was there much about this time; and used to drink success to the association.

Sir John Strange. Do you remember Bochaldie's being at Castle-Downey, and staying there any time?

L. H. S. What place is Castle-Downey?

Chevis. It is lord Lovat's place of residence.

Sir John Strange. My lords, it is sometimes called Beaufort, and sometimes Castle-Downey. To whom does it belong?

Chevis. To my lord Lovat.

Sir John Strange. Do you know whether you heard my lord Lovat say any thing to Bochaldie at that time?

Chevis. He mentioned an invasion of Britain in favour of the Pretender.

Sir John Strange. What year are you now speaking of?—*Chevis.* The year 1739.

Sir John Strange. You say, That Drummond was then at lord Lovat's, stayed there a considerable time, and heard my lord Lovat propose an invasion of Britain in favour of the Pretender?—*Chevis.* I did.

Sir John Strange. Did you hear him propose it? And did you hear of any body else he proposed it to?

Chevis. I have heard the like was proposed to Cameron of Lochiel, and others.

Sir John Strange. From whom have you heard it?

Chevis. From my lord Lovat himself.

Sir John Strange. Do you remember any thing to have happened at lord Lovat's about the time of Ostend being taken by the French?

Chevis. I was not there then; but he wrote a letter to me, and told me, that the whole coast of Flanders was now clear.

Sir John Strange. Did you hear my lord

Lovat say any thing in relation to the coast of Flanders upon Ostend being taken?

Chevis. I have heard him say as much as he wrote in that letter.

Sir J. Strange. What have you heard him say?

Chevis. That the coast of Flanders was then cleared; and that the French would be over in one night's time, and carry all before them.

Sir J. Strange. I should be glad you would inform their lordships, whether, at any time in the year 1745, lord John Drummond was at Castle-Downey, or not?

Chevis. To the best of my memory, he was about that time at Castle-Downey.

Sir J. Strange. I should be glad you would inform their lordships about what time of the year this was, whether it was summer or winter?

Chevis. I think it was summer; to the best of my memory, between summer and harvest.

Sir J. Strange. I beg you will inform their lordships, whether at any time, and in what month, in the year 1745, the master of Lovat came to my lord's house; or whether you saw him at my lord's in 1745?

Chevis. I saw him there several times in 1745.

Sir J. Strange. Did you see him there when any paper or Manifesto was produced?

Chevis. I saw him there when the Manifesto was produced.

Sir J. Strange. At what time was this?

Chevis. It was in September 1745. The Manifesto came in a packet inclosed to lord Lovat.

Sir J. Strange. What Manifesto was it?

Chevis. The Pretender's Manifesto and Declaration, which he ordered the master immediately to read.

Sir J. Strange. Was it read accordingly by the master of Lovat?

Chevis. It was accordingly read.

Sir J. Strange. What did lord Lovat say when it was read, or before it was read?

Chevis. I objected to the Manifesto's being read; and lord Lovat told me I talked treason.

Sir J. Strange. Did he tell you what was his own disposition in regard to that Manifesto, after it had been read?

Chevis. He told me, after reading the Manifesto, That he was to join the Pretender's party in that cause; and that he would live and die in that cause.

Sir J. Strange. I beg the witness may mention to your lordships, whether the noble lord at the bar expressed his opinion in relation to the good or ill success of it?

Chevis. He said he thought success was morally sure: as sure as light, as sure as God was in heaven; the Pretender would prevail.

Sir J. Strange. I beg you'll recollect, and give my lords the very words. Did he say the Pretender?

Chevis. Not the Pretender; but his right master.

Sir J. Strange. What was the expression he made use of?

Chevis. "As sure as the sun shined."

Sir J. Strange. That who would prevail?

Chevis. That his master (the Pretender) would prevail.

Sir J. Strange. I beg you will inform their lordships, whether any thing was offered to you upon that occasion?

Chevis. I was offered a captain's commission.

Sir J. Strange. By whom?

Chevis. By lord Lovat, in that service.

Sir J. Strange. In what service?

Chevis. In the service of that person, whom he called his lawful prince.

Sir J. Strange. My lords, I beg he may inform your lordships, whether my lord Lovat said any thing in relation to the Pretender, to recommend him to the witness, at the time he says lord Lovat offered him a commission?

Chevis. I have often heard lord Lovat say, That whoever looked the Pretender, his lawful king, in the face, he would own he was his only rightful king, as he himself owned him to be.

Sir J. Strange. I beg he may be asked, whether he can recollect, during the time of the late rebellion, any number of Frasers being assembled?

Chevis. I cannot say; for, after the time of reading the Manifesto, I did not visit my lord Lovat. I discontinued going to his house.

Sir J. Strange. For your own sake, I desire to ask you, Did you accept of the commission offered you by lord Lovat or not?

Chevis. I did not indeed; I refused it.

Sir J. Strange. What healths have you heard the prisoner toast in your company?

Chevis. "Confusion to the White Horse, and all the generation of them."

Sir J. Strange. Are you certain you heard my lord Lovat propose that health?

Chevis. I have heard him propose it, and drink it.

Sir J. Strange. What did you understand was the meaning of that expression, Confusion to the White Horse?

Chevis. Confusion to the present royal family: It could mean nothing else. It was in allusion to the arms of the family.

Sir J. Strange. I should be glad you would inform their lordships, whether you know of any message sent by my lord Lovat, by Drummond of Bochaladie, besides what he has mentioned; any thing concerning the Reformation or Revolution?

Chevis. He was to execute the message, and that with respect to his commission and patent.

Sir J. Strange. With whom was he to execute that commission?

Chevis. With the Pretender, at Rome.

Sir J. Strange. Did he, at that time, say any thing more to him; and what was it?

Chevis. He talked of the association, and of the invasion.

Sir J. Strange. Did my lord Lovat say any thing of religion, at that time?

Chevis. I heard him say frequently, he believed there was no true religion in the world but one, which was the Church of Rome.

Sir J. Strange. Was any thing said of the Revolution?

Chevis. He cursed the Reformation and the Revolution too.

Sir J. Strange. What did he curse the Reformation for?

Chevis. Because, he said, it brought a false religion upon us; and the Revolution involved us in a load of debt.

Sir J. Strange. Did he then propose any scheme to get rid of this grievance?

Chevis. The scheme he proposed was, by favouring the invasion, and by taking part in it.

Sir J. Strange. Did he say for what purpose that invasion was to be?

Chevis. To restore the rightful king.

Sir J. Strange. Did he name him?

Chevis. To restore his lawful sovereign king James the eighth.

Sir J. Strange. I beg you will give their lordships an account, whether you ever heard lord Lovat say any thing in relation to a marriage contracted for his daughter?

Chevis. I heard lord Lovat say, that when his daughter was married to M^rPherson of Clanie, he took it to be an accession of strength, by the adding one Highland clan more to the number.

Sir J. Strange. Please to inform their lordships, whether through the progress of the rebellion, you heard the lord Lovat say any thing, as to what he would do with his tenants that would not join?

Chevis. He said, it was very easy for him to cut them off in a moment, as he was in such a capacity now.

Sir J. Strange. What did he mean by that?

Chevis. Any tenant that should oppose him, or any of the clan, or neighbours.

Sir J. Strange. I beg you will inform their lordships, what is the power and authority that lord Lovat insists to have over his own clan? or whether they are under his power and command, or not?

Chevis. Lord Lovat certainly has the power of an absolute king over them.

Sir J. Strange. Inform their lordships, whether you apprehend the command of the clan to be in my lord Lovat, or his son the master?

Chevis. It is entirely in my lord's own hands.

Sir J. Strange. Do you know what age my lord Lovat's eldest son is?

Chevis. Much about nineteen.

Sir J. Strange. Was he at home at the beginning of the rebellion? or was he then at any other place, and where, for education?

Chevis. He was at Saint Andrews, the place of his education; and was called home about that time.

Sir J. Strange. How long was that before
VOL. XVIII.

lord Lovat made his son read the Manifesto which you have mentioned? How long was he at home before that?

Chevis. Not very long before that.

Sir J. Strange. You say the young gentleman was at Saint Andrews, and was sent for home by his father; and that his father set him to read the Manifesto: pray how long had the young gentleman been at home, before he was ordered to read the Manifesto?

Chevis. It might have been about two months, to the best of my memory.

Sir J. Strange. Do you think it was so long?

Chevis. I believe it might have been about two months.

Sir J. Strange. When my lord Lovat offered you a captain's commission, did he acquaint you who was to be your colonel?

Chevis. He did not acquaint me, at that time, who was to be my colonel; but he said he was in that service in that cause himself; and I understood, that I was to serve under him.

Sir J. Strange. My lords, as the witness has informed your lordships, that he did not go to lord Lovat's, after he told him it was high treason to object to the reading of the Pretender's Manifesto, I shall not examine him to any thing subsequent in point of time to that; and therefore I shall not trouble your lordships with asking him any more questions.

Att. Gen. My lords, I beg this witness may inform your lordships, whether he has heard any thing of any threats made use of by the noble lord at the bar, to his tenants, or clan, to come down upon them, if they refused joining?

Chevis. I saw a party of the M^rDonalds in the country; and I think they came to the place where I lived; and I take the design of them to have been, that they should be there, to overawe the country.

Att. Gen. Who commanded that party of the M^rDonalds?

Chevis. M^rDonald of Barisdale.

Att. Gen. Did you hear any thing said by my lord Lovat to M^rDonald, concerning him or his clan?

Chevis. He said, in general, that, upon being invested with this patent of duke, he would be able not only to humble and keep in awe his own clan, but his neighbours.

Att. Gen. I beg he may inform your lordships, whether he knows any thing of Barisdale's going about to the clans, to encourage them to join.

Chevis. I saw him at lord Lovat's house the day of the rendezvous.

Att. Gen. What did he do there?

Chevis. He spirited up the country people, and carried them along to the rendezvous.

Att. Gen. Who was that?

Chevis. M^rDonald of Barisdale.

Att. Gen. What do you know in relation to that rendezvous?

Chevis. I saw the rendezvous at a distance, but I was not upon the spot.

Att. Gen. Who was at the rendezvous?

Chevis. Four, or five, or six hundred men,

2 Q

Att. Gen. Whose men were they?

Chevis. The Frasers.

Att. Gen. Under whose command were they?

Chevis. I was told, they were under the master's command; but I was not personally present.

L. H. S. Gentlemen of the House of Commons, have you done with this witness?

Managers. My lord, we have done with him.

L. H. S. My lord Lovat, the gentlemen of the House of Commons have gone through with their examination of Mr. Chevis: has your lordship any questions to ask him?

Lord Lovat. My lords, he has said so many false and wicked things, that I do not know what questions to ask him, or where to begin.

L. H. S. Your lordship will be pleased to propose the questions; and then they will be asked of the witness.

The Clerk repeated the prisoner's questions to the witness.

Lord Lovat. My lords, I pray he may be asked, whether or no, since my arrival here, and being before the House of Lords, and that many witnesses had been summoned to give evidence against me, whether this witness did not go about to solicit witnesses against me? and whether he did not examine witnesses himself?—*Chevis.* I refuse it.

Manager. You mean, you deny it.

Chevis. I deny it.

Lord Lovat. My lords, I offer to prove it.

L. H. S. My lord Lovat, your lordship must do that when you come to make your defence: your lordship will then have an opportunity, by witnesses, to contradict or invalidate the testimony of this, or any other witness produced against you.

Lord Lovat. I beg this witness may be asked, Whether he knows, or ever heard, that several people were threatened to be put in prison, and were put in prison, if they did not come up to be evidence against me.

Chevis. I deny it.

Lord Lovat. I beg he may be asked, Whether he discovered to any person belonging to the government, the Declaration which he says he heard read at my house?

Chevis. In September 1745, I told it in common conversation; but I never went to any of the government, to inform them of it: the rebellion broke out then immediately.

Lord Lovat. My lords, I beg this witness may be asked, Whether he ever said himself, or has heard others say, that the late plot by the master of Lovat against me, was to hang the old man, and save himself?

Chevis. I never heard of such a plot; but have often heard of a plot of my lord Lovat's, to try to hang his son the master of Lovat, and save himself.

A Lord. My lords, I don't doubt the witness designs to pay the money he owes to my lord Lovat; but I pray he may be asked, whether he expects to be forgiven that debt, if my lord Lovat is convicted?

L. H. S. My lords, while this witness was examined upon a Voire Dire, there was a question proposed by my lord Lovat, to be asked him, which was, whether he owed my lord Lovat any money? That question was objected to by the gentlemen of the House of Commons, as not tending to discover any thing material to the point then in question: and what is now proposed by the noble lord, to be asked of the witness, is, whether this gentleman owes my lord Lovat any money? And if he does, whether he expects to be forgiven that debt, in case my lord Lovat should be convicted?

Chevis. In regard of that debt, it was condescended some years ago, that my lord Lovat should accept a gentleman who was my debtor, for the payment of that money.

L. H. S. Do you owe my lord Lovat any money?

Chevis. A mere trifle: this which he speaks of was to be compensated another way.

L. H. S. Whether the debt be more or less, do you expect to save that debt, or to be favoured in the payment of it, if my lord Lovat should be convicted?

Chevis. Not at all; I deny it.

A Lord. How long have you been in town?

Chevis. Since Tuesday last about noon.

A Lord. Whether have you lived at your own expence since that time; or who hath supported you?

Chevis. I did design to have lived at my own expence; but I have been supported at the expence of the government. [Then the witness withdrew.]

Sol. Gen. (the hon. William Murray, esq.) My lords, the next witness we beg leave to call, is Robert Fraser, late secretary to my lord Lovat.

Robert Fraser called in and sworn in Chief.

Proclamation made for silence.

The prisoner rising up, the Lord High Steward said, My lord Lovat, do you object to this witness?—*Lord Lovat.* Yes.

L. H. S. What is your objection?

Lord Lovat. He holds a tack of land of me.

L. H. S. Is it true? Do you hold a tack of land of his lordship?

R. Fraser. No; I do not hold any tack of land of my lord Lovat.

Lord Lovat. I am ready to prove it.

L. H. S. Gentlemen of the House of Commons, My lord Lovat may have liberty to examine a witness, to prove that fact. It has been frequently done after a witness has been sworn in chief. My lords, at the common law, where a witness is tendered by the plaintiff to be sworn, the oath to give evidence in chief is administered to him, unless the defendant makes an objection to his competency, and then he may be examined touching that objection upon a Voire Dire: but, after the witness has been sworn in chief, if any objection is then made to him, he may be asked the same question by virtue of his oath in chief, as he might have been asked upon a Voire

Dire. I have known it done both ways. But, after the witness has been examined by the defendant to the fact of the objection, and has denied it upon his oath, it is not usual to give the defendant liberty to call a witness to prove it, in order to repel him from being a witness, unless the other side acquiesces in it.*

Lord Lovat. I have sent for my witness.

The House having waited some time, my Lord High Steward asked the prisoner, where his witness was: who said, he was at the coffee-house; and a little time afterwards said, My lords, the witnesses are all gone about an hour ago, not expecting to be called.

L. H. S. How came your witnesses to go away whilst your Trial is going on?

Lord Lovat. My lords, they did not know they would be called to-day.

Sol. Gen. My lords, the objection made by the noble lord at the bar having been positively denied by the witness, and there being no evidence here to contradict him, we hope we may proceed to examine him.

Att. Gen. My lords, we hope your lordships will not permit the prisoner at the bar to suspend your lordships' proceedings whenever he pleases: and we hope the candour of the Managers, in not opposing his going into this objection, after the witness has denied it upon his oath, shall not be extended to delay his examination, under a pretence of this kind. The witness produced denying the objection upon his oath, and there being no evidence here to contradict it, we hope we shall be permitted to go on with the witness. My lords, the Managers were aware of this; nevertheless did not at first oppose any indulgence to the prisoner that might tend to justice; but as it is now known what point the witness is called to, though I do not suppose the witness capable of being influenced, yet if a bare allegation of this sort is sufficient to put off your lordships' proceedings, I must submit it to your lordships, whether it will not give an opportunity of something to be done which ought not to be done.

Mr. Noel. It is with great difficulty and disinclination, that we can prevail upon ourselves to object to the utmost candour that can be shewn to the noble lord at the bar. My lords, this is an occurrence which, in my little experience, I never knew to arise. My lords, I apprehend the way is, upon this occasion, to ask the questions of the witnesses upon a Voire Dire. The noble lord at the bar made the objection, and applied to the witness for an answer to that question, who has positively denied it: if, after that, the prisoner is to say, I can falsify what the witness has now sworn; allow me time for it; and your lordships should indulge him with it in this manner; there is nobody but must be apprehensive of

very dangerous consequences attending it: for any kind of evidence may, by that means, be prevented.

L. H. S. My lords, the gentlemen of the House of Commons may proceed in their examination of this witness; and my lord Lovat will be at liberty to ask what questions he pleases, in his cross-examination; and will likewise be at liberty to call witnesses to prove this particular fact in his defence in another shape; for he may prove this fact, in order to impeach this witness's credit, and probably have as much effect of it as if it had been properly taken advantage of.

Sol. Gen. My lords, I beg this witness may be asked, when he first came to live in lord Lovat's family; and how long he lived with him?

L. H. S. Sir, you hear the question.

R. Fraser. I entered into lord Lovat's service in October 1744.

Sol. Gen. How long did you continue with him?

R. Fraser. I continued in his service till his lordship and I were taken prisoners, the 7th of June last.

Sol. Gen. I beg you may inform their lordships, whether, in the month of July 1745, you knew of any information that was given to my lord Lovat, of an intention of an insurrection and invasion; and what intimation was given of it?

R. Fraser. Some time after the 25th July 1745, I heard a gentleman came to my lord Lovat's house, to tell him, that the Pretender's son was landed somewhere about Lochaber. I heard my lord Lovat say, he did not land like a prince; that he had no army with him, and only a few servants.

Sol. Gen. What did my lord Lovat say upon that occasion? Was his son at home?

R. Fraser. He was at home, or was then sent for.

Sol. Gen. Do you know of any person that was sent by my lord Lovat to see the Pretender at that time?

R. Fraser. Not at that time; I can't say that I knew of any.

Sol. Gen. Do you know of any endeavours that were then used to raise men upon my lord Lovat's estate? And if you do, please to mention the times.

R. Fraser. I remember some time after he dictated a letter to me, to be sent to two of the heads of the tribes of the Frasers.

Sol. Gen. Name them.

R. Fraser. James Frazer of Foyers, and John Fraser of Ferraline.

Sol. Gen. What was that letter for?

R. Fraser. To get men ready to join the master of Lovat.

Sol. Gen. Where were the men to go with him?

R. Fraser. The letter does not particularize that.

Sol. Gen. Do you know of any body that was sent to take lists of the men to be raised?

* As to this, see Peake's Law of Evidence, c. 3, s. 6, see also sects. 2, 3, of the same chapter,

R. Fraser. I took the lists of the names of the men. My lord Lovat's chamberlain ordered me to make a list of the names of all the men capable of bearing arms north of Loch Ness.

Sol. Gen. For what purpose were those lists made?

R. Fraser. To the best of my knowledge to join the master of Lovat, with the Pretender.

Sol. Gen. Were such lists made out with my lord Lovat's privity, or by his direction?

R. Fraser. I am sure he was acquainted with it.

Sol. Gen. How are you sure he was acquainted with it?

R. Fraser. Because I went into the room, and told him what I was doing; and that I was writing the list.

Sol. Gen. What did he say to you upon that occasion?

R. Fraser. I cannot remember now.

Sol. Gen. Pray, did my lord Lovat see the list after it was made out?

R. Fraser. I can't tell; I returned it to John Fraser, my lord's factor.

Sol. Gen. Do you know of any message that was sent or passed between my lord Lovat, and lord Loudon, and lord President?

R. Fraser. Yes.

Sol. Gen. What was it about?

R. Fraser. Several letters were sent by my lord London, and my lord President, to my lord Lovat, to dissuade him from entering into the rebellion.

Sol. Gen. What answer did my lord Lovat make to these letters?

R. Fraser. He said his son was so obstinate as to enter into the rebellion; but that he could not help it.

Sol. Gen. Was that fact true? Was the son so obstinate?

R. Fraser. No; I am sure it was not true.

Sol. Gen. Why are you sure it was not true?

R. Fraser. Because, whilst I was preparing a letter to the lord president, which my lord Lovat dictated, wherein he acquainted them of his son's obstinacy in going into the rebellion (which letter my lord directed me not to let any body see,) his son the master came in, and asked me for the letter; and I refusing to give it him, the son took the letter out of my hand.

Sol. Gen. Who took it out of your hand?

R. Fraser. The master of Lovat took it out of my hand; and, after reading it, said, Good God, how is this! Accuse me behind my back! To call me stiff-necked and disobedient! I will set the saddle upon the right horse.

Sol. Gen. Pray repeat the answer you made last.

R. Fraser. The master of Lovat said, If this letter goes, I will go, and put the saddle upon the right horse, and will go and discover all to my lord President.

Sol. Gen. What did he mean by putting the saddle upon the right horse?

R. Fraser. That he would go and discover to

my lord President, that his father, my lord Lovat, had forced him to do what he had done.

Sol. Gen. Did the son say any thing to my lord Lovat upon that occasion?

R. Fraser. Not that I know of. The words 'stiff-necked and disobedient' were left out of the letter.

Sol. Gen. How came these words to be left out?

R. Fraser. It was done by the master of Lovat's order.

Sol. Gen. Did you hear any thing that passed between lord Lovat and his son about his backwardness in going into the rebellion?

R. Fraser. I heard him blame the master of Lovat for being dilatory.

Sol. Gen. Dilatory in what?

R. Fraser. In raising men.

Sol. Gen. For what purpose?

R. Fraser. To join the Pretender's son.

Sol. Gen. Do you know any thing of lord Lovat's sending for people, as painters, or of any sort, to prepare his tents?

R. Fraser. Yes; I myself wrote a letter to his agent at Inverness, who was a painter.

Sol. Gen. By whose order did you write that letter?

R. Fraser. By my lord Lovat's order.

Sol. Gen. To what purpose was the letter wrote?

R. Fraser. It was to order the agent, or the painter, to make some bell-tents.

Sol. Gen. What did the painter do in consequence of that letter?

R. Fraser. He made them.

Sol. Gen. Did my lord Lovat know of it?

R. Fraser. Yes.

Sol. Gen. How do you know he did?

R. Fraser. Because I was with my lord Lovat when the men was making them.

Sol. Gen. What are bell-tents?

R. Fraser. They are lodges to keep arms dry from the rain.

Sol. Gen. Did you know of any colours being made?

R. Fraser. Yes; we had one pair of new ones made, and another pair mended.

Sol. Gen. About what time was that? and what month?

R. Fraser. About the month of September, I think.

Sol. Gen. Was it before the first rendezvous?

R. Fraser. I think it was after the first rendezvous.

Sol. Gen. Can you give an account of the men being rendezvoused, and whether it was done by my lord Lovat's directions, or under his authority?

R. Fraser. They were rendezvoused.

Sol. Gen. Where were they rendezvoused?

R. Fraser. Upon that part of lord Lovat's estate near Castle Dewdney.

Sol. Gen. About what time was this? what month?

R. Fraser. In the month of August.

Sol. Gen. What was the particular purpose of their being reviewed then?

R. Fraser. To see who was capable of bearing arms, and who had any.

Sol. Gen. Were the officers appointed then?

R. Fraser. No, I believe not.

Sol. Gen. How do you know that the prisoner was made privy to this rendezvous?

R. Fraser. Because they came back to my lord's house afterwards.

Sol. Gen. Were they in officers dress?

R. Fraser. They had white cockades on.

Sol. Gen. How far was the place of rendezvous from lord Lovat's house?

R. Fraser. About a quarter of a mile.

Sol. Gen. Were the persons there tenants to my lord Lovat?

R. Fraser. They were his tenants.

Sol. Gen. What arms had they?

R. Fraser. I can't say: I had my lord's liberty to go there and see them; but I did not stay there.

Sol. Gen. Do you know of any other rendezvous?

R. Fraser. About a fortnight afterwards there was another rendezvous.

Sol. Gen. Do you know of any ammunition, muskets, or arms, that were given to the men?

R. Fraser. I don't know of any arms that were given them. There was a barrel of powder sent from Inverness.

Sol. Gen. By whose order was that done?

R. Fraser. By my lord Lovat's order; I wrote the letter.

Sol. Gen. What was done with that powder?

R. Fraser. It was distributed among the men.

Sol. Gen. How do you know that it was done by my lord Lovat's order?

R. Fraser. Because the house-keeper being disgraced, I got the key of the place where it was, and saw the powder and bullets there.

Sol. Gen. Was the key delivered you for that use?

R. Fraser. I told my lord of my having the key.

Sol. Gen. Do you know of any bonnets being provided?

R. Fraser. There were bonnets provided for them.

Sol. Gen. By whose order?

R. Fraser. By my lord Lovat's.

Sol. Gen. For what purpose were they provided?

R. Fraser. They were given to the men.

Sol. Gen. Do you know where the officers went after the last rendezvous?

R. Fraser. The officers came back that night.

Sol. Gen. Where did they come to?

R. Fraser. They came to my lord Lovat's house.

Sol. Gen. Had they cockades?

R. Fraser. They had white cockades in their bonnets.

Sol. Gen. Do you know for what sign or mark they wore white cockades?

R. Fraser. It was a symptom of their being people to join the Pretender.

Sol. Gen. Do you know of any thing that

happened at my lord Lovat's after the battle of Preston-Pans?

R. Fraser. Fraser of Dallcraige came to Castle-Downey with an account of the battle of Preston-Pans.

Sol. Gen. What did my lord Lovat say to him upon that occasion?

R. Fraser. He said, that his men should be soon ready to go south.

Sol. Gen. For what purpose?

R. Fraser. To join the rebels, I understood.

Sol. Gen. Do you know of any men passing by my lord Lovat's house?

R. Fraser. My lord Cromartie's regiment passed by; and he and the M'Donalds, and several others, were entertained there that night.

Sol. Gen. Did you hear any thing that passed upon that occasion? any thing that was said by my lord Lovat upon it?

R. Fraser. Yes, that it was owing to the master of Lovat's disobedience, that the Frasers were not ready as soon as any other.

Sol. Gen. Was there any thing else that passed then, or any particular healths drank?

R. Fraser. Yes, the health of the Pretender's son was drank.

Sol. Gen. By what name?

R. Fraser. By the name of prince Charles.

Sol. Gen. Pray at what time did the master of Lovat go and join the rebels?

R. Fraser. It was between the 10th and 20th of December that he went. My lord Lovat was taken prisoner on the 10th or 11th of December, and escaped about the 19th or 20th; and at the same time the master marched with the Frasers.

Sol. Gen. Was my lord Lovat extremely displeased at his son's so marching; or did he disapprove of it?—*R. Fraser.* No.

Sol. Gen. Did he send word for his son to come back again?

R. Fraser. He did afterwards send for him back, to raise more men.

Sol. Gen. Do you know of any person who was concerned in the rebellion, that after the battle of Falkirk, came to my lord Lovat's house; and whether any thing passed in company then, and what it was?

R. Fraser. Yes; there was a French gentleman came, that was said to be the French ambassador.

Sol. Gen. Where did he come to?

R. Fraser. To a place belonging to my lord Lovat.

Sol. Gen. When was that?

R. Fraser. It was after the retreat from Stirling.

Sol. Gen. Do you know who was there besides?

R. Fraser. There were several others, particularly Lochiel, Keppoch, Cameron.

Sol. Gen. Do you know of my lord Lovat's saying any thing to them about his assisting them?

R. Fraser. He told them, he hoped they would excuse him, on account of his age and infirmities.

Sol. Gen. Did he say any thing to shew his zeal for their success, as he did not go himself?

R. Fraser. Yes; he said, I cannot go myself; but I will send my only son, the darling of my life.

Sol. Gen. Do you know of any thing that passed between my lord Lovat and his son after that?

R. Fraser. Yes; the master came to Gortuleg; and my lord had lately received a letter from one Mr. Sheridan, who had some office under the Pretender's son, complaining of my lord's not getting his men ready.

Sol. Gen. Do you know of any thing that passed between them in relation to the men having leave to go home?

R. Fraser. Yes; my lord was angry with the master for giving them leave.

Sol. Gen. Pray, how long was this before the battle of Culloden?

R. Fraser. This was in the month of February.

Sol. Gen. Do you know any thing of the Pretender's son's coming to my lord's house after the battle of Culloden?

R. Fraser. Yes; the very night after the battle, the Pretender's son came to my lord's.

Sol. Gen. Was my lord Lovat there then?

R. Fraser. Yes.

Sol. Gen. Do you know any thing of what passed between them; or what my lord Lovat said to him?

R. Fraser. He made some apology for not joining him in person.

Sol. Gen. Did he mention any thing to shew his zeal for him, though he did not join him in person?

R. Fraser. He said he had sent his son to join him, whom he loved more than himself.

Sol. Gen. Did he mention his having sent any more?

R. Fraser. Yes; he mentioned his having sent his clan.

Sol. Gen. Was the excuse accepted; or what did the Pretender's son say to him?

R. Fraser. I cannot tell particularly: I do not understand French, and they spoke in French.

Sol. Gen. Did all the conversation, which passed between them, pass in French?

R. Fraser. No; they spoke sometimes English, and at other times they spoke French.

Sol. Gen. What language was that discourse spoken in, which you have given an account of as to lord Lovat's son and clan?

R. Fraser. It was in English.

Sol. Gen. You have said you did not understand all their discourse: Pray did you perceive any other demonstrations of friendship that passed between them?

R. Fraser. Yes; they embraced one another.

Sol. Gen. Do you know of any consultation or meeting of the general officers of the rebel army, which my lord Lovat had at that time?

R. Fraser. Yes.

Sol. Gen. Who were present?

R. Fraser. There were several gentlemen present.

Sol. Gen. Name them.

R. Fraser. There was Cameron of Lochiel, John Murray of Broughton, Barrisdale, John Roy Stuart, Glenbucket, and others.

Sol. Gen. How long was this after the battle of Culloden?—*R. Fraser.* It was not very long.

Sol. Gen. How long was it?

R. Fraser. A matter of ten or twelve days.

Sol. Gen. Was there any body else there? Was the young Pretender there?

R. Fraser. No; he was not.

Sol. Gen. Do you know any thing of the conversation that passed then, or the result of the consultation?

R. Fraser. No; I was turned out of the room: I did not hear.

Sol. Gen. Do you know of any money that was distributed? To whom was it distributed, by whom, and for what purpose?

R. Fraser. I saw the Pretender's son's treasurer give money.

Sol. Gen. For what purpose was the money given?—*R. Fraser.* To raise men.

Sol. Gen. Do you know what kind of money was so given?

R. Fraser. It was French louis-d'ors.

Sol. Gen. Were you with the prisoner till the time he was taken? If you were, give an account of his retreat.

R. Fraser. We staid in an island for a month; and when we escaped, we were obliged to take a boat to come down a loch.

Sol. Gen. What was the name of the island?

R. Fraser. The island of Morer.

Sol. Gen. Had you been with lord Lovat from the time of the battle of Culloden to that time?

R. Fraser. We were in the island from the beginning of May till the 7th of June.

Sol. Gen. With what view did my lord Lovat come there?

R. Fraser. To screen him from the king's troops, which were then in pursuit of him, and several others of them.

Sol. Gen. Do you know of any thing that passed between the master of Lovat and him at that time?

R. Fraser. I remember the master proposed it to him to surrender himself to the duke; but my lord Lovat advised him against it, and said he could not do it consistently with his honour; and he did not think he had been so mean-spirited as to offer it.

Sol. Gen. Do you know any thing of any advice that was given by my lord Lovat about the raising of men?

R. Fraser. Yes; my lord Lovat was present at Morer, where they were speaking of the raising of men.

Sol. Gen. Had the prisoner any guard that attended him whilst he was in Morer?

R. Fraser. Yes; he had a guard of twenty men to attend him.

Sol. Gen. Did they resist any of the king's forces that might oppose them?

R. Fraser. Not that I know of.

Sol. Gen. By whom were they paid?

R. Fraser. I paid them.

Sol. Gen. By whose directions did you pay them?

R. Fraser. By my lord Lovat's directions.

Sol. Gen. Did you apprehend, that the master of Lovat carried his men into the rebel army without his father's permission?

R. Fraser. No; I am very sure he could not.

Sol. Gen. Why are you sure of it?

R. Fraser. Because my lord Lovat is a very strict man; and none of his children could have done it without his consent.

Sol. Gen. Had my lord Lovat a power over them?

R. Fraser. Yes; he had a very great power over them.

Sol. Gen. Pray, was the guard my lord Lovat had, armed?—*R. Fraser.* Yes.

Sol. Gen. You say there was no opposition given by them to any of the king's forces?

R. Fraser. No; I think there were two or three of them fired: but my lord Lovat sent me out to tell them not to fire.

Sol. Gen. Do you know any thing of my lord Lovat's soliciting a commission from the Pretender, to be lieutenant-general of the Highlands, or a patent to be duke?

R. Fraser. I remember, some time after I went into my lord Lovat's service, which was the 18th of October 1744, I saw in the desk a copy of an old patent, which gave the title of duke to lord Lovat only.

Sol. Gen. What other papers did you see there?

R. Fraser. Some time after I saw a new patent, where the title was to descend to the heirs male of the family.

Sol. Gen. Did you hear from my lord Lovat how he obtained the patent?

R. Fraser. I have heard my lord Lovat say, That his patent lay in the hands of one Drummond in France.

Sol. Gen. Did he say what Drummond?

R. Fraser. To the best of my knowledge, he said it was Drummond of Bohaldie.

Sol. Gen. Do you know any thing of any other commission which my lord Lovat had?

R. Fraser. Yes; I saw a commission for his being lieutenant-general of the Highlands.

Sol. Gen. Where did you see that commission?

R. Fraser. Lying upon a table in my lord's room. I read it, and made a copy of it by my lord's order.

Sol. Gen. Are you sure whether he himself ordered you to copy it?

R. Fraser. I am sure he ordered me to make a copy of it.

Sol. Gen. Had you any other discourse with him about it? Did you hear with what view he had got it?

R. Fraser. No; I had no other than what I have now informed you of.

Sol. Gen. Do you know of any complaint

my lord Lovat ever made about an independent company being taken from him?

R. Fraser. I heard him complain, that the court did not use him civilly in taking away his company.

Sol. Gen. When did you hear him make that complaint?

R. Fraser. Frequently in company, in speaking upon the subject.

Sol. Gen. Pray what did my lord Lovat say upon that occasion?

R. Fraser. I heard him say, that it was entirely owing to general Wade; and that he did not blame the government.

Sol. Gen. Did he draw any consequences from that?

R. Fraser. I have heard him speak extraordinary well of his late master king George.

Sol. Gen. What more did he say about this treatment?

R. Fraser. He said, that the court use him so ill, that he could not help doing what he was doing.

Sol. Gen. What was he then doing?

R. Fraser. Raising men to join in the rebellion. He said he had no dislike to his present majesty, but only to the persons who took away his commission.

Sol. Gen. Pray what do you apprehend was the meaning of that expression of the master of Lovat, that he would go to the lord President, and discover all?

R. Fraser. I understood, that he meant, that he would go and join his majesty's forces.

Sol. Gen. My lords, we have done with the examination of this witness for the present. We shall have occasion, by-and-bye, to call him, to prove an exhibit or two.

Lord High Steward. My lord Lovat, the gentlemen of the House of Commons have gone through their examination of this witness: would your lordship ask him any questions?

Lord Lovat. I am not able to ask him any questions.

Then the witness, by order of the Lord High Steward, withdrew; and the Lord High Steward returning back to his chair, the House was moved to adjourn to the chamber of parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the chamber of parliament?

Lords. Ay, ay.

The House was accordingly adjourned to the chamber of parliament; and the Lords, and others, returned in the same order, in which they came down: And the House being there resumed,

Ordered, That this House will proceed further in the Trial of Simon lord Lovat in Westminster-hall, to-morrow, at eleven of the clock in the forenoon: And

A Message was sent to the House of Commons, by Mr. Eld and Mr. Thurston, to acquaint them therewith.

Ordered, That the lieutenant of the Tower

of London, or his deputy, do take back the said lord Lovat, and bring him again to the bar of this House in Westminster-Hall to-morrow, at eleven of the clock in the forenoon.

SECOND DAY.

Tuesday, 10th March, 1746.

The Lords and others came from the Chamber of Parliament into Westminster-hall, in the same order as on Monday: Where the Commons, and their Managers, were in the seats prepared for them respectively, as before: And the Lords took their places in the Court; and the Lord High Steward in his chair.

L. H. S. The House is resumed. Is it your lordships' pleasure, that the Judges have leave to be covered?

Lords. Ay, ay.

Then the Serjeant at Arms made proclamation for silence; and afterwards the following proclamation:

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner, Simon lord Lovat, to the bar, pursuant to the Order of the House of Lords, to you directed.

The deputy governor of the Tower brought the prisoner to the bar, in the like manner as before. And then he kneeled down.

L. H. S. Your lordship may rise.

Then the Lord High Steward asked leave to go down to the table; which was done.

L. H. S. Gentlemen of the House of Commons, you may proceed in your evidence.

Mr. Noel. My lords, The next witness we beg leave to call in support of the charge, is John Murray of Broughton.

John Murray of Broughton came into Court.

Mr. Noel. My lords, We desire that he may be sworn.

Lord Lovat. My lords, I have objections against this witness. One or two I apprehend to be essential.

L. H. S. Make your objections.

Lord Lovat. As I cannot read myself, I desire your lordships will give leave to the clerk to read them.

Clerk reads:

My objection is, That he is attainted by an act of parliament made in the last session, p. 443; and that he did not surrender himself before the 18th of July last.

Att. Gen. My lords, I observe, that the noble lord at the bar said, that he had several objections to the examining this witness; and that one or two of them were essential; but the noble lord has not mentioned more than one. I presume, my lords, it would be proper that he should name all his objections, at once, that the Managers may have an opportunity of answering them all, and receiving your lordships' judgment upon the whole: Therefore, if he has any other objections to offer, it would

be proper he should mention them now to your lordships.

Lord Lovat. My lords, I submit it to your lordships, that that is a very odd proposition. I give your lordships an essential one now; and when that is answered, I have another. I am not to be directed by those who are my persecutors.

L. H. S. My lord Lovat, You are not to be directed by your accusers, but by the Lords who are your judges; and the course of proceeding in this, and all other courts, is, That a person who objects to any witness, should name all his objections at the same time; and it is the more material in this court, as it tends to prevent the trouble of making several unnecessary adjournments.

Lord Lovat. My lords, As this objection is very essential, I pray that it may be answered before I make another.

Lord Talbot. My lords, If this is a material objection to the witness, then there will be no occasion for any other; but if it is an immaterial one, then your lordships may go into any other; but the way proposed by the Managers may be very detrimental to the unhappy person at the bar.

L. H. S. Your lordships bear what is proposed; and the question is, Whether the noble lord at the bar shall name all his objections now, or take them up by one?

Sir William Yonge. My lords, I should hope, that in any course of proceeding, where objections of this kind are made, they should be made all together; for if they are made separate we must consequently make distinct answers to them all; which may oblige your lordships to adjourn often to the Chamber of Parliament; which will create a great and unnecessary delay of time: And, my lords, there can be no objection to his naming the whole at once, since they will all be distinctly considered by your lordships, and undoubtedly receive distinct answers. I therefore humbly insist, That he may be obliged to name all his objections at once.

Mr. Noel. My lords, What we are now upon, is no point of law at all: It is singly, Whether the noble lord at the bar, as is usual, should not name all his objections at once? When he does name them, then to such as are clear points of law, he must be heard by his counsel: But, at present, my lords, we are upon a question concerning the course of proceeding, Whether he shall name them all at once? that they may be taken into consideration at the same time.

My lords, one thing struck me in a very extraordinary manner: It was said by the noble lord at the bar, That he was not to be directed by his persecutors. My lords, We are no persecutors; we persecute no man; we are entrusted by the Commons, who carry on this prosecution against the noble lord at the bar for treason; and we prosecute for the preservation of the king's government, and the laws of the land.

Lord Lovat. My lords, I said I was not to be directed by those who accused me. Your lordships cannot expect, I can say what I have to offer in an eloquent manner. My lords, Should the saving of a little time be a reason for taking away a person's life? I hope these will not act like the parricides who took off the head of both kingdoms in a day, by their prosecution. I am a peer of this land; and I think no excuse of saving time should be allowed as a reason to destroy me.

L. H. S. My lord Lovat, The lords will use all the deliberation, and give you all the time that is requisite for your defence; but I must beg your lordship will have so much consideration as to keep your temper, and not suffer yourself to be hurried into passion; for that may greatly prejudice you in making your defence. Your lordship will find the advantage in your defence, by keeping your temper.

Lord Lovat. I give your lordship my humble thanks: And, since your lordships will not allow me counsel, I have spoke the little nonsense I had to say; but now your lordships shall hear me say nothing out of temper.

L. H. S. My lord Lovat, The question now is, Whether you shall name all your objections at once? I must acquaint your lordship, That is the rule in the courts below, That if several objections are made to a witness, they are all named at once, in order to prevent unnecessary delays.

Lord Lovat. My lords, To shew how much I desire to save time (though, according to the course of nature, my time can be but short) I am so far from desiring to give your lordships trouble, or to prolong time, that I do insist upon this objection to the witness, and rely upon it as the only material objection.

Then the Lord High Steward directed the act of the last session of parliament, for the attainder of several persons, and amongst others, of John Murray of Broughton, to be read: And the same was read accordingly by the clerk at the table.

L. H. S. Gentlemen of the House of Commons, You hear the objection made by my lord Lovat against this witness: Which is, That he stands attainted by the act of parliament just now read; and that he did not surrender himself before the 13th of July, the day prescribed by the act. And this being a question of law, he desires to be heard by his counsel to it.

Att. Gen. My lords, We have that which will appear to your lordships, to be a plain and a clear answer to it. It appears, that this is an act of parliament for attainting several persons, upon a certain condition: which is, That if those persons do not, before the 13th of July 1746, surrender themselves to one of his majesty's justices of the peace, then every one, so not surrendering himself, shall be adjudged to be, and is thereby attainted of high treason. And our answer to it is this, That the condition has been complied with by Mr. Murray. I shall readily own, that, supposing

VOL. XVIII.

the condition had not been complied with, according to law, in that case Mr. Murray, being an attainted person, could not be a witness, unless he had been pardoned. But our answer to that will be, That he hath surrendered himself; and the surrender will appear upon record: and the manner of it is this: The last term, Mr. Murray was brought by Habeas Corpus to the bar of the Court of King's-bench; and a transcript of the act of parliament being by Mittimus and Certiorari brought into that court; and Mr. Murray brought up, and personally appearing before the justices of the court of King's bench; and being asked by them, What he had to say, why he should not suffer death, according to law? upon a supposition, that he was attainted upon that act of parliament; he pleaded in general, that he was one of the persons named in the act; and that, long before the 13th of July 1746, to wit, on the 28th of June then last, he did, at Edinburgh, in due manner, according to the meaning of the act, render himself to Andrew Fletcher, lord justice clerk, and one of his majesty's justices of the peace: And he says, that the said Andrew Fletcher had then authority to admit him to make such surrender. He then states, That on the said 28th of June, in consequence of this surrender, he was committed by the lord justice clerk to prison, according to the directions of the act of parliament; and that he had ever since that surrender remained in custody, and still continues in prison, and is ready to take his trial, and submit himself to justice. My lords, he having pleaded this plea, the attorney general, by virtue of a warrant from his majesty, confessed the plea to be true: Upon which the Court of King's-bench made a record of it. He was remanded back to prison, and there remains to answer, according to law, when he shall be called to an account for this high treason. My lords, we have the record, and beg it may be read.

Lord Lovat. My lords, I object to the reading this record, because it is no evidence against me; and I beg my counsel may be heard to it. I am a stranger to the record, which is grounded only upon the confession of the attorney general, unsupported by any proof; and I desire my counsel may be now heard.

Att. Gen. My lords, as to the objection against reading this record, I apprehend there is no foundation for it. It is a record of the court of King's-bench, concerning the person to whom the noble lord at the bar has objected, as being attainted; and, upon the face of the record, it will appear, that he is not a person attainted. As to what the noble lord says, that he is no party to the record, it is true he is not; but it is a record notwithstanding. It is a record upon the point in question, to shew whether or no the person who is proposed as a witness, is attainted: and there is no other way by which he can have an opportunity, in a court of justice, to avoid that attainder, but by being brought into that court, and asked, What he has to say why execution should not be

2 R

awarded against him, upon the foundation of his being attainted by the act? The law gives him a right to make his defence against that demand of execution. He has done it, by averring a fact of a surrender, pursuant to the act; and the attorney general having confessed that fact, it appears, that the witness is not attainted; and the whole is (as it ought to be) entered on record, which is the proper evidence of his not being attainted; and therefore must be proper to be read to your lordships, to answer an objection, founded on a supposition, that he is, though the prisoner is not, nor could possibly be, a party to it.

L. H. S. My lord Lovat, You have heard what the managers say; Do you now insist upon the objection to the reading of the record? or will you reserve your objection to the witness till after the record has been read?

Lord Lovat. I desire, that it should not be read.

L. H. S. Do you desire that your counsel may be heard to that question, as a point of law?

Lord Lovat. Yes, I do.

Att. Gen. To be sure, my lords, if it is any thing, it is a point of law; but your lordships will judge whether it is a point of doubt; and therefore deserves to have counsel heard to it.

L. H. S. If my lord Lovat insists upon it, his counsel must be heard to this point.

Mr. Forrester. My lords; I am, by your lordships' order, assigned counsel to the noble lord the prisoner at the bar, to advise and assist him in matters of law. The objection that the noble lord has made to the reading this record, is, That it is grounded upon a plea of Mr. Murray, confessed by his majesty's attorney general, to which the noble lord is no party; that nobody is bound by that confession but the crown; and consequently, that it cannot be read against the noble lord at the bar. And, my lords, I apprehend, that a plea resting merely upon the confession of the king, and which, in fact, may or may not be true, ought not, in point of law or justice, to conclude any party but the crown, in whom alone resided the power of confessing it.

My lords, I am ready to acknowledge, that the law of England gives the greatest credit to proofs by matter of record; and that they are proofs of the highest nature: but, my lords, there is a great difference between records grounded upon the confession of the party, and records upon verdicts.

The reason is, That in records grounded upon confession, the party may come in, and suggest a thing that is true or false: and it would be extremely hard, in regard to third persons, who may be injured by it; I say, it would be extremely injurious, if they had no method to be let in, to falsify a plea thus confessed. But where a record is grounded upon a verdict, and judgment given thereupon, the case is very different, because there is always a full hearing before a court of justice; the facts

are proved by testimony of the witnesses; and the jury give their verdict upon such proofs: so that both the matters of fact and law, if any arise, being fully debated and determined, it is highly reasonable such proceedings should be conclusive, upon the maxim, '*Expedit reipublice ut sit finis litium*'; since, if it was not, every fact might be called in question over and over again: and so courts of justice would never come to an end of the business before them. My lords, the distinction that I make is not purely of my own imagination; your lordships will find it in the best writers on the crown law. My lord Coke, in his 3rd Inst. fol. 231, and lord chief justice Hale, in the first volume of his History of the Pleas of the Crown, fol. 361, tells us, That if a tenant in fee aliens his lands, and then is attainted of treason, by verdict upon an indictment, supposing the offence committed before the alienation, the alienee cannot falsify the attainder, upon a supposition, that there was no treason committed before the alienation; but that, had the attainder been by confession, the alienee might falsify the attainder in the very point of the treason, there being nothing conclusive done by the alienor. This, my lords, I apprehend is extremely strong to the present purpose: your lordships will be pleased to observe how far it goes; it respects the crown in point of interest, the lands actually forfeited to and vested in the crown by the attainder; which yet being grounded only on the confession of the party, cannot operate to injure a third person, but he may set it aside, and recover his lands again, notwithstanding the record by which it appears, that the alienor committed treason, and sold the lands after the treason actually committed.

My lords, I am aware of an objection that may be made: it will perhaps be said, that it was in the power of the crown to have fully established Mr. Murray's credit, by taking another method, that of granting him a pardon; which would have removed all objection. My lords, I grant it would; and had it been done, the noble lord at the bar, nor his counsel, would not have troubled your lordships with any objections. But, my lords, there is a very wide difference between the two methods: a pardon takes away, as lord Hobart expresses, both *penam et reatum*; it obliterates the crime as much as if there had been no crime at all; and when that has been once declared by the crown, it is conclusive to all people: a pardon removes all objections to the person, and to his character. But the present case is extremely different; for the substance of Murray's plea, though confessed by the attorney general, still remains a matter of doubt, and a matter of evidence. My lords, that Mr. Murray appeared in the Court of King's-bench, that he pleaded he was the person named in the act, so far is true, and so far I allow: but, my lords, notwithstanding he pleaded that he surrendered on the 28th June, and was then committed to prison, this may be false; evidence might have been produced to the contrary; and, upon that evi-

dence, it might have appeared, that he did not surrender before the 12th of July.

My lords, should that happen to be the case, in what condition would a third person be, were this proceeding to be conclusive against him? It is a maxim in law, that 'actus legis nemini facit injuriam.' The maxim holds equally strong as to the acts of the crown; and, if our books are not so explicit on the latter as the former head, their silence proceeds from the great modesty of our laws, which, as they repose the highest trust in the honour and justice of the crown, won't suppose its prerogative will ever be turned to the subjects detriment: and indeed right reason tells us, that neither the acts of the crown, or of any party whatsoever, ought to affect a third person, who was a stranger to them, and who has had no opportunity of controverting them.

My lords, I would trouble your lordships with a very short case to illustrate what I am contending for: a copyholder is attainted, and flies, and the land escheats to the lord: suppose that he is afterwards taken, and brought up into the court of King's-bench, and there pleads, that he is not the man; and that plea is confessed by the attorney-general; would this be evidence against the lord, who had acquired a property in the land by escheat? would he be concluded by that proceeding? Would the tenant, by saying, I have pleaded I am not the man, and the attorney general has confessed it, avail himself against the lord? My lords, here is to be an interest divested out of a person by a mere confession of the parties, in a proceeding to which he is a stranger, and was never admitted to litigate: and as the law by escheat would not be concluded in the case I just now put, I do not see any distinction can be made between that and the present.

The noble lord at the bar has a right to object to every person attainted; and that right cannot be taken away by any proceeding between other persons, to which he is no party.

My lords, the case is rather stronger here; because, by the same reason that Mr. Murray is enabled to be a witness, by having pleaded, that he surrendered within the time limited by the act, and that plea confessed by the attorney-general, if a person actually attainted by verdict and judgment (which is the highest kind of attainder) should, upon any occasion, be brought up to the court of King's-bench, and asked why execution should not be awarded against him, that he should deny, as happened in Okey's Case, his being the same person, and that denial be confessed by the attorney-general, this man, whom the law disables by his attainder for an offence of the highest kind, from giving testimony in any case, the Attorney General would, by his bare confession, restore to credit, and enable to give evidence in any case.

This would be investing the attorney general with a legislative power; and that, I believe, your lordships will scarcely think proper or reasonable.

Mr. Ford. My lords; I am likewise assigned of counsel for the noble lord at the bar. And the question before your lordships is, whether the record, now produced, can be received in evidence to repel the objection that arises from the late act of parliament to Mr. Murray's evidence?

By that statute, he is actually attainted, unless he surrendered before the 12th of July 1746; and, if attainted, it is admitted by the gentlemen of the House of Commons, that he is incapable of being a witness.

My lords, the great consequence of questions of this nature is obvious to every one, the justice of all judicial determinations depending entirely on the veracity of witnesses, who are to prove the facts, upon which such determinations are to be founded: and there can scarcely arise a question relating to evidence of greater importance to any man, than the present to the noble lord at the bar, whose estate, life, and honours, depend on the evidence that may be received against him; and therefore your lordships will be particularly cautious that he shall not be affected by any but legal, unexceptionable witnesses.

As to the record now offered to be read, it consists only of a plea by Mr. Murray, that he surrendered in due time; which Mr. Attorney General has thought proper to confess. And it is argued, that this plea and confession are proper evidence, that such surrender was made; and the provision of the act, so far as concerns Mr. Murray, absolutely defeated.

My lords, how far such a proceeding may bind the crown is not material in the present question; but whether it shall conclude the noble prisoner, who is an absolute stranger to it, and who never had any opportunity of contesting the truth of the fact, is of the utmost importance. The Attorney General, by his office, prosecutes and defends the causes of the crown, and, as such, may make many admissions to bind the crown; but it would be extremely inconvenient, if such admissions should conclude any body else. In some cases they are totally disregarded; and therefore, if things are confessed as errors in a record, which appear not to be errors, the Court where such record is depending, is bound to give judgment against such confession, and according to law.

So, if a matter of fact is offered to be admitted, which the Court knows to be otherwise, it seems to be their duty to reject such admission; and therefore suppose, upon the statute of Edw. 6, one outlawed for treason should be brought into the King's-bench, in order to have execution awarded upon the outlawry, and should plead what the Court knows to be false, that he surrendered himself within the year to the chief-justice, according to that statute, and the Attorney General should be disposed to confess it, ought not the Court to reject such an admission? Or must they be concluded by what is well known to be untrue? Certainly the Court would not suffer such an attempt to prevail.

In the present case, there is nothing offered to your lordships to prove Mr. Murray's surrender, but the record of what passed between him and the Attorney General in the King's-bench; and if this record is permitted to be read, though the contents of it should be absolutely untrue, yet, when once read, it will be conclusive evidence of the fact it imports, and no proof can be admitted to contradict it; and, if it is evidence to be received on this occasion, it must be evidence in all courts, and on all occasions, where a question may arise about Mr. Murray's attainder.

My lords, Mr. Murray may have estates, which by the custom of the manors where they lie, or by the grant of the crown, may belong to the lords of those manors. If his surrender was not made in proper time, all such estates are forfeited to such lords; and yet, if this record is to be admitted, it will be evidence, that cannot be contradicted by them, and must divest those rights and estates, which, by this attainder, they were lawfully entitled to.

But the mischief of permitting such a record to be read will not stop here: for purchasers likewise must be concluded by it; and therefore, though lands may have been long since sold and enjoyed, under a title arising from an attainder of the same nature with Mr. Murray's, yet, if this amicable proceeding between the attorney general and the party attainted, is to prevail, no purchaser, even at any distance of time, can be secure.

In this light, the point seems of very extensive consequence: for it is to give the king's attorney power to do more by the admission of a fact, which perhaps may not be true, than the king, by a pardon, can effect: for the king's pardon cannot restore lands forfeited to others; whereas, if the present attempt should succeed, the rights and titles of strangers may be destroyed, though never so justly founded.

My lords, whether Mr. Murray surrendered, or not, is a matter of fact capable of proof, is a fact of the utmost importance to the prisoner; and, therefore, as the rule of law is general, that nothing done or transacted between two persons shall prejudice a third, who does not concur in the act, nor has an opportunity of contradicting it, the present record, which, for any thing apparent, may be an entire fiction, ought not to be received.

And, my lords, supposing there was a possibility of proving this fact by matter of record, yet, by the constant rule of evidence, the record produced seems improper to be read; because it is not the best evidence the nature of the thing will admit of, and, for that reason, is not the proper record to prove the point in question.

That the judge or justice, to whom Mr. Murray surrendered himself, made a record of such surrender, cannot be doubted. It was his duty so to do, and must be presumed to have been done; and therefore, if this fact is proper to be proved by any record, the original made

by such magistrate, who took the surrender, ought to be produced.

My lords, it may be said, this record in question imports an admission by the proper officer of the crown, of a fact which he must be supposed to have inquired into, and has therefore admitted, because he finds it to be true.

My lords, this answer might have been given, if Mr. Attorney had, at this bar, offered originally to confess the same thing.—And suppose the record, now attempted to be read, had never existed; and, upon an objection to Mr. Murray's testimony, the Attorney General had said, Here, I have the king's warrant to confess, that he surrendered before the 12th of July;—would your lordships have received such an admission?—Would you conclude yourselves by the confession of a fact, without knowing whether it was so or not?—Would the Court have suffered the force of an act of parliament to have been defeated by such an acknowledgment?—Or, would not clear and positive proof have been required of an actual surrender?

My lords, if it could, upon what reason can such a confession in the King's-bench, in an inferior court, in the absence of the prisoner, who may be prejudiced by it, be received in evidence against him?—If it is true that Mr. Murray surrendered in proper time, it may be easily proved; if it is not, the present method, by which it is attempted to be proved, is a certain one to draw the Court into an error about it.—Your lordships must perceive the danger of allowing such a proceeding; how mischievous it may be to the prisoner, to lords of manors, to purchasers, to all strangers, who never can have an opportunity of disputing the truth of it:—And therefore, whatever effect it may have between the crown and Mr. Murray, it is humbly submitted, that it ought not to be read against the lord at the bar.

Mr. Hamilton Gordon. My lords; I have likewise the honour to attend your lordships, as one of the counsel for the noble lord at the bar, whose province it is to lay before your lordships, and enforce, with all humble submission, what may occur to them in his favour in point of law: but the two learned gentlemen, who have gone before me, have spoken so fully, and discharged their duty so well, that I should trespass upon your lordships' time, and also do them injustice, if I consumed much of it. Besides, my lords, I am too diffident of my own abilities to speak long upon a question, which is involved in the particular laws of this country; and therefore I shall, with your lordships' indulgence, confine my endeavours to serve my client, to a few general observations, which, I humbly think, must naturally occur to every man upon that point, which the noble lord at the bar has taken the liberty to propose to your lordships by way of objection.

The noble prisoner at the bar has objected, that Mr. Murray is not a competent witness against him; or, in other words, that, according

to the rules of law, his evidence ought not to be received. And, to maintain that position, he has laid down another, namely, that the record of the Court of King's-bench, which proceeds singly upon the bare admission of his majesty's attorney general, unsupported by any proof, ought not to be read as evidence of Mr. Murray's surrender, so as to qualify him to give evidence upon this trial.

As to the first, I humbly apprehend it to be wholly unnecessary to use any arguments to prove, that, if those proceedings in the King's-bench did not stand in the way of the noble lord at the bar, Mr. Murray must, of course, have been rejected as an incompetent witness.

It remains therefore only to be considered, whether such proceedings, transacted only between the crown and Mr. Murray, can affect the interest of a third person.

My lords, the consequences of this question are of the greatest importance to the subjects in general; and although the noble lord is more immediately concerned in it, yet if it should be determined, that this is proper evidence to affect him, the like evidence must be received against every other subject of Great Britain; for the law cannot distinguish between him and others: and I beg leave, my lords, to say, that it appears from the authorities, which have been cited by the other gentlemen, and which have always been considered as of the greatest weight in this country, that the admission of the attorney general, or any other, cannot affect a third person; and I take it, my lords, to be a general established rule, that the interest of one cannot be affected by the admission of another.

My lords, I apprehend, that my lord Coke's sense of this matter is so extremely clear and obvious, that it requires no explanation; and so is the opinion of another great lawyer, my lord chief justice Hale.

My lords, the law gives an opportunity to falsify the verdict of twelve men, where a third party, from the want of it, may be injured only in a pecuniary matter; how much more reasonable is it therefore, that this kind of agreement should be set aside, and held of no consequence, in a case where the life, fortune, and honour, of a noble lord is concerned?

My lords, I would humbly ask, what kind of acquittal was this? Not an acquittal by verdict, the legal acquittal in this kingdom; but by a bare consent; a consent that surely has not force enough to repeal an act of parliament.

My lords, the only way the act of parliament left for Mr. Murray to avoid the consequences of an attainder, was the performance of a condition; that is, surrendering himself within a time limited.

Now, I would suppose that this act had been a deed granting an estate on a certain condition, must not that condition have been performed truly and effectually? Certainly, it must, by the rule laid down by lord Coke. Shall not acts of parliament, therefore, be as

strictly complied with as common deeds and conveyances? Surely the gentlemen of the House of Commons will hardly deny it. Consequently the attorney general could not, by any consent of his, make this record in the King's-bench tantamount to an actual surrender.

Suppose, my lords, the act had attainted Mr. Murray of felony instead of treason, could this admission of Mr. Attorney General have deprived the lord of the lands which would have escheated to him? No, my lords, it could not, if any regard is to be paid to the rule laid down in 5 Coke 96, that the estates of third persons shall not be divested by colourable or covinous payments, but by such as are true and effectual. And what are payments but performances of conditions? And the same law that guides one, will the other.

The fact is not as the record states it; the attorney general's consent, which is the fiat for this record, was a consent after the impeachment of the noble lord. I wish it rather had preceded it.

My lords, if Mr. Murray had held by copyhold from the noble lord at the bar, and had been attainted, the noble lord would have been intitled to the escheat or forfeiture of those lands; and no admission of the attorney general's could defeat him of it, any more than it could in the case of a forfeiture of lands in a county palatine, where the grantee of the crown became intitled to the benefit of it. Shall therefore, my lords, such admission be permitted to affect the life, honours, and fortune of the noble lord at the bar? or, indeed, of any other in his unhappy situation? No, surely; for it is against the common known principles of law, and of reason too, that a man shall be attainted as to some circumstances, and free from attainder as to others; that he shall be incapable to hold his lands or chattels, and yet be restored in credit, so as to affect the life of an innocent man; for such, till conviction, every one is, by law, presumed to be: I say, my lords, this is a construction so unprecedented and new, that, we hope, it will never receive the sanction of your lordships.

My lords, I hope your lordships will never countenance the admission of such an evidence, an evidence who is so strongly agitated by the hope of pardon, and fear of punishment, that, to procure the one, and avoid the other, he may give up all sense of honour, humanity, and justice.

My lords, as the learned gentlemen, who spoke before me on the same side, have made it unnecessary for me to add any thing more. I shall not give your lordships any further trouble at present; and I beg your lordships' pardon for that which I have already given you. But, if any reply should be necessary to what shall be offered by the gentlemen of the House of Commons, I hope we shall have your lordships' indulgence.

Lord High Steward. Gentlemen of the House of Commons, you may proceed.

Attorney General. My lords; The managers do not dispute the prisoner's right to any good objection against the competency of the witness, or insist, that it is not equally proper before your lordships on this impeachment, as it would be on a trial in the ordinary courts of justice. But they dispute the validity of the objection, upon its own proper legal foundation.

As the objection is to the reading this record, the mere stating of the question will be an answer to it, and obviate or refute every argument used in support of it.

The original objection was against Mr. Murray's being examined as a witness, upon the supposition of his standing attainted of high treason by the late act, in not surrendering within the time prescribed. The managers allowed the consequence, if the allegation of his attainder were true, as that would render him infamous, not as it would prove him guilty of treason; for the guilt alone, without the attainder, would not render him incompetent, it being a clear established point, that even a *particeps criminis* may be a witness, to prove the guilt of those who joined with him in the same crime: and your lordships, in the late trial of the lord Balmerino, admitted that sort of evidence. But the managers answered the objection, by denying the attainder; and produced this record, to shew the surrender pursuant to the act, which attaints him only on condition of his not surrendering within the time limited. This record is of a proceeding commenced on the part of the crown, on the foot of this very act, in the proper court of justice, against the witness, and defended, on the part of the witness, by this surrender; and that defence and surrender confessed by the attorney general, by warrant from the crown; and this allowed by the Court, who, instead of awarding execution against him, remanded him to prison, where he now remains forthcoming to justice, according to the act.

Now, to say that such a record, relating to the precise point in question, cannot be read to disprove the supposed attainder, and support the competency of the witness, would be to deny one of the first principles of evidence; and therefore the counsel, aware of the absurdity, have not ventured in terms to assert a proposition so contrary to the known law of the land, as that such a record is not proper to be read; but seem rather, in the way of argument, to deny the consequence of it when read, and have insisted on reasons that tend to shew that it is not conclusive evidence; and therefore, that the fact of the surrender may be still controverted by evidence on the side of the prisoner, rather than that it is no evidence at all.

Though this is more properly a subsequent question, and a very different one in its nature, yet, in the present case, it is really, and in effect, the same, and the necessary consequence of the other: for to insist, that this record is not conclusive proof of Mr. Murray's not being attainted by that act, must proceed on this supposition, that he may still be held attainted

under the act, notwithstanding this record. But, I presume, your lordships will upon no terms be induced to admit of that suggestion, when it is considered, that the certain effect of it must be, that he may be called up again for execution, and put a second time on the defence of his life against the same charge.

But to consider the grounds, on which the objection has been attempted to be supported,

There are two general reasons insisted on; one, that the surrender insisted on in behalf of the witness, when he was brought before the Court of King's-bench, was neither proved to the Court, nor found by a jury; but only confessed by the attorney general: the other, that the noble lord was himself no party to the record; and therefore not to be affected by it.

As to the first, in order to support that reason, a distinction is attempted to be set up between the case of a fact, on which a judgment is grounded, appearing by a verdict on evidence, and where it appears only by the confession of the party; and it is said, that in the former case it may, but in the latter, cannot be conclusive to any other persons but those who were parties.

And, for this purpose, the authorities of my lord chief justice Coke and lord Hale, and others, are cited, to shew the difference, in point of consequence to third persons, between an attainder by verdict, or by confession; that, in the one case, the crime may be disputed by a purchaser under the attainted person; but, in the other, it cannot, though the time of the commission of it may.

It will be unnecessary for me to enter minutely into the nice disquisition, how far, and for what purposes, the crime appearing on an attainder, may be controverted by strangers, whose interest is affected by it; because I am satisfied your lordships will see, that the distinctions on that head are totally foreign to the present question; and one single observation would be sufficient to make that manifest; that is, that none of the cases cited, or that can be cited, prove, that any stranger can controvert the attainder itself, whether founded on a verdict or confession, or by default; and it is the attainder, and not the crime, that is the only material thing on the present objection.

All that will be necessary, therefore, upon this point, will be to shew, that the confession, in this case, binds the crown; and that, if it does, there is no attainder. The inference will then follow of course, that the record may be read, to prove Murray not attainted, as the precise point to be proved in answer to the objection to his competency.

The authority of the attorney general to confess the truth of the plea of surrender, has not been directly denied by the counsel; but as they have seemingly, in consequence, done it, and the clear establishment of that right, in this case, will, by certain inference, establish the right to read this record, I shall state a little to your lordships, how that authority stands,

upon the nature and reason of the thing, and the known constant practice.

The law and constitution has intrusted the crown, as the executive power, with the prosecution of crimes; and though oftentimes such prosecutions are carried on by private persons, even those are, for the most part, in the name of the crown.

But those, as well as civil suits, may be commenced sometimes without a just foundation, and the party sued may have a just defence to the one as well as the other. Where that appears, it is equally just, in both cases, to put a stop to them; and as a subject plaintiff may confess the defendant's plea; so may the crown, by the attorney general, its proper officer, confess the prisoner's defence; and such confession, in both cases, is, and ought to be, both in law and natural justice, a security against future action or prosecution for the same cause. Nor is there any reason that can be given for the power in the case of a subject, but what will hold equally strong, and stronger, in the case of the crown, as there could not be a greater grievance to the subjects in general, than to have it established as a rule, that, when once a criminal prosecution is commenced, the defendant, how innocent soever, or how willing soever to make satisfaction, must be put to the vexation of a trial, or the charge of a pardon, which might, in many cases, be his ruin. And how strange would it appear to say, that the king might not do the same justice to innocence, that every honest man would do? or that he might not, for such wise and gracious reasons as would induce him to grant a pardon after sentence, stop the proceedings in the ordinary course of law, before they come to sentence?

To avoid these absurdities, the law intrusts the proper officer, the attorney general, with the power of confessing a defendant's plea, where it appears to be true, in charges of a lesser nature, and, in the higher, by the immediate warrant of the crown; and such confession has the effect it ought to have of an absolute discharge; and, I should imagine, nobody, who thinks of it for a moment, would, for the sake of the subject, wish it otherwise.

And, my lords, this has been the constant practice, not only in criminal prosecutions, properly so called, but in all crown causes even for civil rights: and whoever has had the honour of serving the crown in the office of attorney general must have eased the subject on that head, when, on applications by the parties sued, and attendances by the officers of that branch of the revenue which is in question, the plea has appeared to be a just one, and both the crown and the subject find their account in this method of proceeding, in the expence and delay that are saved by it; and such confession, being recorded, has, to all intents, the same effect, as if, on issue joined, a jury had found the fact to be what the attorney general confessed.

The practice is the same in criminal cases,

where the attorney general confesses the plea, whether it be to the merits of the charge, or only in order to let the defendant into an opportunity of trying those merits.

There is one sort of case frequently happens, very parallel to the present, where a person is outlawed for treason or felony, which amounts in law to an attainder for the crime, and equally affects the party, both as to his life and estate, as on a verdict. The party having no way of coming at the trial, but by reversing the outlawry by writ of error, which cannot be allowed without his majesty's consent, it is a frequent practice to apply for that indulgence; and it is very easily granted, provided there has been no great delay. If the party assigns an error in fact, as he may, the attorney general confesses it, if true; and the outlawry is reversed, and the attainder avoided by it. And no one ever doubted but the record of that reversal is conclusive proof of his not being attainted.

Nay, the crown has sometimes directed the attorney general to confess errors in fact, as the party's being beyond sea at the time of the outlawry, which have not been true; only that he may have an opportunity of taking his trial, and not suffer for a default in not appearing only. And no lawyer ever said, that such a confession was not as effectual to avoid the outlawry, as the verdict of a jury impanelled to try it.

And if, in the present case, the truth was, that Mr. Murray did not actually surrender, but was apprehended before the day; and that should be thought, in strictness, not a compliance with the act; and the attorney general was now prosecuting for the crown only; I believe he would be under no difficulty of owning the truth, or apprehensive, that your lordships would say, that the confession was either illegal or unequitable: or that, when the end of the act was answered, by Mr. Murray's being ready to take his trial, it was not agreeable to his majesty's royal justice and clemency, to remove the only impediment to his having it.

Nor can the exercise of this power be objected to from any reasons but what would equally affect the exercise of that great and excellent prerogative of pardoning.

What I have now said will fully shew, that the cases cited are not applicable to the present: They are the cases of innocent purchasers, whose estates were to be lost by the subsequent attainder, and supposed guilt of the vendors.

It would be unjust in itself, not to give them an opportunity of defending their property, by controverting the fact on which it depended. The law, in conformity to natural justice, gives them, in some cases, liberty of disputing the crime in itself, where the conviction is by confession; and the time of the commission, where it is by verdict: But, in those cases, the question was a matter of property between the crown and an innocent subject, and depended on the crime being committed before or after the purchase, and not merely on the attainder,

which would stand good, let that question be determined either way; but, in the present case, the question is on the incompetency of a witness, which depends solely on his attainder, and not on the reality, or time, of his crime. Therefore, to make a parallel case, it must be said, that if the attorney general had confessed a plea of not guilty to an indictment of treason, and the prisoner, being thereupon acquitted, should be brought as a witness either in a criminal or civil suit, his competency might be objected to, and the objection supported by proof of his actual guilt: But this cannot be pretended; the contrary is so clear, that if he had never been indicted or acquitted, the clearest proof of his crime could not be admitted for this purpose; and no evidence can, in any case, establish such an objection, but a record of an attainer.

The only colour of distinction between the case put, and the present, is, that the attainer here appears *prima facie*, and must be avoided by a surrender to be proved. This is true; and therefore puts the proof on us, to remove the objection; and it is for that reason this record is offered as the proper proof: And, as in the case where the proof lies on the side of the objection, the record of the attainer is the proper evidence; so in this, where it lies on the side of the witness, the record of his surrender is the direct proof that he is not attainted.

My lords, I come now to the second reason given for the objection, That the prisoner is no party to this record; and I shall have occasion to say very little upon this, because it is, in effect, answered by the first reason insisted on by the counsel themselves; which supposes, if the surrender had been found by verdict, the record would be proper evidence; and yet the prisoner would then have been equally no party. This, therefore, destroys the rule and supposition on which this reason is founded, which is, that no record can be read against a man to which he was no party; and, indeed, there is not, nor can be, any such rule; it is most notoriously otherwise in the very instance in question, of the incompetency of a witness, on account of his attainder, which never can be proved by any thing but the record; and yet the party to be prejudiced by it neither is, nor can be, a party to it.

The noble lord is controverting no property on the foundation of Mr. Murray's supposed attainer; he neither claims nor defends any right that is demanded on the foundation of his discharge; the record has no more relation to him than to all the world; and if the witness is disabled as to him, he is so with respect to all mankind, and in all causes civil or criminal, and must be put on the trial of his surrender, as often as he shall be called upon during his life, to give his testimony in any court, and in any suit. What absurdities this would be attended with, I need not mention; your lordships will be beforehand with me, in suggesting them to your own thoughts.

Sir John Strange. My lords, The question arising upon the objection made by the noble lord at the bar, is not what the consequence of this record will be, when it is read, but singly, Whether we shall be now admitted to read it, or no? My lords, the objection made by the noble lord at the bar against this witness, was founded upon this record. My lords, it was called for, and read; which was the act of parliament made in the last sessions for the attainer of several persons; and, my lords, upon that sort of attainer no writ of error could lie; and therefore, my lords, there was no other way to take off the force of that attainer, that was warrantable, than the method taken in the present case. And, my lords, I must submit it to your lordships, whether we are not entitled to read what we now call for, not as a distinct record, but as part of the whole record relating to the person now at your lordships' bar; for the record must come before your lordships in all its parts: Nobody can call for a particular part of a record to be read, but the whole must be laid before your lordships; and therefore, my lords, I beg leave to contend, that this is part of the record of the proceedings against the person whom we now call upon as a witness, which the noble lord at the bar himself called for. My lords, what the consequence of it will be afterwards, is a question of another nature; but I must submit it to your lordships, that as part of the record of the proceedings against Mr. Murray, we are certainly entitled to have it read.

My lords, one objection taken by the gentlemen on the other side, is, that it is not the record of the proper jurisdiction, but that it ought to be a record made by the person to whom Mr. Murray surrendered himself: But, my lords, I must beg leave to submit it to your lordships by way of answer, that it is the record of a proper jurisdiction, in a case of this nature. My lords, the Court of King's-bench, as a court of criminal jurisdiction, may have offenders of all sorts brought before them. My lords, in the present case a Certiorari issues out of Chancery, and by Mittimus the record is removed into the King's-bench: And I will call upon the counsel for the impeached lord, if they will venture to say, that a Certiorari will not lie for that purpose. My lords, if it will lie, it must be for some end or purpose that a Certiorari was brought, and the record transmitted thither; that was the proper jurisdiction, and that court then had a right to call upon the party brought up before them by Habeas Corpus, to know what he had to say, why execution should not be awarded, upon the footing of the attainer by this act of parliament? My lords, the question was put by that Court to the person who was then a prisoner before them: He pleaded a surrender within the time; and insisted, that there he was amenable to justice: He alleges that as a proper answer to that Court, upon the question asked him; and whether it was, or was not a

Proper answer, depended upon the fact. The Court could have no doubt, but if the party surrendered himself in time, and was amenable to justice, but that was an answer to their demanding to know of him, why execution should not be awarded against him? And, my lords, if that fact had not been verified in a legal way, there must have been execution awarded; but if legal satisfaction was given by the then prisoner, it was the duty of that Court to record that as a matter of fact, which was properly verified before them. And, my lords, there are two ways of verifying matters of fact; one is by the actual proof of the fact (if the other party denies it,) or by confession; and if the party knows that he cannot in conscience deny it, then he ought to confess it, and not put the other to the expence and trouble of proving that which he knows to be true: If you know that to be fact, that the party surrendered himself to justice, and was forthcoming, will any body say, that it is not right and just to admit that fact as alleged? Therefore, my lords, the question of fact in this case has been properly determined by that court; the consequence of which is, that that court ought to make a record of it; and that is to be considered, not as a distinct, separate record of itself, but as the proceeding upon this record of this act of parliament, which had thus been removed there by *Certiorari*; and it is, to all intents and purposes of law, to be considered as a record of the proceedings; and they are to be considered as having the former proceedings before them, upon the same record; and all courts are bound to admit that record, which was thus made in a court of legal proceeding: and therefore, my lords, if that court was the proper jurisdiction, can any body say, that the record of what was there transacted is not as proper evidence as what the noble lord at the bar has called for, and which has been read to your lordships, which is the Act of Attainder of the last sessions of parliament? My lords, the gentlemen on the other side say, that this is an erroneous method: Say they, you have not gone to the proper person; here is a particular jurisdiction to record a surrender, and you should have gone to the justice of peace to whom the surrender was made. My lords, I have looked upon the act of parliament, to see what the legislature had thought proper to prescribe, as the duty of the justice of peace to whom the surrender is directed to be made.

My lords, all that is required of him by this act of parliament is, he is, upon the surrender, to commit the person so surrendering to prison, for the high-treason, there to remain till he is discharged by due course of law; and he is immediately to give notice of it to the secretary of state. Your lordships will then be pleased to consider, what it is that the gentlemen insist upon: My lords, will any body say, that what is mentioned in this act of parliament, in regard to the justice of peace, will take away the jurisdiction from a supreme court of original jurisdiction, in cases of that kind; and that

VOL. XVIII.

without a word being mentioned in the act concerning it?

My lords, they say that the jurisdiction of recording the surrender is given to the justice of peace, though the act of parliament does not say a word of his doing any thing of this nature: And, my lords, if the act of parliament had made him the proper person, whose duty it was to record the surrender, to what purpose is he to send an account of it to the secretary of state? Was he to make up the record? No; all the justice of peace was to do, was to give notice of the transaction before him, to those persons who are appointed to do what shall be done upon such a surrender. My lords, there is something that was said by the counsel for the noble lord at the bar, which I will only just take notice of: They were pleased to put this case: Say they, suppose this record is now to stand, it is a matter transacted, to which the noble lord at the bar is no party, and consequently ought not to be read against him. My lords, I will venture to say, there is no such general rule: Nobody will contend (because there are numberless instances of it), that records are not constantly permitted to be read as evidence against persons who are no parties to them. My lords, suppose a man is charged with having harboured a person attainted of treason or felony; and, when he comes to be tried, say they, gentlemen, you shall not read the record of that person's attainder, because the man now charged is no party to it: Do not charge me with receiving or harbouring a man attainted by that record; for though the record may be read as against him, yet it cannot be read against the person charged, who was no party to it. My lords, would any court of justice make the least difficulty in admitting such a record to be read? My lords, the reason of the thing itself speaks it; for till the record is read, it does not appear there is any person attainted; and consequently no charge against the prisoner. And, my lords, to make it a civil case, suppose a lord of a manor claims by escheat the estate of a person attainted, and another lord claims the same estate, cannot the record of the person's attainder be read as evidence in that case, though neither of them are parties to it? My lords, there can be no doubt but it may; and therefore, my lords, that objection has no force upon the present question. My lords, the objection now made is to the reading of a record, or part of a record, which the noble lord at the bar himself called for; and I must submit it to your lordships, that we are entitled to have it now read: What the consequence of reading of it will be, is not now to be considered; for we argue singly upon the question, whether it shall be now read, or no?

Solicitor General. My lords; whether the record which has been opened may be read at all; and what shall be the effect of it, after it is read (I mean, whether it may be falsified), are two separate and distinct considerations.

Your lordships were pleased to ask the noble lord at the bar, and his counsel, whether they would rest their objection to the reading of it? or suffer it to be read, and then object to the consequence of it?

They chose to object to the reading; and the counsel were allowed to speak to that point only: And yet there is not an authority they have quoted, which don't prove, that at least it must be read.

The competency of all evidence, in a great measure, depends upon the nature of the question to which it is applied: for that is evidence in one case, and to one purpose, which is not so in another kind of case, or to another sort of purpose.

The merits of this objection, therefore, will depend upon thoroughly understanding the purpose for which this record is produced.

The incapacity of a person attainted to give testimony, does not arise from his life being thereby in the power of the king; or any presumption, that, through the fear of death, he may be induced to exceed the bounds of truth; but it is one of those many incapacities which are the consequences of his attainder.

He is cut off from the community; his blood is corrupted; he loses his credit; and therefore can be a witness in no case, neither for nor against a prosecution, nor in any civil suit between subject and subject.

All proceedings upon which a man can be attainted, at the common law, are between the king and the party only: But such proceedings are evidence, and the only evidence to prove the attainder between all persons, and upon all occasions; which shews the mistake the gentlemen proceed upon, when they object, that my lord Lovat was no party to this record; and therefore it shall not be read against him.

The party who objects to a witness, because he is attainted, undertakes to shew, that, according to the course of the public law and justice of the nation, he is so; and therefore may read any proceedings in the course of that public law, to prove it.

So likewise, in answer to the objection, and to shew the person not attainted, any of the like proceedings may be read.

If a conviction and judgment is read, it may be answered by reading the reversal of that judgment upon a Writ of Error; and yet the king must be the only party to both these proceedings.

The like case to the present, at common law, is that of an outlawry.

If an outlawry is produced, to prove a man attainted, the reversal of that outlawry may be given in evidence, as a full answer to that proof: and yet most of those reversals in high-treason, are grounded upon the attorney general's confessing an error in fact, by the king's command; and this generally is a merciful confession, contrary to the truth of the case. Several noble families now enjoy their honours, and their estates, by virtue of such reversals.

I will not mention instances; as your lord-

ships have the assistance of the judges, I am persuaded they will inform your lordships, that there are many. Would an objection be endured to the reading such a reversal?

The present case is that of a parliamentary outlawry, if I may so call it: persons fled from justice are attainted in a more expeditious and summary way than could be done by the course of the common law, unless they come in, and take their trials within a limited time.

The only court in this part of the kingdom, which can award execution against a person, as attainted within this act, is the court of King's-bench: there can be no party to such proceedings but the king, who is intrusted with the whole execution of the public law of the nation. A proceeding, therefore, in that court, which shews a man never to have been attainted within the act, is evidence to answer an objection, which says, he is. It proves conclusively, that, in the eye and consideration of the public law, he is not an attainted man; he may inherit, he may purchase; he can't be put to death. By this proceeding the king is bound for ever; all magistrates are bound; no judicature can now consider the witness in any other light than he ought to be considered in, if the act had never been made. Is it possible then to doubt, whether (in answer to an objection, that by the law of the land this witness is now looked upon as an attainted man) a record should be read, which proves, that by the law of the land he is not looked upon as an attainted man? He is either a person liable to all the consequences of an attainder, or none.

Mr. Noel. My lords; I shall be very short in offering my sentiments to your lordships upon the present question, because three learned and able gentlemen have already spoken very fully to it.

My lords, the question arises upon an objection taken by the noble lord at the bar, against the competency of Mr. Murray's testimony, as he stands attainted by the act of the last sessions of parliament, which has been read to your lordships: but after that, another objection arose, in consequence of what we, on the part of the prosecution, offered, which was a record we proposed to be read: to the reading of which the noble lord objected, and has relied upon that objection, that it cannot be read at all.

My lords, I was surprised at that objection; and the counsel for the noble lord have been so sensible, that there was no great weight in it, that they have prematurely, in the course of their arguments, run into a debate concerning the force and effect of it when read, and not to the actual reading of it; and, my lords, it was a very strange proposition to be insisted on before your lordships, that in a question relating to Mr. Murray, and him alone, when an objection is made to his testimony, that he stands attainted by an act of parliament, that your lordships should shut your eyes, and not receive evidence of the proceedings of a Court,

having proper jurisdiction to determine any question which might arise upon that act of parliament: I say, my lords, that would be a most extraordinary thing indeed, when the objection relates to Mr. Murray, upon the attainder by act of parliament; and yet, they say, your lordships shall not see the record of the proceedings of a court of justice, founded upon that act of parliament. But, my lords, as the gentlemen have, under a notion of considering this objection in some degree, considered the force of the record itself, if it had been read, though they have done it improperly, yet I doubt it will be expected, that we should take notice of the foundation of that argument.

The question, therefore, seems to be, whether Mr. Murray is to be considered under the act, and the proceedings in the court of King's-bench upon it, as an attainted person, or not.

My lords, the act of parliament does not finally conclude any person: it names several persons, whom the act declares shall be attainted by the force of that law, unless they comply with the terms expressed in it; and the proper court of law must judge, when the person comes before them, whether he was a person within the meaning of the act of parliament, or not. Therefore, my lords, when he was before a court, who had proper jurisdiction upon that question, whether he was an attainted person, or not, and they have determined that question, that he was not, then there is an end of that question. But it has been said, that this may affect, in consequence, the property of a third person; and that the noble lord at the bar ought not to be affected by the proceedings in the King's-bench. But I apprehend this question relates personally to Mr. Murray, and to no other. It is merely a question as to his capacity or incapacity; that is, whether he be attainted or no; and therefore, my lords, that distinguishes this case from the cases of private property, alluded to by the counsel for the noble lord in the course of their argument.

My lords, I beg leave to state this matter in a stronger light: if your lordships shall say, that Mr. Murray is an attainted person, you must likewise say, that he is liable to have execution awarded against him upon this act; for, when that is the question, it must be considered intire, with all its consequences.

My lords, if no execution can be awarded against him, your lordships cannot say that he is an attainted person: therefore your lordships see what difficulties will ensue, if you should determine, that he stands attainted, with respect to the noble lord at the bar, but not to the consequences that the law draws from his being an attainted person. My lords, it would be the strangest case in the world, if that should be your lordships' sentiments, that he is not attainted in one respect, and yet that he is attainted in another respect.

My lords, the counsel for the noble lord object, that the proceeding which has been had,

has been by the confession of the attorney general, though they admit it was in the power of the crown to make such confession. I must submit it to your lordships, that though it is by the confession of the attorney general, as it is by proper authority, and in a legal court, having proper jurisdiction, that it is as effectual and binding upon the crown as any act they can possibly do: and can your lordships say, that Mr. Murray shall not have the benefit of a legal proceeding of a court of justice, having complete and lawful jurisdiction, and who have determined the case?

My lords, it is said, that there is some difference where it is upon the confession of the attorney general, and where it is founded upon a verdict. My lords, your lordships will consider what are the circumstances of the case in regard to that matter: a gentleman is brought before a court of justice, to answer why execution should not be awarded against him upon a supposed attainder. He pleads a fact that is sufficient, if true, to exempt him from that attainder: can the gentleman say, that he must not avail himself of it, because the attorney general will not put him to the expence to prove it? My lords, it is said, that if he had denied the plea, the consequence to Mr. Murray must have been, that he would not have appeared to have been a person exempted from the act? No: but, say they, because the attorney general and the crown are satisfied with the truth of the plea, and will not put him upon proving it, therefore he is not to have the benefit of the judgment of the Court upon that question. I must submit it to your lordships, that every man, under those circumstances, would be in a most fatal situation, and that it would be attended with very bad consequences. A man is asked, what he has to say why execution should not be awarded against him; and pleads a fact that actually will clear him from the attainder: the attorney general confesses the plea, does not join issue, and will not give him an opportunity of proving it; and, my lords, what is to be the consequence? Why, according to this doctrine, he must inevitably be condemned as a person attainted; whereas, if he had been put to the proof of it, it might have been determined, that he was not attainted. I apprehend your lordships will not suffer them to draw that inference, that, because the attorney general has not put him to the proof of his plea, he is to be considered as a person attainted, contrary to the judgment of the Court.

Sir Richard Lloyd. My lords; The question has been so fully spoken to already, that I shall not have occasion to take up much of your lordships' time: but I cannot forbear expressing my surprize at the objection now made, viz. "That this record cannot be read against the noble lord at the bar:" the reason given for which is, that he is no party to it. Many answers have been given; and I will not repeat them: but shall offer a consideration or two to your lordships, in order to shew that the

force and effect of Mr. Murray's attainder has been, by this transaction on record, totally taken off.

My lords, the whole argument on the prisoner's side is in this compass; viz. they say, that Mr. Murray (the person produced by us as a witness,) is still attainted; and therefore, by the rules of law, cannot be a witness: and it is certainly true, that if he stands now attainted, he cannot, by our law, be admitted to give testimony. Let us come then to that question, does he, or does he not, at this hour, stand attainted by virtue of the late statute?

It cannot be doubted, but that a parliamentary attainder of this sort may be dissolved by some method or other; and the very statute directs one way; viz. by surrender before a particular day; and the only way to ascertain that fact is a judgment on record, that he did surrender.

I would ask the counsel for the noble prisoner, whether Mr. Murray can by law be called to judgment for that high-treason for which he was by the late act attainted? They must own, that this record of surrender would be an absolute defence on such an occasion; nay, it would be an absolute bar to such a demand of judgment. If this defence would not be his security, the consequence is, that there would be no method at all of getting rid of such an attainder.

It has been objected, that though this may be a good discharge betwixt the crown and Mr. Murray, yet it ought not to affect others, who are not parties to that proceeding. My lords, it is true, others may be affected by Mr. Murray's being restored to his credit. But that is no objection; for though by virtue of this record he is so restored, yet that is only a consequence, which necessarily follows from the facts ascertained by that record.—The proceeding on the record was a legal transaction between the crown and Mr. Murray, and no other persons whatsoever had a right to be a party to it.—The king, at the time of Mr. Murray's pleading on the record, was the only person to call him to account for his guilt: the only controversy at that time was betwixt the crown and the party called down to judgment: the matter therefore being a legal transaction, a law controversy betwixt the only proper parties, its necessary consequences must follow, let who may be affected.

But it is said, "That if it had been found by verdict, that Mr. Murray had surrendered in due time, then the record might have been read in evidence against all persons; but that, as it is founded on Mr. Attorney General's confession of the surrender, it ought not."—This is a strange distinction. I would ask the gentlemen who make it, whether this record by confession is not a full and complete record? Has not his majesty's attorney a right to confess it? No lawyer will say, that he has not such a right by the laws of our land.

My lords, let me argue this matter, not on the principles of law only, but on those of reason abstracted from the law: and thence see,

whether Mr. Murray is not as much discharged from his attainder, or his attainder as much avoided, by this confession of the king by his attorney, as he would be by verdict.

Is the king the only person in the kingdom, who shall be compelled to say a thing is not true, which he knows to be true? Or, is his majesty the only person who shall be hindered from owning that to be true upon record, which he and all the world knows is true?

It is a point of legal controversy betwixt the crown and one of his subjects; and supposing it to have been a fact notorious, that Mr. Murray (the defendant in that controversy) had come in and surrendered in due time according to the late act, would it not be absurd to say, that the crown's attorney should be bound by law to say, that he did not surrender? i. e. shall be bound to deny and put to trial a fact, which he knows is indisputably true, and needs no trial? Yet this, my lords, must be the doctrine to be maintained by the counsel for the noble prisoner; or else they must agree, that this record of the fact of surrender, by confession of the attorney general, is of equal weight with any other record whatsoever.

My lords, his majesty has a right to the life of every person attainted; and would it not be a cruel law, that should prevent him from admitting any facts to be true, which such person insists on for the saving his life, when the same, within his own knowledge, strictly are so?

There is no doubt but that a transaction of this kind betwixt subject and subject is good, where each party to a controversy (plaintiffs and defendants) admit such facts on the record, which they know the certainty of, and never, unless out of a spirit of perverseness, put them in issue.—Where is the difference, since the crown and Mr. Murray are, as to that matter then in controversy, the only persons who could be parties? The capacity to be a witness is only a consequence naturally flowing from the avoidance of the attainder. Mr. Murray is not restored to his credit by act of favour, but a necessary consequence of law, and such as the crown could not prevent; for as the attainder was the only cause of his loss of capacity to be a witness; when the force of that is taken off, that capacity is of course restored, not out of favour, but of strict right, and by necessary consequence.

My lords, I would ask one question; viz. Whether the counsel for the noble lord at the bar will say, that Mr. Murray has this present day any attainder against him? Or whether he can ever be called again to answer on the foot of that parliamentary attainder, in which he was included?

If he cannot, as most certainly he cannot, then there is nothing now existing which takes away his testimony; and as the present record is of a controversy betwixt the only proper parties to it, and is produced only to manifest a fact then depending, and then by the rules of law ascertained, it ought to be read.

L. H. S. Gentlemen of the House of Commons, I suppose you have no objection to the counsel's replying.

Sir John Strange. No, my lords; provided we have the last word; which is our right.

Mr. Forrester. My lords; I shall take up the less of your lordships' time at present, because I admit most of the propositions laid down by the learned managers; though I conceive that none of them have answered the objection we made to the reading of this record, which was the possibility of damage that might ensue to the noble lord at the bar. My lords, the reason is plain why we object to it, because the credit of the fact depending merely upon the confession of the attorney general, if it be received in the present case, it must be so in every other, whether the questions relate to property, or any other matter; and if it be conclusive to the noble lord at the bar, it is equally so to every man in this land. My lords, I admit every case put by the learned manager who spoke first, as relative to criminal proceedings; but what we insist upon is, That this confession of the attorney general does only bind the crown, and the parties to it; but binds no other person: And, my lords, they have cited no authority to your lordships to prove it binding upon any body else. My lords, it was said by the learned manager, that if Mr. Murray was brought a second time into any court of justice, he would have the whole benefit of this record, and thereby, my lords, prove himself not attainted by this act of parliament: and there is no doubt of it, because the confession is the act of the crown, who is bound by it.

They likewise say, that any person claiming under Mr. Murray might intitle himself under this record. My lords, I admit that also, because such person would have the same right as Mr. Murray himself; but, my lords, that does not prove that it can affect any other person.

My lords, it is admitted that a pardon would have taken off all objection: but I humbly insist, that by this method, the gentleman still continues liable to be considered as an attainted person in another part of the kingdom, I mean in Scotland, where this record would be no evidence; for should he escape from his present confinement to Scotland, and be brought into the Court of Justiciary, to shew cause why execution should not be awarded against him, as attainted by this act of parliament, his plea in the King's-bench, confessed by the attorney general, would be of no avail to him: he must make out the fact insisted on by other proof, which, being matter of evidence, might as well come out one way as the other, that he did not, as that he did, surrender before the 13th of July last; that he was taken by the king's forces, as that he did surrender himself as the act requires. Thus your lordships see, in how high a degree the question affects the noble lord at the bar; and your lordships

will be very tender how this gentleman's testimony is admitted in a case of this nature, until both his competency and credit be established by better authority than the bare confession of the attorney general.

My lords, I mentioned several instances, where a record of this kind would not be evidence against a third person: but, say the gentlemen, that is not the case here; because my lord Lovat is not affected by Murray's attainder. The king, who had the sole right of prosecuting, and had an interest in the attainder, has declared him not to come within the act of parliament. But I must submit to your lordships, that my lord Lovat is affected by, and concerned in, the consequence of the attainder. He has a right to set aside the testimony of Mr. Murray, if attainted; and that right of setting aside his testimony is equally strong as a right to an estate, or any other right given by law; and the same methods must be used to deprive him of the one as the other. My lords, it is said, that this method of confession is the proper course; that it is daily made use of in that; and the attorney general, upon a writ of error brought, and errors assigned in fact, or in law, may admit them to be so. But, my lords, in none of the cases quoted by the gentlemen is there any, wherein the attorney general has, by his confession, made that error, which is not so: and although the party should assign errors, and the attorney general admit them, yet would not that bind the Court to pronounce them to be errors, if they appear otherwise. My lords, as so much time has been taken up already, I will not repeat any of the former arguments; but shall conclude with an observation delivered down to us by one of the greatest and most upright judges that ever sat in this hall; I mean my lord chief justice Vaughan, who tells us, that the artificial reasoning of law ought never to take place against the principles of natural justice and equity: and, my lords, it is a principle of natural justice, that a third person should not be prejudiced by the acts of others. The same learned judge concludes his paragraph, by adding, that in cases which depend upon fundamental principles, from whence plain and natural conclusions may be drawn, millions of precedents are to no purpose: but, my lords, there has not been one single precedent laid before your lordships, where the right of a third person may be affected in the manner now contended for; and as nothing of that kind has been attempted, I beg leave to insist, that the right of the noble lord at the bar to set aside this witness, is as much a right, as that he has to any part of his own estate; and submit therefore to your lordships, whether they ought not to substantiate this testimony by some better proof than so weak a thing as a record, founded only on the suggestion of the party, confessed by the attorney general.

L. H. S. Gentlemen of the House of Commons, the counsel for my lord Lovat have done with what they had to offer by way of reply: Would you say any thing to it?

Attorney General. My lords; It is said by the counsel for the noble lord at the bar, that they do not deny any proposition laid down by us; but that they deny the consequence of those propositions. My lords, a denial of the premises would be a denial of the consequences; but an admission of the premises here is an admission of the consequences: they now say, all they desire to contend for, is, that the confession in this case does not bind a third person; and that they shall not by that lose their right to this objection. My lords, What is that objection founded upon? It is founded upon this supposition, that the witness called is an attainted person. If he is not attainted, their objection fails; for they cannot say, that he is an improper person to produce as a witness, upon any other ground. If the record therefore destroys the pretence of an attainer, it proves his competency. Now the counsel for the prisoner have not been able to point out, or suggest, any one instance or respect, in which he can be said to be, or affected, as an attainted person, unless for the present single purpose. And it would be very extraordinary to say, that a person who can lose neither his life nor estate, nor the purity of his blood, as a person attainted of treason, should be deemed attainted, for no other purpose but to render him infamous. My lords, What is the offence by this act? It is not high-treason; the offence is in not submitting to justice; and the record shews, that he did submit himself to justice. This is stronger, as to that point, than a pardon, because it avoids the original guilt. The gentlemen say, that this record cannot be made use of in Scotland; and that if the witness was brought before a court of justice there, for execution, upon the foundation of this act, he could never avail himself of this record. My lords, I deny that; and I take it to be clearly otherwise; for what would be the consequence, if he could not? Much more than the gentlemen are aware of: for by the same rule that this record could not avail him there, no verdict, no acquittal in England, could protect a man from another prosecution in Scotland, for the same offence; and the prisoners who have already had, or hereafter shall receive their trial, either in England or Scotland, for the late rebellion, and been acquitted; may, by being sent into the other part of the kingdom, be tried a second time, and be put twice in hazard of their lives. As this is contrary to the laws of England, I believe it is equally so to the laws of Scotland, as they stood originally; for I take it to be contrary to the first principles of all laws, that after a man is fairly tried for an offence, by a court that has full cognizance of the crime, he should be taken up, and tried again for the same offence. No law will admit of it. But, with respect to treason, it is made clear by the statute of 7 Anne, which makes the law of treason, and the manner of trying it in Scotland, the same as in England. My lords, if the gentlemen ask, How this record may be made use of there? The method is by producing the record,

or proving a true copy of it, as is done in case of the record of a judgment of any other court: And the judges in Scotland will be bound by this record. My lords, the absurd consequences arising from the contrary doctrine appear at first sight, and are too many now to enumerate. The gentlemen say, That a confession of an error in law will not be admitted in any court: I do agree that it will not, because the Court must judge upon the whole of the record, and determine upon their own judgment and knowledge of the law, whether (supposing all the facts to be true) there is error, or not. The reason is, because that is their proper province; and they neither want, nor can be bound by, the confession of the attorney general. But it is quite otherwise as to matters of fact, which the Court do not *ex officio* examine into themselves; they must take them to be either as they are stated and admitted between the parties themselves, or appear by the verdict of a jury. To apply this to the present case: Mr. Murray says, that he did surrender, and submit himself to justice according to the act of parliament. The attorney general, by command of his majesty, admits that fact: As there is no issue joined, a jury can't be summoned to try it; and it is impossible the Court should try it themselves, by examining witnesses; they have no commission for it; and the law gives them no such power. The fact, therefore, must be taken to be true; and, as it cannot be now controverted, your lordships must judge, whether it don't clear him of any attainer.

Sir John Strange. My lords, I should not now have stood up, to have taken up any more of your lordships' time, but in regard to what was mentioned by the gentlemen who are counsel for the prisoner, that this record cannot be made use of in Scotland. My lords, I will beg leave to put them in mind of the statute made in the 7th year of queen Anne; which says, That trials for high treason in that kingdom are to be the same as if they were here; and whatever benefit a person will be entitled to here, they would be equally entitled to there: And therefore I would not have it now taken for granted, that in such cases, that should not be admitted as evidence in one part of the kingdom, which is evidence in another part of it.

Lord Talbot. My lords, If the record is now to be read, only to shew, that Mr. Murray surrendered himself within the time prescribed by the act, I should have no objection to the reading of it; but if it is to prove Mr. Murray to be a competent, or an incompetent evidence, then I think it of that consequence, that I hope some lord will move to adjourn to the Chamber of Parliament.

L. H. S. My lords, if any debate arises upon the point that has been argued at the bar, your lordships must adjourn to the Chamber of Parliament, to debate and consider it.

Then the earl Stanhope moved the House to adjourn to the Chamber of Parliament: And, the House was adjourned accordingly: And after about two hours, returned in the same order as before.

The House was resumed: and proclamation made for silence.

L. H. S. The Lords adjourned to the Chamber of Parliament, upon the question which had been argued before them, Whether the record of the court of King's-bench, offered in evidence by the Managers, ought to be read, or not? And their lordships have come to the following Resolution; with which I am ordered to acquaint the Managers for the House of Commons, and you, my lord Lovat: And it is this; That the Managers for the Commons be admitted to prove, and give in evidence, the record of the proceedings in the court of King's-bench, upon the Certiorari; whereby the act of the last session of parliament, for attainting John Murray of Broughton, and others, unless they surrender themselves by a certain day therein mentioned, was removed before that court.

Att. Gen. My lords, We desire Mr. Tulley may be called, to prove the record.

Lord Lovat. My lords, I told your lordships before, that I would give you very little trouble; and now I am willing to give you still less. I acknowledge the record; and shall not give your lordships the trouble of hearing it proved.

L. H. S. That will save the trouble of proving it; but it must be read. Does your lordship admit the record to be read, without further proof?

Lord Lovat. Yes, if your lordships please.

Then the Record was read by the clerk at the table, and is as follows:

PLEAS before our Lord the King, at Westminster, of Hilary Term, in the 30th year of the reign of our Sovereign Lord George the 2nd, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Amongst the Pleas of the King. Roll.

"*England.* Our present sovereign lord the king hath transmitted to his beloved and faithful sir William Lee, knt. and his associates, justices of our said present sovereign lord the king, assigned to hold pleas before the king himself, his writ of Mittimus; together with a writ, directed to the clerk of his parliaments, and the return made to the same; and also the record of a certain act of parliament of our said present sovereign lord the king, made at Westminster, closed in these words:

"The Writ of Mittimus.

"To our beloved and faithful sir William Lee, knt. and others, his associates, our justices assigned to hold pleas before us, greeting. We send you inclosed, in these presents, the tenor

of a certain writ of Certiorari, directed to our beloved Ashley Cowper, esquire, clerk of our parliaments; together with the return, indorsed upon the back of the said writ; and also the tenour of a certain act, whereof mention is made in the same writ, entitled, An Act to attain Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pittaligo; David Wemyss, esq., commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esq. eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esq. eldest son and heir apparent of Simon lord Lovat; George Murray, esq. commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esq. commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham, late of Duntroon, taking on himself the title of viscount of Dundee; John Nairne, taking upon himself the title or stile of lord Nairn; David Ogilvie, taking upon himself the title of lord Ogilvie; John Drummond, taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of duke of Perth; Robert Mercer, esq. otherwise Nairn of Aldie; sir William Gordon of Park; John Murray of Broughton, esq.; John Gordon the elder, of Glenbuckett; Donald Cameron the younger, of Lochiel; doctor Archibald Cameron, brother to Donald Cameron the younger, of Lochiel; Lodovick Cameron of Tor-Castle; Alexander Cameron of Dungallon; Donald Mac Donald of Clanronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac Donald of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Barisdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oliphant the younger, of Gask; James Graham the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivarae of Drumaglash; Lauchlan Mac Intosh, merchant at Inverness; Malcolm Ross, son of Alexander Ross, of Pitcalny; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdain, son to William Lumsdale, otherwise Lumsdain, writer in Edinburgh; and William Fidler clerk in the auditor's office in the Exchequer of Scotland; of high-treason, if they shall not render themselves to one of his majesty's justices of the peace, on or before the 12th day of July, in the year of our Lord 1746, and submit to justice: The tenor of which said act we, for certain reasons, have caused to be

brought before us into our Chancery. And we do hereby command you, That, having inspected the tenour of the said act, you do further cause to be done thereon, that which of right, and according to the law and custom of England, you shall see fit to be done. Witness ourself at Westminster, the 10th day of February, in the 20th year of our reign."

The tenour of the said writ of Certiorari, and the return made to the same; and also the tenour of the said act, in the said writ mentioned, follow in these words:

"The Writ of Certiorari.

"George the second, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, to our beloved Ashley Cowper, esquire, clerk of our parliaments, greeting. We being willing (for certain reasons) to be certified concerning the tenour of a certain act by us made and enacted, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in parliament assembled, at Westminster, the 17th day of October, in the 19th year of our reign, intituled, An Act to attain Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pittligo; David Wemyss, esq. commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esq. eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esq. eldest son and heir apparent of Simon lord Lovat; George Murray, esq. commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esq. commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham, late of Duntroon, taking on himself the title of viscount of Dundee; John Nairn, taking upon himself the title or stile of lord Nairn; David Ogilvie, taking upon himself the title of lord Ogilvie; John Drummond, taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of the duke of Perth; Robert Mercer, esq. otherwise Nairn of Aldie; sir William Gordon of Park; John Murray of Broughton, esq.; John Gordon the elder, of Glenbuckett; Donald Cameron the younger, of Lochiel; doctor Archibald Cameron, brother to Donald Cameron the younger of Lochiel; Ludovick Cameron of Tor-castle; Alexander Cameron of Dungallan; Donald Mac Donald of Clanronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac Donald of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Barriisdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oli-

phant the younger, of Gask; James Graham the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivrae of Drumaglash; Lauchlan Mac Intosh, merchant at Inverness; Malcolm Ross, son of Alexander Ross of Pitcalay; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdaine, son to William Lumsdale, otherwise Lumsdaine, writer in Edinburgh; and William Fidler, clerk in the auditor's office, in the Exchequer of Scotland, of high-treason, if they shall not render themselves to one of his majesty's justices of the peace, on or before the 12th day of July, in the year of our Lord 1746, and submit to justice; do command you, that, immediately after the receipt of this writ, you do distinctly and openly send before us, into our Chancery, the tenour of the said act, with all things touching the same, as fully and perfectly as the same now remains in your custody; together with this writ.—Witness ourself at Westminster, the 7th day of February, in the 20th year of our reign."

"The Return.

"The execution of this writ appeareth in a certain schedule to this writ annexed, as within I am commanded, Ashley Cowper, esq. Cler' Parliamentor'. In the parliament held at Westminster, the 17th day of October, in the year of our Lord 1745, and in the 19th year of the reign of our sovereign lord George the second, by the grace of God, of Great-Britain, France, and Ireland, king, defender of the faith; and there continued by several adjournments until and unto Wednesday the 4th day of June 1746, by the consent of the Lords as well spiritual as temporal, and of the Commons, and by the assent of the king's majesty then present; the following statute (amongst others) was ordained, enacted, and established, to wit, An Act to attain Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pittligo; David Wemyss, esq. commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esq. eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esq. eldest son and heir apparent of Simon lord Lovat; George Murray, esq. commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esq. commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham, late of Duntroon, taking on himself the title of viscount of Dundee; John Nairn, taking upon himself the title or stile of lord Nairn; David Ogilvie, taking upon himself the title of lord Ogilvie; John Drummond, taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of duke of Perth; Robert Mercer, esq. otherwise Nairn of Aldie:

sir William Gordon of Park; John Murray of Broughton, esq.; John Gordon the elder, of Glenbuckett; Donald Cameron the younger, of Lochiel; Doctor Archibald Cameron, brother to Donald Cameron the younger of Lochiel; Ludovick Cameron of Tor-castle; Alexander Cameron of Dungallon; Donald Mac Donald of Clanronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac Donald, of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Barisdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oliphant the younger, of Gask; James Graham, the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivrae of Drumaglash; Lauchlan Mac Intosh, merchant at Inverness; Malcolm Ross, son of Alexander Ross of Pitcalny; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdaine, son to William Lumsdale, otherwise Lumsdaine, writer in Edinburgh; and William Fidler, clerk in the auditor's office, in the Exchequer of Scotland, of high-treason; if they shall not render themselves to one of his majesty's justices of the peace, on or before the 18th day of July, in the year of our Lord 1746; and submit to justice."

"Whereas Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pitligo; David Wemyss, esquire, commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esquire, eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esquire, eldest son and heir apparent of Simon lord Lovat; George Murray, esquire, commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esquire, commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham, late of Duntroon, taking on himself the title of viscount of Dundee; John Nairn, taking upon himself the title or stile of lord Nairn; David Ogilvie, taking upon himself the title of lord Ogilvie; John Drummond taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of the duke of Perth; Robert Mercer, esq. otherwise Nairn, of Aldie; sir William Gordon of Park; John Murray of Broughton, esquire; John Gordon the elder, of Glenbuckett; Donald Cameron the younger, of Lochiel; doctor Archibald Cameron, brother to Donald Cameron the younger, of Lochiel; Ludovick

Cameron of Tor-Castle; Alexander Cameron of Dungallon; Donald Mac Donald of Clanronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac Donald, of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Barisdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oliphant the younger, of Gask; James Graham the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivrae of Drumaglash; Lauchlan Mac Intosh, merchant at Inverness; Malcolm Ross, son of Alexander Ross of Pitcalny; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdaine, son to William Lumsdale, otherwise Lumsdaine, writer in Edinburgh; and William Fidler, clerk in the Auditor's Office in the Exchequer of Scotland; on or before the eighteenth day of April, in the year of our Lord 1746, did, in a traitorous and hostile manner, take up arms, and levy war, against his present most gracious majesty, within this realm, contrary to the duty of their allegiance; and are fled, to avoid their being apprehended, and prosecuted, according to law, for their said offences; Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That if the said Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pitligo; David Wemyss, esquire, commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esquire, eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esquire, eldest son and heir apparent of Simon lord Lovat; George Murray, esquire, commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esquire, commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham late of Duntroon, taking on himself the title of viscount of Dundee; John Nairn, taking upon himself the title of lord Nairn; David Ogilvie, taking upon himself the title of lord Ogilvie; John Drummond, taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of duke of Perth; Robert Mercer, esquire, otherwise Nairn, of Aldie; sir William Gordon of Park; John Murray of Broughton, esquire; John Gordon the elder, of Glenbuckett; Donald Cameron the younger, of Lochiel; doctor

Archibald Cameron, brother to Donald Cameron the younger, of Lochiel; Ludovick Cameron of Tor-Castle; Alexander Cameron of Dungallon; Donald Mac Donald of Clanronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac Donald of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Barisdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oliphant the younger, of Gask; James Graham the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivrae of Drumaglash; Lauchlan Mac Intosh, merchant, at Inverness; Malcolm Ross, son of Alexander Ross of Pitcalny; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdain, son to William Lumsdale, otherwise Lumsdain, writer in Edinburgh; and William Fidler, clerk in the Auditor's Office in the Exchequer of Scotland; shall not render themselves to one of his majesty's justices of the peace, on or before the twelfth day of July, in the year of our Lord 1746, and submit to justice for the treasons aforesaid; then every of them the said Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pitsligo; David Wemyss, esquire, commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esquire, eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esquire, eldest son and heir apparent of Simon lord Lovat; George Murray, esquire, commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esquire, commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham, late of Duntroon, taking upon himself the title of viscount of Dundee; John Nairn, taking upon himself the title or stile of lord Nairn; David Ogilvie taking upon himself the title of lord Ogilvie; John Drummond, taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of duke of Perth; Robert Mercer, esquire, otherwise Nairn of Aldie; sir William Gordon of Park; John Murray of Broughton, esquire; John Gordon the elder, of Glenbuckett; Donald Cameron the younger, of Lochiel; doctor Archibald Cameron,* brother to Donald Cameron the younger, of Lochiel; Ludovick Cameron of Tor-Castle; Alexander Cameron of Dungallon; Donald Mac Donald of Clan-

ronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac Donald of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Barisdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oliphant the younger, of Gask; James Graham, the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivrae of Drumaglash; Lauchlan Mac Intosh, merchant at Inverness; Malcolm Ross, son of Alexander Ross of Pitcalny; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdain, son to William Lumsdale, otherwise Lumsdain, writer in Edinburgh; and William Fidler, clerk in the Auditor's Office in the Exchequer of Scotland, not rendering himself, as aforesaid, and not submitting to justice, as aforesaid, shall, from and after the said eighteenth day of April, in the year of our Lord 1746, stand and be adjudged attainted of the said high-treason, to all intents and purposes whatsoever; and shall suffer and forfeit, as a person attainted of high-treason by the laws of the land ought to suffer and forfeit: and every of the said justices of the peace are hereby required to commit every of them, the said Alexander earl of Kellie; William viscount of Strathallan; Alexander lord Pitsligo; David Wemyss, esq. commonly called lord Elcho, eldest son and heir apparent of James earl of Wemyss; James Drummond, esq. eldest son and heir apparent of William viscount of Strathallan; Simon Fraser, esq. eldest son and heir apparent of Simon lord Lovat; George Murray, esq. commonly called lord George Murray, brother to James duke of Athol; Lewis Gordon, esq. commonly called lord Lewis Gordon, brother to Cosmo George duke of Gordon; James Drummond, taking upon himself the title of duke of Perth; James Graham late of Duntroon, taking on himself the title of viscount of Dundee; John Nairn, taking upon himself the title or stile of lord Nairn; David Ogilvie, taking upon himself the title of lord Ogilvie; John Drummond, taking upon himself the stile or title of lord John Drummond, brother to James Drummond, taking on himself the title of duke of Perth; Robert Mercer, esq., otherwise Nairn of Aldie; sir William Gordon of Park; John Murray of Broughton, esq.; John Gordon the elder of Glenbuckett; Donald Cameron the younger, of Lochiel; doctor Archibald Cameron, brother to Donald Cameron the younger, of Lochiel; Ludovick Cameron of Tor-castle; Alexander Cameron of Dungallon; Donald Mac Donald of Clanronald, junior, son to Rhonald Mac Donald of Clanronald; Donald Mac

* See his Case, A. D. 1753.

Donald of Lochgarie; Alexander Mac Donald of Keppoch; Archibald Mac Donald, son of Col Mac Donald of Bardsdale; Alexander Mac Donald of Glencoe; Evan Mac Pherson of Clunie; Lauchlan Mac Lauchlan of Castle-Lauchlan; John Mac Kinnon of Mac Kinnon; Charles Stewart of Ardsheil; George Lockhart, eldest son and heir apparent of George Lockhart of Carnwath; Lawrence Oliphant the elder, of Gask; Lawrence Oliphant the younger, of Gask; James Graham the younger, of Airth; John Stewart, commonly called John Roy Stewart; Francis Farquharson of Monalterye; Alexander Mac Gilivrae of Drumaglash; Lauchlan Mac Intosh, merchant at Inverness; Malcolm Ross, son of Alexander Ross of Pitcalny; Alexander Mac Leod, son to master John Mac Leod, advocate; John Hay, portioner of Restalrig, writer to the signet; Andrew Lumsdale, otherwise Lumsdaine, son to William Lumsdale, otherwise Lumsdaine, writer in Edinburgh; and William Fidler, clerk in the Auditor's office in the Exchequer of Scotland; so surrendering himself to prison for the said high-treason, there to remain till he shall be discharged by due course of law; and thereof immediately to give notice to one of his majesty's principal secretaries of state.

"I Ashley Cowper, clerk of parliaments, by virtue of the writ of our said lord the king of Certiorari to me directed, and to these presents annexed, do certify, that what is above written is the true tenor of the act of parliament above said in that writ expressed. In witness whereof, to this schedule I have set my seal, and subscribed my name. Dated the 9th day of February, in the twentieth year of the reign of our said lord the king, and in the year of our Lord 1746. ASHLEY COWPER."*

"Plea of John Murray.

"And now (that is to say) upon Thursday next after the Octave of the Purification of the Blessed Virgin Mary, before our said present

* "Mr. Murray being brought to the bar of the Court of King's-bench, by Habeas Corpus directed to the lieutenant of the Tower, the foregoing record was read to him by the secondary on the crown side: and the attorney general prayed that execution might be awarded. The secondary then demanded of him, what he had to say why execution should not be awarded?

"The prisoner *ore tenus* pleaded, that he did surrender himself to the lord justice clerk of Scotland (who is a justice of the peace) at Edinburgh, the 28th day of June last; whereupon the attorney general declared, that he had authority from his majesty to confess the truth of the prisoner's plea, and did accordingly confess it. And the Court ordered the prisoner's plea, and the attorney general's confession, to be recorded; and that the attorney take nothing by his motion, and that the prisoner be remanded." Foster's Reports, p. 50.

sovereign lord the king at Westminster, cometh the said John Murray in the said act named, under the custody of the lieutenant of the Tower of London, by virtue of his majesty's writ of Habeas Corpus ad subjiciendum, &c. into whose custody he the said John Murray had been before committed, upon the account aforesaid, being brought to the bar here in his own proper person, who is committed by the Court to the said lieutenant of the said Tower of London, charged as a person attainted of high-treason by virtue of the said act: and being asked by the Court here, at the instance of sir Dudley Ryder, knight, attorney general of our said present sovereign lord the king, who, for our said present sovereign lord the king, in this behalf prosecuteth, if he the said John Murray hath, or knoweth of, any thing to say for himself, why the Court here should not proceed to award execution against him thereupon, he the said John Murray, for plea, saith, that it is very true, that he is one of the persons in the said act named and intended; to wit, the person therein designed and described by the name, stile, and addition, of John Murray of Broughton, esq., against whom, with the rest of the persons therein named, designed, and described, the said act was made, passed, and intended, for and on account of the high-treason therein mentioned, and thereby supposed to have been committed against our said present sovereign lord the king: but, for further plea, he saith, that, long before the 12th day of July in the said act mentioned; to wit, upon the 28th day of June then last past, he the said John Murray, at the city of Edinburgh, in the shire of Edinburgh, did, in due manner, and according to the directions, and agreeable to the true sense, intent, and meaning of the said act, render himself to the right honourable Andrew Fletcher, esq., lord justice clerk of Scotland, being one of his majesty's justices of the peace in the said act mentioned and intended for that purpose (he the said Andrew Fletcher having then and there full power and authority, by virtue of the said act, to admit him the said John Murray to make such render of himself to him the said Andrew Fletcher, as aforesaid;) and that he the said John Murray was, upon the said 28th day of June, in consequence of such render, as aforesaid, committed by him the said Andrew Fletcher to prison, for and on account of the said high-treason, according to the directions, and agreeable to the true sense, intent and meaning, of the said act; and that he the said John Murray hath, ever since his said render and commitment, as aforesaid, until now, remained and continued, and still doth remain and continue, a close prisoner, upon the account aforesaid; and this he is ready to verify and prove, as the Court shall award: With this further, that, at the time of his said render and commitment, as aforesaid, he the said John Murray was, and ever since hath been, and yet is, willing and desirous to take his trial, and submit himself to justice, pursuant to the di-

rections, and agreeable to the true sense, intent, and meaning of the said act."

Confession of the Attorney General.

"And the said sir Dudley Ryder, knight, attorney general of our said present sovereign lord the king, who, for our said present sovereign lord the king, in this behalf prosecuteth, having heard and considered the said plea of him the said John Murray, by him now pleaded in form aforesaid, he the said attorney general for our said present sovereign lord the king saith, that he doth not in any wise deny any of the matters in the said plea alleged; but doth now here in court, for and on behalf of our said present sovereign lord the king, and by the special order and command of our said present sovereign lord the king, admit and confess the same to be in all respects true: Whereupon it is considered and adjudged by the said court here, that the said plea of him the said John Murray, for him so above pleaded, as aforesaid, and also the said confession of the said attorney general by him so made of the said plea, as aforesaid, be recorded; and that he the said John Murray be remanded to the said Tower of London, under the custody of the said lieutenant, to be by him there kept in safe custody, until he shall be from thence discharged by due course of law."

Att. Gen. My lords, we desire that Mr. Murray may now be sworn.

Lord Lovat. My lords, I desire leave to falsify the record, and to prove, by witnesses, that Mr. Murray did not surrender himself within the time prescribed by the act of parliament.

Att. Gen. My lords, what the noble lord at the bar now insists upon, is, that he shall be at liberty to falsify the record, by shewing, by witnesses, that Mr. Murray did not surrender himself according to the act of parliament; but I must submit it to your lordships, that there is no ground whatsoever to admit the prisoner to go into that kind of evidence; because this is a record, which, according to the known rules of proceeding, cannot be falsified, since it is a proof of a thing transacted in a court of justice, before whom it was properly cognizable, and who alone, in this part of the united kingdom, could hear it, and had power to record it; and I therefore must insist, that it is out of the power of any person whatsoever to contradict that record.

L. H. S. My lord Lovat, the Managers insist, that it appearing by matter of record, that Mr. Murray did surrender himself according to the act of parliament, that matter cannot now be falsified.

Lord Lovat. My lords, I must beg, that, since it is a point of law, your lordships will be pleased to hear my counsel to it.

Att. Gen. My lords, as to its being a question of law, whether the noble lord at the bar shall be at liberty to produce witnesses to falsify that record; to be sure, my lords, it is a

question of law, because it cannot be said to be a question of fact; but it does not follow as a consequence, because the noble lord at the bar says, that he has a point of law to submit to your lordships, that therefore your lordships should permit his counsel to argue it: for it is still in your lordships' judgment, whether you have any doubt concerning it; and it is apprehended, that this is too plain a case to admit of any doubt with your lordships; and therefore that you will not permit counsel to argue it, as the consequence can only be delay; and an indulgence of this kind, in matters of no doubt, would put it in the power of a prisoner to protract his trial, and keep your lordships sitting as long as he pleased.

Sir John Strange. My lords, I beg leave to have it clearly understood, what it is that the noble lord at the bar insists upon; whether it be to prove, by witnesses, that Mr. Murray was not in custody within the time prescribed by this act of parliament; or that Mr. Murray did not surrender himself, and submit to justice within that time.

Lord Lovat. I put it upon that strict word, that he did not 'surrender himself.'

L. H. S. Lord Lovat, does your lordship desire to be heard by your counsel to that point?—*Lord Lovat.* Yes.

Mr. Forrester. My lords, it would ill become me, in the station of counsel for the noble lord at the bar, to decline arguing any point which he thinks may be of service to him. The question now made by the noble lord is singly this, Whether he shall be at liberty to adduce witnesses, *visâ voce*, to falsify the contents of this record? that is, to prove that Mr. Murray did not surrender himself within the time prescribed by the act; which being closely connected to the former objection, I can at present, and until I have time to consider the question, do little else but what would be extremely indecent in me, repeat a great part of what I troubled your lordships with in the morning, and which is now over-ruled. But, my lords, the debating this point may lead to the consideration of another, and indeed a very material one; which is, Whether evidence of his being taken prisoner by the king's forces will make it a surrender within the legal construction of the act of parliament, so as to warrant his plea, and the attorney general's confession contained in the record? And this I shall, in point of law, beg leave to deny, upon the authority of lord Duffus's case, and several other cases. Your lordships are to determine, whether we shall be heard to these points or not: but, if I am at liberty to speak to them, as they are both questions of great difficulty, I must beg some further time for preparing myself, and laying my thoughts together; since, at this hour of the night, and unprepared as I am, it is impossible to argue them so fully as my duty requires, as the noble lord has a right to expect from me, and as your lordships have a right to expect matters to be debated at your bar.

Lord Lovat. My lords, I am so very weak and infirm, and have been obliged, in order to attend in obedience to your lordships' commands, for two days together, to be up by three o'clock in the morning; I must therefore beg, that your lordships will indulge me with a later hour, and some respite; otherwise I shall die at your bar.

Att. Gen. My lords, I did apprehend, from what the noble lord at the bar said, that the point he wanted to submit to your lordships was, Whether he should not be at liberty to bring witnesses to prove, that Mr. Murray did not surrender himself within the meaning of the act? But something has dropt since from the prisoner's counsel, as if they meant to shew, that Mr. Murray did not, in fact, surrender, but was taken prisoner before the time given by the act to surrender; and that this would not, in point of law, be a surrender within the act. My lords, that is a question totally different from the former. It is one question, Whether he may be admitted to prove, that he did not surrender according to the act of parliament? and another, what would be the legal effect of his being apprehended previous to the time appointed? They are two entirely distinct questions; and whether they shall be admitted to argue the former, is now for your lordships' consideration; but as to the latter, it is a matter subsequent, and not now to be considered.

Then the duke of Newcastle moved to adjourn to the Chamber of Parliament; and the Lord High Steward went back to his chair; and the House was adjourned accordingly.

The Lords and others went back in the same order as before; and the House being resumed in the Chamber of Parliament, after debate,

Ordered, That this House will proceed further in the Trial of the said lord Lovat to-morrow at 11 o'clock in the forenoon: And

A Message was sent to the House of Commons, by Mr. Elde and Mr. Thurston, to acquaint them therewith.

Ordered, That the lieutenant of the Tower of London, or his deputy, do take back the said lord Lovat, and bring him again to the bar of this House in Westminster-hall, at 11 o'clock in the forenoon to-morrow.

THE THIRD DAY.

Wednesday, March 11, 1746.

About 11 o'clock in the forenoon the Lords and others came from the Chamber of Parliament, in the same order as on Monday last, into Westminster-hall; where the Commons, and their Managers, were in the seats prepared for them respectively, as before: and the Lords took their places in the court, and the Lord High Steward in his chair.

L. H. S. The House is resumed. Is it your lordships' pleasure that the judges have leave to be covered?—**Lords.** Ay, ay.

Then the serjeant at arms made proclama-

tion for silence, and afterwards the following proclamation:

Serj. at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner Simon lord Lovat to the bar, pursuant to the order of the House of Lords to you directed.

The deputy governor of the Tower brought the prisoner to the bar, in the like manner as before: and then he kneeled down.

L. H. S. Your lordship may rise.

L. H. S. My lord Lovat, your lordship thought fit yesterday to insist upon it, that notwithstanding the record, produced by the Managers for the House of Commons, of Mr. John Murray of Broughton's having surrendered himself within the time, and according to the terms prescribed by an act of parliament made in the 19th year of his majesty's reign, your lordship should be permitted to give evidence, by witnesses *visâ voce*, that Mr. Murray did not surrender himself within the time prescribed by that act. To this kind of evidence the Managers for the House of Commons objected, because, as they alleged, it was giving evidence to contradict a fact which was verified by a record of the highest nature; and that therefore you should not be permitted to enter into such proof: whereupon you desired, that your counsel might be heard to that matter, as a point or question of law. Against this the Managers thought fit to object, that it was no doubt or question of law at all; that the law of the land was full, and clear, and settled in this point; and that therefore your lordship ought not to be heard by your counsel to it. The House has taken all these matters into consideration, in the chamber of parliament; and hath come to the following Resolution, with which they have directed me to acquaint you; and it is this, That the counsel for the lord Lovat be not permitted to argue, that parol evidence should be received to prove, that John Murray of Broughton did not surrender himself according to the act made in the last session of parliament in that behalf, in contradiction to the record of the Court of King's-bench, produced by the Managers for the Commons.

The Lord High Steward asked leave to go down to the table: Which was done.

L. H. S. Gentlemen of the House of Commons, you may proceed.

Mr. Noel. My lords, we now desire that Mr. Murray of Broughton may be sworn.

Lord Lovat. My lords, I did object against Mr. Murray's being examined as a witness: your lordships have been pleased to over-rule that objection, and I now submit, that Mr. Murray may be examined, if you please.

John Murray sworn.

Lord Talbot. My lords, I desire to ask Mr. Murray some questions for the sake of forming my own judgment in the matter; but if it is improper that they should be asked, I submit it to your lordships.

L. H. S. My lords, the ordinary method of proceeding in these cases is, that where a witness is produced, he is to be sworn in chief, unless there be some objection to his competency; and then he is to be sworn upon a *Voire Dire*. After he is sworn in chief, the party, who produces him, asks him such questions as he thinks proper; after which the other party is at liberty to cross-examine him either to the matter of fact concerning which he has been examined, or any other matter whatsoever, that shall tend to impeach his credit, or weaken his testimony; provided the questions that are asked him, are such as the law allows: So in this Court, after the Managers have produced any witness, and have finished their examination of him, the prisoner has liberty to ask him whatever questions are proper; and it is most regular, that, after both sides have gone through with their examinations of the witness, any of your lordships should ask him what questions you shall judge proper.*

Mr. Noel. Mr. Murray, you will be pleased to attend to the questions that shall be asked you. Give your answers distinctly, and raise your voice as much as you can, that my lords may hear you.—My lords, the first thing I desire of this witness is, that he may give your lordships an account when was the first time that he heard of any invitation to the son of the Pretender to come into Scotland, and from whom he heard it.

J. Murray. My lords, to the best of my remembrance, in the month of February, 1741-2, when I was at Edinburgh, I had there occasion to see my lord Traquair, who told me that there were several gentlemen, to the best of my memory, the prisoner at your lordships' bar, my lord Perth, my lord John Drummond, sir James Campbell of Achenbreck, and Mr. John Stuart brother to lord Traquair, had employed one Drummond of Bochalzie to go from Scotland to Rome, to assure the Pretender of their zeal for his service; and that they would be ready and willing, as soon as sufficient assistance could be had from France, to appear publicly in arms for him: and, at the same time, he said, that he had given Drummond a Memorial signed by those persons, I think seven of them in number, to Cardinal Fleury, expressing their attachment to the Pretender, and desiring him to procure assistance from the court of France; and at the same time this Drummond carried with him a list of all the people, that, by those gentlemen, were supposed to be ready and willing to join in the Pretender's service—

Lord Lovat, interrupting, My lords, your lordships will be pleased to consider, that what this gentleman says, is only hearsay evidence,

which should not be admitted before your lordships, as it gives you a bad impression of a man. I am now trying for my life and fortune, and hope your lordships will consider it.

Mr. Noel. My lords, I am so far from differing from the noble lord at the bar in this respect, that I did understand the witness was speaking only what he had heard from my lord Traquair.

Att. Gen. My lords, the Managers do know and desire, that your lordships will distinguish between evidence that does, and evidence that does not affect the prisoner at the bar. The witness was giving an account by way of introduction; which will be material for your lordships' consideration. I beg leave to say, it is impossible for a witness, in his giving an account of a transaction, to speak nothing but words that alone will affect the prisoner; and therefore this, though it does not affect the prisoner, may be proper to introduce that, which he has to say, that may affect him. What he now says, is only giving an account of a plot or conspiracy, entered into by several persons, which did afterwards bring on the rebellion.

L. H. S. My lord Lovat, the Managers do admit that what has been hitherto said by the witness under examination does not affect you; and they desire now to offer it only as evidence of a conspiracy in general, which, if they do not apply to your lordship by particular evidence, will not affect you.

Lord Lovat. My lords, as I said before, it gives a bad impression.

Lord Coke. My lords, I apprehend that we are right in going into this kind of evidence; because, in the preamble to our Articles of Impeachment, we set forth the general conspiracy.

Sol. Gen. My lords, what has hitherto been said, is not evidence against the noble lord at the bar; and God forbid that he should be affected by any thing that is not strictly evidence against him! And therefore it is fit, that the view with which the evidence is offered should be fully understood. The preamble to the Articles of Impeachment asserts, That, ever since the breaking out of the war, and particularly in 1743, many persons have plotted and conspired with the enemy, to procure an invasion of this kingdom by a foreign force, and to raise a rebellion at home. The first Article charges lord Lovat to have been one of those conspirators. It is necessary therefore, by general evidence, to shew, that there have been such plots and conspiracies as the Commons assert, and then to affect the noble lord at the bar, by proper evidence, with being concerned in those plots. This method of proceeding is not new, but the established course. Upon the impeachment of the lord viscount Stafford, a general evidence was given of the conspiracy, which was declared not to affect him, but as introductory only. The like was done upon the trials at law of the persons accused of having been in the same plot. The same method

* As to this, see Mr. Peake's observations in his *Law of Evidence*, ch. 3, s. 2. For more respecting examinations upon the *Voire Dire*, see vol. 13, p. 334, *Peter Cook's Case*; *Francis Francia's Case*, vol. 15, p. 398; *Townley's Case*, p. 330, of this volume.

was allowed as proper, and liable to no just objection, in many trials after the Revolution. In the reign of the late king, upon the trial of Laver, the like method was pursued: General evidence was given of a plot which did not directly affect him. I dare answer for the gentlemen who manage this prosecution, that no one of us will urge against the noble lord any thing which is not brought home to him by strict and legal proof: If we should, he is safe in your lordships' judgment, which will distinguish general from particular evidence.

Then the Witness was directed to go on with his narrative.

J. Murray. My lords, I mentioned to your lordships, that at the same time that Drummond went over to Paris, he carried with him a list of all the gentlemen in Scotland, who, it was supposed by those who signed this Memorial, were ready and willing to join them: But this list I take rather to be a general list of the Highlands of Scotland; nor do I imagine there could be any reason to think, that the great number of people there mentioned, could appear in favour of the Pretender. My lord Traquair, at the time of his informing me of this, told me, that Drummond was then in Edinburgh; and proposed that I should have a meeting with him. Accordingly I had a meeting with him; and he repeated to me much the same thing that I have repeated to your lordships: Said he had been extremely well received by the cardinal, to whom he had delivered the Memorial given him at Edinburgh: That he expressed much satisfaction, and was very sanguine, and had the Pretender's interest very much at heart; and that, provided he could get sufficient assistance and assurance from those who are called the Pretender's friends in England, that then he would send over the troops required; the number was 3,000 men, to be landed in Scotland; 1,500 at or near Inverness, so as immediately to join with the clan of the Frasers; the other 1,500 were to be landed in the west-coast, near Cameron's of Lochiel, who was to take the command of them upon him, and to raise the people of Argyleshire: At the same time, a body of 10 or 12,000 men were to be landed as near London as they possibly could. That at the same time Drummond was in Edinburgh, he sent for Cameron; and when they met, he repeated what had past, and the success he had at Rome and Paris; and assured them, that provided he could have assistance in England, the scheme might be put in execution in autumn following. After a week's stay in Edinburgh, Drummond went to London. I do not remember to have heard any thing more concerning this matter till the August following. This was, to the best of my memory, the end of March, or beginning of April, that he left Edinburgh.

L. H. S. What year was it in?

J. Murray. 1742. We call it so in Edinburgh.

L. H. S. You begin the year in Scotland on the 1st of January?

J. Murray. Yes. My lords, in the autumn following, when I was at my lord Traquair's house in the country, he told me he understood by Drummond, that cardinal Fleury proposed sending a body of Swedish troops into Scotland, thinking they might be more agreeable to the people there, as they were Protestants, than French or Irish brigades would be: But, at the same time, said, he thought it would be necessary that a person should be sent from Scotland, to be deputed to solicit those troops from Sweden, in conjunction with the person whom the cardinal should employ. My lord Traquair thought that I should go on that account: But I think it was rather Drummond's than my lord Traquair's proposition.

L. H. S. When was this?

J. Murray. In August 1742. I refused to comply with this. From which time I do not remember to have heard any thing for six months; and, about that time, my lord Traquair and Cameron of Lochiel, at Cameron's house, did shew me a letter written by Drummond from Paris; wherein he said, That upon his return to France, he had represented the thing to the cardinal in such a light as engaged him to promise, that in a short time he would land the troops in Scotland, as proposed. There were several other circumstances in the letter, which I cannot now remember: So far I can say, that letter, in general, when it was read to me, seemed very extraordinary, to think, that an affair of such consequence as the invading these kingdoms, and raising a civil war in the country, was to be undertaken by a few people, and by such kind of management. I said, I apprehended it was a scheme of Drummond's, to keep up a spirit of party in this country, and to make himself useful to the gentlemen, who employed him; and that there was no such thing intended by cardinal Fleury. My lord Traquair determined, that it was then necessary to know the real state of the case; and he desired I would go to Paris for that purpose. I at first did not comply with it; I did not care to execute it; nor did I agree to it till several weeks afterwards: I was then coming to London; and in January I came up; but, upon the road, I understood that cardinal Fleury was dead.

L. H. S. When was this?

J. Murray. In January 1743, by the Scotch stile. I stayed some short time in London; and from thence I went over privately to Paris; and, by means of one Mac Donald the banker, I found out Drummond: He carried me that evening to one Mr. Semple, who is there called my lord Semple; and was the person employed by the Pretender to manage his affairs in France: They both joined in lamenting the death of the cardinal; and said, that, had he lived, in all probability the scheme would have been executed that spring; that the reason why it was not, was owing to the marshal Maillebois having orders from France

to march his army towards Hanover, instead of the coast of Flanders, as the cardinal intended: but that the cardinal had been so extremely sanguine in the Pretender's interest, that he had given all his papers, memorials, and the like, to M. Amelot, the then secretary for foreign affairs. I proposed to see M. Amelot: and accordingly I went to Versailles, where I stayed two or three weeks. I was first presented by Drummond to Semple; and had an audience of M. Amelot, whom I told I had been sent from Scotland, by the persons who had signed the Memorial which I mentioned to your lordships, and who were concerned in it, to know whether the king of France, his master, was willing to put the scheme in execution. He told me, that Mr. Semple had acquainted him with the reason of my coming: And thereupon he went to the king of France, and told him of it; and upon that I desired to know what answer he had from the king of France. The answer he gave me was, That the king told him, that I might assure those gentlemen, that he had the interest of their master as much at heart as they; and that, as soon as he had an opportunity, he would put the scheme they proposed in execution. With this answer I returned to Paris, where I only stayed two nights. At first, I observed, that M. Amelot seemed very desirous to have such assurances from England as the cardinal had required; and he applied to Drummond and Semple on that head. When I left Paris, Mr. Drummond determined to come over. I set out from Paris, and came privately to London. The reason of Mr. Drummond's coming over was to collect those assurances which had been expected from England.

J. H. S. What time was this?

J. Murray. It must have been the end of March, or beginning of April.

L. H. S. In what year was it?

J. Murray. In 1743. I stayed but a few days in London after my return; and Mr. Drummond desired me, that as soon as I arrived in Scotland, I would acquaint my lord Traquair of his being come to London, and the reason of it; and desired, that he would come and assist in procuring the assurances from the Pretender's friends. Upon my return to Edinburgh, I stopt at York, where I met with the late lord Perth, who then was at York; and I acquainted him with what had been done; who seemed extremely dissatisfied at it. I soon afterwards came to Edinburgh; and soon after my arrival there, I met lord Traquair, whom I acquainted with Drummond's being come over; and that he desired his lordship to go to London to assist him in his intended purpose. His lordship went with that intent (as he said) in about two weeks after, about the beginning of April, to the best of my remembrance. On lord Traquair's return to Scotland, in autumn, he acquainted me, that he had several meetings with Drummond; and that he had endeavoured to get as many assurances as he could

from the Pretender's friends, at least such as he thought so: The persons he named were lord Barrymore, sir John Hinde Cotton, and sir Watkin Williams Wynne: That he had several meetings with these several persons; and that sir John Hinde Cotton seemed extremely shy, and unwilling to converse or meet on the Pretender's affairs; and none of them were willing to give any such assurances under their hands and seals as were given by the seven in Scotland. The same summer one Butler was sent from France, to know the state of the Jacobite party in England.

Lord Tulbot. My lords, I object to the witness's proceeding to give evidence which does not relate to the point in question: He has mentioned the names of several honourable gentlemen, on a very extraordinary occasion, which does not all relate to the trial of the noble lord at the bar: He is calumniating the characters of several gentlemen, who are my worthy friends: And therefore, if it is insisted that he should proceed, I think it will be worth our while to adjourn to the Chamber of Parliament, to consider how far it shall be permitted.

L. H. S. Gentlemen of the House of Commons, you hear what is said by the noble lord. It is objected, that the witness is going on to give evidence of a fact not relating to the noble lord at the bar, but to other persons; and that this is an improper kind of evidence, and ought not to be given.

Att. Gen. My lords, we did not examine the witness to those particular facts which he has mentioned, that do not relate to the noble lord at the bar; but in giving an account of the facts inquired into, he has himself entered into that kind of narrative; but as it is only what he heard my lord Traquair say concerning other particular persons, we do not insist on his proceeding in his hearsay account of what concerns those gentlemen.

Mr. Noel. My lords, what the witness has dropt in respect of the honourable gentlemen he has named, does not affect them at all. It is nothing more than a relation which he had from my lord Traquair, and not from any matter arising within his own knowledge. And, my lords, I may venture to assure your lordships, for myself and all the gentlemen concerned in this prosecution, that we will not ask the name of one person immaterial to the present trial: And therefore I must submit it to your lordships, whether the witness should not be suffered now to go on; and that for the future, when he comes to any transaction of that kind, he should not name any persons till he comes to the noble lord at the bar.

L. H. S. Your lordships hear what is mentioned by the managers, that they agree that the witness, in mentioning these transactions in general, should not name any persons, till he comes to the noble lord at the bar.

J. Murray. I was directed, that when I came to be examined here, I was to give a narrative of the springs, the rise and progress of

the late rebellion, as well as what related to the noble lord at the bar; but if I have committed an error, I readily submit to your lordships correction.

Earl of Cholmondeley. As the witness says he was directed to give a narrative, with regard to the whole rise and progress of the rebellion, I beg he may be asked by whom he was directed?

L. H. S. My lords, I did not at this distance hear the witness use the word 'directed;' but understood him only, that he was brought here to give an account of the rise and progress of the rebellion. Possibly it might escape me.

Earl of Chesterfield. I did not hear the word 'directed;' but I should be glad to have it cleared up.

L. H. S. Mr. Murray, when you spoke last of your giving a narrative of the rise and progress of the rebellion, did you make use of the word 'directed,' or not?

J. Murray. My lords, this is the first time I ever spoke in public; I may have committed an error; I cannot say whether I made use of the word 'directed,' or no.

Earl of Cholmondeley. My lords, I had no other intention in the question, but to know the meaning of the person who spoke the words; whether he apprehended that the general question asked him by the managers, was a direction to him, and whether that was what he meant?

J. Murray. My lords, some days after my examination in the Tower, by the honourable committee of the House of Commons, a gentleman, who I believed was their secretary, came to me to take a further examination; and to ask me as to any other matter that had occurred since my last examination. Some days after that, he told me, that I should be called here before your lordships, upon the trial of my lord Lovat; and that at the same time, it would be expected that I should give an account of the rise and progress of the rebellion in general.

Sir William Yonge. My lords, now the witness at the bar has explained what he meant by the word 'directed,' I hope your lordships will have no ill impression of the managers, from any thing that may have dropped from the evidence. And, my lords, I beg leave to assert, that no direction has been given to Mr. Murray by the managers; and that they neither have given, or will give, any direction to any witness whatsoever. My lords, we well know, that it does not become us to do any thing of that kind; nor have we done it. So far from it, that when we first examined the witness at the bar, we examined him solely to the point of the conduct of the noble lord at the bar. My lords, we did afterwards determine among ourselves, that as it was our duty to lay before your lordships that conspiracy wherein the noble lord at the bar appeared to have acted a part, we did therefore give Mr. Murray notice, that he would be examined be-

VOL. XVIII.

fore your lordships to that point. My lords, we never had any information from him on that subject; and this is the first time I ever heard him give an account of this general conspiracy. My lords, we were so careful in our examination of the witness in the committee, that I well remember the question's being asked him by the worthy manager who sits near me; and it was in the most general terms that we could conceive, in order to let your lordships into the knowledge of this matter. And your lordships will observe, through the whole course of this proceeding, that the utmost candour will be made use of by the managers, in their examination of the witnesses; and that they will put no leading questions to them, but general questions, and such as they are to answer upon oath, and according to the truth.

Earl of Cholmondeley. My lords, I beg leave to say, that I did not conceive that the Managers, in their examination of witnesses, made use of the least direction or authority whatsoever. I have the greatest sense of their candour and fairness; it is my opinion of them, and of the whole body by whom they are deputed; and it was upon that principle I proposed my question to the witness.

Lord Talbot. My lords, I pray that the witness may be asked, Whether he is, upon this occasion, a voluntary or an involuntary evidence?

Att. Gen. My lords, the Managers are now prosecuting for the whole Commons of Great Britain; they are prosecuting upon the foundation of evidence, for a treason of the greatest magnitude; there is now a witness at your lordships' bar, whom they are examining to prove that treason; and, while they are so, I hope they shall not be interrupted. There is no doubt, but when they have done with the examination of the witness, if any lord thinks proper to ask him any questions, your lordships have a right to do it: but we are now examining the witness on behalf of the prosecution; and we hope we shall have liberty to go through with it; and then your lordships will permit him to be examined by any body else: but, my lords, at present we are in possession of the witness; and we beg we may have liberty to go on.

Earl Stanhope. My lords, I beg the question proposed may be asked; or that we may adjourn to the Chamber of Parliament.

L. H. S. My lords, the rule for the examination of witnesses in this court, in either house of parliament, and every where else, is, that if a witness is produced by a prosecutor, or plaintiff, they have a right to examine him first: but if any objection is made to the questions asked by the prosecutors, whether they are Managers of the House of Commons upon an impeachment, or counsel upon an indictment, the objection is first to be considered; and if the objection prevails, and is allowed, then the question is not to be asked: but all questions that are asked, whether touching the matter of fact to be tried, or the credibility of

the witness, are to be asked at the proper time. The party who produces the witness has a right to go through the examination first; and then the other side cross-examines him; and after that is over, the judge asks him such questions as he thinks proper, unless, as I said before, there be any objection to the questions, or any doubtful matter arises that wants immediately to be cleared up. The same method is to be observed here; and the reason of it, my lords, is, that unless your lordships observe this method, you will be in perpetual confusion.

Earl Stanhope. My lords, the question now proposed, arose from an expression that just now dropped from the witness.

The Witness proceeded in his evidence.

J. Murray. My lords, this Butler, whom I mentioned to your lordships, was for some time in England during that summer that my lord Traquair was in London; when, to cover his intention, he bought up a number of horses for the king of France's use, and expressed himself so well pleased with the encouragement he had from the Pretender's friends in England, that he said, that, as soon as he went over, he would represent it in such a light to the king of France, his master, as he imagined, would induce him to send the succours desired. Upon his return to Versailles, where Drummond went with him, Drummond went to Rome, as he said, at the desire of the French court, to persuade the Pretender to send his son to France. Accordingly he did persuade him to do it; but Drummond returned to France, before the Pretender's son left Rome. After Drummond went to Paris, he came to London, to acquaint the friends of the Pretender in England, that the king of France was determined to send over a body of troops in the spring. This came to my knowledge by two letters from Drummond; the one written from Paris in December, and the other written from London. The first letter he sent over was not forwarded in time to my lord Traquair; but when Drummond returned, he found it lying here: he inclosed it in another letter; and they both came to my lord Traquair's hands at Edinburgh. In the first letter, he mentioned his intended journey to Rome: in the second, he mentioned his return to Paris, and the reason of his coming to London; and that he found the Pretender's friends there very backward: that with difficulty he had persuaded them to agree to the French's landing. In this letter, there were a great many contradictions and absurdities, in regard to the landing a body of troops in Scotland and England at the same time. It particularly mentioned, that earl Marshal was to command the 3,000 men that were to come from Dunkirk to Scotland; and at the end of the same letter he says, "But I do not know how my lord Marshal is to be equipped;" which, with other circumstances, determined us to write a letter to Drummond, to desire him to explain himself.

My lord Perth, and my lord Traquair, shewed me the letter, and desired I would prepare a letter to Drummond, desiring him to explain himself. Accordingly I wrote a letter in their presence, which they both signed; and I believe, I cannot say positively, that I signed it myself. This letter, as my lord Traquair said, was sent to London, to be forwarded to Drummond at Paris; but the person to whom the letter was delivered in London, wrote to Drummond, and told him, that such a letter was in his hands; and desiring to know, whether he should send it to him at Paris or not. Drummond said in answer, That he should not send the letter, lest it should be intercepted; but desired he would burn it.

Mr. Noel. What time was this?

J. Murray. In the month of January 1743.

Mr. Noel. According to what stile?

J. Murray. It was in the year 1743, not long before the intended embarkation at Dunkirk.

Mr. Noel. When was that?

J. Murray. To the best of my memory, in 1743.

Mr. Noel. Be pleased to recollect the time; because it is very material.

J. Murray. It was about two months before the intended invasion.

L. H. S. You may possibly recollect the time from the other circumstances. Do you remember the year of the battle of Dettingen?

J. Murray. I believe it was in the year 1743.

Mr. Noel. How long was this after the battle of Dettingen, that you speak of? Or was it in the January before, or after the battle?

J. Murray. I believe it was the January following.

Mr. Noel. It would be proper for you to recollect from these circumstances, if you can, whether it was in January 1743, or 1744, according to the Scotch stile?

J. Murray. January 1744, by the Scotch stile. In two weeks after, there was another letter came from Drummond, consisting of a few lines only, wherein he said, that, in all probability, before that letter came to hand, the Pretender's son would be landed in England, with the troops under the command of marshal Saxe. From this time to July following, so far as came to my knowledge, there were no accounts from abroad. It was proposed to me, as I had then an intention that summer of going to Flanders to see the army, that I should go the length of Paris, to know in what situation their affairs then stood. The first time I declined it; but was afterwards brought to agree to it, upon being shewed a letter of Mr. Semple, wherein he made a number of excuses for the intended invasion's not taking effect; and desired fresh assurances from Scotland, and that endeavours should be used in England: upon which I was pressed to go. We then thought it extremely necessary that we should know upon what footing things really were. I accordingly came to London, and from thence I went to the army

in Flanders, staid only a few days there, and then I went to Holland, and from thence, in a private manner, to Paris. When I went to Paris, I was introduced to the Pretender's son by Drummond and Semple. The first time I saw him, so far as I can remember, there was nothing essential passed. I desired to see him in private; which I accordingly did the next day. My design was to represent to him, that I thought the persons employed by him at Paris were imposing upon him; and that they had no other intention but to serve themselves, to keep up the spirits of the party in Britain, and thereby make themselves necessary to the party. With this intent, I explained the letter wrote by Drummond, endeavoured to shew the contradictions in it, and that Drummond endeavoured to serve himself, and not him. He said at that time, he was determined to come to Scotland.

Mr. Noel. Whom are you speaking of?

J. Murray. The Pretender's son. He mentioned the association; and said, he was determined to come into Scotland, and did not doubt but the king of France intended an invasion in the spring; but that he was then preparing for it, and intended to execute it as soon as the campaign was over; and that, if he did not do it before, he was determined to come into Scotland. I endeavoured to shew him, that the undertaking was desperate; and that he could not propose having above 4 or 5,000 men, supposing all the friends he could expect should be ready to join him: and it was seen afterwards, that he had not so many. Notwithstanding which, he insisted upon coming. I was so much against it, that I spoke to sir Thomas Sheridan, a person who lived with him for many years, and told him of the danger of such an attempt; and that it would be the ruin of many families, and the destruction of the country. Sir Thomas Sheridan said, he would endeavour to persuade him against it; and, upon his arrival in Scotland, told me he had; but to no purpose. After staying a few days in Paris, I returned to Scotland, where I gave an account, not to all, but to some of the persons concerned in the Memorial, of what had passed; and every body, but my lord Perth, declared against the Pretender's son coming into Scotland: upon which I wrote a letter to him, representing the opinion of his friends in Scotland, and setting forth the bad consequences of such an undertaking. This letter I committed to the care of a gentleman who was going to London, in the month of January 1745, Scotch stile. This was neglected to be forwarded, and was returned to me in the month of April following. I, notwithstanding, endeavoured to forward that letter several times; and there having been occasion to send from the west of Scotland, by my lord Perth's means, the packet was sent to France; but could not arrive in time, before the young Pretender set out. In June, I received a letter from the young Pretender, wherein he said, he was fully resolved and determined to come

into Scotland; and that he was to set out in June, and proposed to come to the west of Scotland; and appointed signals for his landing. Upon the receipt of this, I sent it, by an express, to my lord Perth; desiring him to forward the letter, or the contents of it, to Cameron of Lochiel's house, because I began to reflect, that it would be necessary some methods should be taken to inform the gentlemen in the Highlands, who were supposed to be ready, and to see if they approved of it. Upon that, I went to Cameron's house of Lochiel; who told me, that he had sent his brother doctor Cameron, with a copy of that letter, to the noble lord at the bar. Doctor Cameron returned the next day, and said he had accordingly gone to the noble lord's house; that he had told him he had business of consequence to impart to him; and that he had taken his promise to mention nothing of what was to pass between them: upon which, he shewed my lord Lovat a copy of the letter. I cannot say these were the very express words; but it was to this effect: upon which, the noble lord at the bar declared, That it was a foolish and rash undertaking; and that he should not land; and, if he did, that none of the men would join him. And this is what Dr. Cameron told me. And it was the opinion of all those of the Highlands, that he should not land, but return. They desired I would write a letter of the opinion of those gentlemen to the Pretender, and of the bad situation the country lay under; and to desire, as their utmost wishes, that he would return to France; which letter I did write: I wrote two of them, and committed them to the care of a gentleman; and which letters he received upon the island.

Mr. Noel. Who received them?

J. Murray. The Pretender's son. The first notice I had of his landing was by an anonymous letter that I received about a week after. It did not say expressly, that the Pretender was landed; but, by the words of it, I judged it was so. I was desired to come to the house of lord John Drummond: there I understood that he was landed; and, in a little time after, joined him, at the house of Mac Donald of——upon the west coast. About ten days after that, he erected a standard in a place called Glengarie; where he was joined by the Camerons, the Mac Donalds of Kepoch, and a few of the Mac Donalds of——. With those, he marched to the house of Mac Donald of Glengarie. There was a gentleman of the name of Fraser of Gortuleg, whom he there applied to, and the laird of Lochiel, as being persons acquainted with the noble lord at the bar. Lochiel told me there was such a person there; that there were two commissions granted by the old Pretender in favour of the noble prisoner, which he desired the young Pretender to send. Accordingly, I asked him for those commissions. He said they were in a trunk, with other papers, which he had left up the country, by reason of the ap-

proach of general Cope, who was then expected in the country; but desired, at the same time, that Mr. Kelley might write a commission; whether it was of lieutenant-general, or no, I cannot say; but I saw the commission written by Mr. Kelley. I was also to make an apology to my lord Lovat, why the original commissions had not been sent. Whether I made the apology verbally to Mr. Fraser of Gortuleg, or whether I did it by letter, I cannot say. I did not see it put into the packet, or sent; and I did not inquire whether he had received it, because I did not doubt of the thing. After the arrival of the Pretender's son at Edinburgh, nothing material relating to the noble lord at the bar happened between the last time I spoke of, and the time of his arrival there. Some time after the battle of Preston-Pans, Cameron of Lochiel came to me, and told me, that one Hugh Fraser, who had been clerk, or servant in some capacity, to my lord at the bar, but was then an attorney at Edinburgh, he was a fit person to send to my lord Lovat, to desire him to send out his clan. I agreed that he should go; and he had instructions so to do. Whether I wrote to my lord Lovat by Hugh Fraser, or no, I cannot recollect; very probably I did; but cannot say positively I did. The next thing, in regard to the noble lord at the bar, that happened, was upon the return of the Highland army from Derby to Glasgow. There this Hugh Fraser came to Glasgow; and this was the first time I ever saw him after he left Edinburgh. He came at that time, as he said, from Perth, and was sent, by the master of Lovat, to procure arms for a few men which he had under his command, and to know where he should join the army. It was then proposed to write to my lord the prisoner at the bar, to endeavour to persuade him to appear publicly in favour of the Pretender. This was agreed to, and the letter was wrote by Cameron of Lochiel, and signed by him, Clunie Mac Pherson, and myself. This letter was delivered to Hugh Fraser, with one that was wrote by the Pretender's son himself, a letter of compliment. I do not remember that there was any commission, or any thing sent, save these two letters, and a letter which I wrote to the master of Lovat, which was sent by Hugh Fraser. If there were any more sent, it is more than I can remember. Hugh Fraser at the same time asked, if there had not been a patent granted by the old Pretender to create my lord Lovat a duke: to which Lochiel answered, That if there had been any such granted, it was in the hands of his father John Cameron, who was then at Dumblain. It was for this reason that I did not address this letter or packet to my lord Lovat; but left that to the management of Hugh Fraser, if he should find the patent creating my lord Lovat a duke, when he should come to Dumblain. Hugh Fraser, at the same time, answered, That my lord Lovat had made a proposal, that lord John Drummond (it was either he, or my lord Strathallan,

who then commanded at Perth, or perhaps both of them) should march, with the troops under his command, to Inverness, and bring with him some more people of his own. The proposal, if it came from my lord Lovat, as Hugh Fraser said it did, was a very judicious one; and my lord Lovat must have desired it to cover his country from the troops then under lord Loudon's command, as my lord Lovat had left Inverness some little time before that. And the next thing that occurs to me, with respect to the noble lord at the bar, is, that while I was at Inverness, I received a letter from the hands of Fraser of Gortuleg. This, he said, came from my lord Lovat; but wrote to me seemingly in some clerk's hand. This letter was produced; but, one paragraph of it being very remarkable, I asked Gortuleg the meaning of it; and he said, That my lord Lovat was desirous of having that patent creating him a duke, which he expected some time before. I said, that I had no such patent; and told him, that he ought to put my lord Lovat off from any such expectation.

Mr. Noel. You said, that this letter came to you at Inverness; pray when did it come to you?

J. Murray. It was in the end of February, or beginning of March.

Mr. Noel. In what year?

J. Murray. In the year 1746.

Mr. Noel. According to the Scotch stile?

J. Murray. Yes. I had no occasion either to see or hear from the lord at the bar from that time for some weeks after the battle of Culloden; and, when in company with Lochiel, I was informed, that my lord Lovat was in that country, and that he lay at the place called Glenmely; and there was a boat sent to bring lord Lovat to the other side of the lake, where a meeting had been proposed by Lochiel. I believe that meeting was accidental in regard to the noble lord at the bar, because Lochiel expressed great satisfaction, that they should have lord Lovat's advice and assistance. Another reason which induced me to think so was, that Cameron sent a servant, with two horses, to procure wine and spirits from Beaufort, lord Lovat's seat, there being neither in that part of the country. Cameron of Lochiel, with some others, and I, came to the place where lord Lovat was: he was then upon the side of a lake.

Mr. Noel. What is the name of that place?

J. Murray. I heard it is called Morell, or Morlaig; but whether that is the real place, I cannot say. The first night we were together, or rather the only night that I was there, I do not remember that any thing material passed; but, in general, we told my lord Lovat, that there was a meeting to be the next day; and that we should be very proud of his advice. Accordingly, the next day there was a meeting of about twelve or thirteen gentlemen, where we did desire the noble prisoner at the bar to give his opinion. There were present Cameron of Lochiel, Barisdale, John Roy Stewart, and

Glenbuckett, Dr. Cameron, and a nephew of Kieppoch's, and some few others. I cannot particularly remember them all.

Mr. Noel. You have not said whether the noble lord at the bar was there?

J. Murray. Yes: he was at that meeting.

Mr. Noel. Did you see him there?

J. Murray. Yes. I proposed in that meeting, that my lord Lovat should give his opinion. My lord Lovat said, that, in his opinion, the only thing for the gentlemen there to do, was, to raise a competent number of men to protect their country, families, and cattle, and endeavour to defend themselves.

Mr. Noel. To protect their country! from what?

J. Murray. To protect or defend their country from the king's forces, who were then at Inverness: there were no other forces. The number of men then proposed to be raised was 3,000, or 3,500; a compact body, whom it was easy to find provisions for. This proposal was agreed upon; and the particular number of men that each gentleman should bring was agreed upon. Among the others, the clan of the Frasers was named for 400, to be commanded by the master of Lovat: but my lord Lovat himself would not answer for his son; but required Lochiel to answer for him. My lord Lovat said, that he was an old man, and not able to do any thing himself; and that he would not answer for his son's abilities; but desired they would let Lochiel answer for him; and that he did not doubt but he would do it. Lochiel accordingly answered for him. There was a sum of money distributed there, and, I think, about seventy louis-d'ors given to the servant of my lord Lovat, to carry to his son, as ten days pay for the 400 men which he was to bring out.

Mr. Noel. Was my lord Lovat present, or not, at the time you speak of, when that money was given to his servant?

J. Murray. I cannot say positively whether my lord Lovat saw the servant get the money; but it was distributed by a person who was my clerk; and my lord Lovat was at the other end of the room.

Mr. Noel. Was it in the same room?

J. Murray. Yes: my lord Lovat was in the same room that the money was distributed in. There were several persons there, to whom money was paid.

Mr. Noel. Can you name the servant who received it for lord Lovat?

J. Murray. No: I think he was called the steward of my lord Lovat.

Mr. Noel. From whence came the money?

J. Murray. From France.

Mr. Noel. What was the sum that came from France?

J. Murray. Thirty-five thousand louis-d'ors at that time.

Proclamation was made for silence.

After this meeting was over, so far as I can remember, I, with Lochiel, crossed over

to the opposite side of the lake; and my lord Lovat, as I understood, and he himself proposed, remained there all that night. Four or five days after, I had occasion to be at a place called Glendesherrrie, when my lord Lovat was on the opposite side, at a house formerly belonging to the brother of Lochiel. I went there to my lord Lovat the next day, with no intention to speak to him of business; but upon seeing his servant, to whom the money was given, I asked him, when he intended to send the servant away with it? He said, he should go that day, or the next; and then called a person who was called his secretary; and desired him to write a letter to the master of Lovat, in my name: but what were the contents of the letter, or that I saw it, I cannot remember; but I took it in general, that the contents of the letter were to give the master of Lovat the reason why the money was sent. I did not then stay above an hour or two with my lord Lovat, but returned to Lochiel. What was agreed upon at the meeting, and proposed to be done, did not take effect so soon as was expected; neither indeed, was there above 4 or 500 men in the whole, that met, about ten days after the time first proposed; that handful of men were two days at Lochiel's house before the king's troops marched northwards, in pursuit of them: upon intelligence that the king's troops were on their march, two men were ordered out, to see what number of men there were; and if we could make any head: they saw a great number of men; upon which we retired to the head of the lake; when it was determined, that we should disperse, and every one do the best he could for himself. From thence I went into the country that belongs to the clan Ronald, where I received a few lines by a young man, who said he was servant to my lord at the bar; wherein he said, It was necessary for him to have a watch or guard to attend him, of 22 men, and a lieutenant; and desired, that I might send him money, to pay those men 30 days pay, I think it was. I do not remember, that I wrote any answer to this letter, because I had no pen, ink, or paper: but I gave the servant 15 louis-d'ors, having then not much money; and desired him to give it to my lord Lovat. After that I had a message from the noble lord at the bar, by one Bishop MacDonald, desiring, that I would see him before I left the country; but so far as I remember, it was nothing farther than compliments. Since that time till yesterday, I never had the honour to see the noble lord at the bar, nor had any letters from him, nor corresponded with him.

Mr. Noel. Were the 15 louis-d'ors that you sent to my lord Lovat, part of the French money that was landed there?

J. Murray. Yes, it was part of the French money.

Mr. Noel. My lords, he has told your lordships already, that the men that were to be raised were to defend the country against the

king's forces: now I beg to know, whether it was mentioned at that meeting, where these men were to march, or where to rendezvous?

J. Murray. It was proposed, that the general rendezvous should be near to the house of Keppoch. Lochiel's people, Barisdale, and Clanronald's, were to have rendezvoused upon the lake, about two miles above Lochiel's house, and then to proceed to the general rendezvous, by Lochiel's.

Att. Gen. Pray, had you any blank letters from the young Pretender, after he came to England; or that were sent to you?

J. Murray. I had letters that were sent to me, and were not directed, but left with me, to deliver to such persons as I thought willing to support the cause.

Att. Gen. Please to give an account to my lords, what those letters were, and the import of them.

J. Murray. I do not remember the exact number of letters, but I did receive a number of letters; they were not directed, but left to be directed to such people in Scotland as were thought the best friends to the Pretender, and proper to cultivate a party for him in the country.

Att. Gen. Please to give an account to my lords, at what time these letters were delivered to you, and by whom.

J. Murray. There were some of the letters, either two or three of them, that I brought with me from Paris; and the others were sent to me; but who delivered them to me, I cannot particularly remember.

Att. Gen. Please to mention to my lords, who delivered you the letters you received at Paris.

J. Murray. The young Pretender himself.

Att. Gen. What were the directions he gave then?

J. Murray. There was a credential attached to every letter; and they were to be delivered to such persons as were disposed to promote his interest in the country.

Att. Gen. And what was the meaning of the credential? Was it signed by the young Pretender, or by any body?

J. Murray. Yes, by him.

Att. Gen. Please to give an account to my lords, to whom you delivered those letters.

J. Murray. One of those letters, together with the credential, I delivered at Edinburgh, to the laird of Mac Leod.

Att. Gen. Please to give an account to my lords, to whom you delivered any of those letters.

J. Murray. There was another of those letters sent to sir Alexander Mac Donald.

Att. Gen. You say it was sent; then you did not deliver it yourself?—*J. Murray.* No.

Att. Gen. Do you know whether it was received or no?

J. Murray. No, I never heard it was.

Att. Gen. Please to give an account to my lords, of any other of these letters which you delivered.

J. Murray. The other letters, so far as I can remember, were put into the custody of Lochiel, who was the proper person to send them to the people who were to have them: as to those who had them, I cannot distinctly name them all; but my lord Perth had one, I am sure.

Att. Gen. What time was it, that those several and respective letters were delivered?

J. Murray. They were delivered in the mouths of November and December, 1744.

Att. Gen. Was that after the time you came from Paris?—*J. Murray.* Yes, it was.

Att. Gen. Were they delivered, in order to forward the intended invasion from France, which you gave an account of before?

J. Murray. They were designed by the Pretender as letters to be given to people who were most his friends, to know whether or no they were ready to join him; and the credential annexed was for them to forward his interest in the country.

Mr. Noel. You have told us, that a computation was made at that meeting, of the number of men that could be raised; please to give an account to my lords, whether any particular person, and who, mentioned the number of troops that might be raised?

J. Murray. It was the general opinion, that 3,000 men should be raised; and my lord Lovat said, that such a number would be sufficient.

Mr. Noel. Did he mention any proportion of men that were to be raised by the master of Lovat?

J. Murray. He mentioned 400 Frasers, to be raised by the master of Lovat.

L. H. S. Gentlemen of the House of Commons, have you done with the examination of this witness?

Att. Gen. My lords, we have done with this witness at present.

L. H. S. My lord Lovat, the Managers for the House of Commons declare, that they have done with this witness at present: will your lordship ask him any questions?

Lord Lovat. My lords, I beg leave to tell your lordships, that I am the most incapable man of the three kingdoms to make my defence, because, as I mentioned to your lordships before, I want both my sight and my hearing; and I therefore begged of your lordships to allow my counsel to examine my own witnesses, and counter-examine the witnesses against me; but your lordships were not pleased to allow that. Your lordships are much more capable of examining the witnesses than I am; and therefore I shall refer it to your lordships; and beg leave to sit down. I will ask this witness no questions now.

Lord Talbot. My lords, I beg leave to ask this question: Did you voluntarily surrender yourself to the king's forces? or were you taken by the king's forces?

J. Murray. I did not intend, at that particular time, to surrender myself; and I presume it is not necessary for me to say now,

whether I ever did intend it or not : but at the time that the party of dragoons came to the house where I then was, the doors were shut, and I was in such a position, as that I could have killed two of them myself ; but I rather chose to submit myself, and throw down my arms.*

Lord Talbot. My lords, the question that

* The London Gazette, published by authority, July 5, 1746, relates it thus :

“Edinburgh, June 29.

“Upon information that John Murray, of Broughton, late secretary to the Pretender's son, had on Friday night dined at Kilbucco, and had that night gone to the house of Mr. Hunter of Polmood, who married Mr. Murray's sister ; John Smith, serjeant in St. George's dragoons, with seven private men then under his command at Broughton, was ordered thither with a guide ; and yesterday, at three o'clock in the morning, he seized Mr. Murray at the house of Polmood, and the same day he was brought before the lord justice clerk, and was committed close prisoner to the castle of Edinburgh. Upon his examination he declared, that the Pretender's son, with Sullivan and O'Neal, both Irish, and no other person in company, did, about four days after the battle of Culloden, go off from Moidart in an open boat, in order to get on board a ship : but that he (Murray) being at that time indisposed, was not able to go with him. The said Murray had been mostly with Lochiel, and his uncle major Kennedy, and his brother, in a starving way, lying on the sides of hills all day, and travelling or wandering all night, with scouts at a mile or half a mile's distance, never daring to stay two nights in a place. Lochiel was very ill, wounded in the heel, and obliged to use a horse ; and he (Murray), unable to bear fatigue and want any longer, crossed the hill without a servant, and came by Monteith to the place where he was taken.”

Mr. Justice Foster, in his *Crown Cases*, p. 50, makes this observation : “Note, This gentleman was made use of as an evidence against lord Lovat on his Impeachment. And it was suggested on that occasion, that the attorney-general's confessing the truth of the plea by warrant from his majesty, was a strain of prerogative, calculated to elude the force of the Act of Attainder, and to serve the turn of making Mr. Murray an evidence. But whoever considereth that he was actually brought before the lord justice clerk on the 28th day of June, (fourteen days before the time limited by the Act for his surrendering was expired) and was the same day by him committed to the castle of Edinburgh, where he was kept close prisoner till he was removed to the Tower ; whoever considereth this, must admit, that, with whatever view he might be brought up at this time, he had merely that justice done him now by his majesty's order, which at one time or other, whenever he should have

I ask is, Whether he did, or did not, voluntarily surrender himself ; and whether his intention was then to submit to the king's forces ?

J. Murray. I did say, that it was not my intention then particularly to submit myself ; it was not my intention till I saw the dragoons.

Lord Talbot. Did you use any means to make your escape afterwards ?

J. Murray. I never did.

Lord Talbot. Have you ever taken the Oaths of Allegiance and Fidelity to the king ?

J. Murray. I never did.

Lord Talbot. Did you never take those oaths, or oaths of the same nature to any body else ?—J. Murray. No.

Sir William Yonge. My lords, we hope the witnesses shall not be obliged to answer questions of this nature ; it is a question that tends to accuse himself of high-treason.

Lord Talbot. My lords, I did not ask him any question to accuse himself of any crime which he had not himself before confessed ;

been brought up, on the foot of the Act of Attainder, could not be denied him.

“The intent of the Act was answered by, his being made amenable to justice before the time limited for his surrender. And he being kept close prisoner till the day for surrendering was passed, it was put out of his power to comply strictly with the letter of it ; and therefore his non-compliance ought not to be fatal to him.” See *Roger Johnson's Case*, Foster, p. 46, *Strange*, vol. 2, p. 824.

The judge says further, (in a Note) “I have been informed that Mr. Murray was now brought up, to obviate an objection that might have been made to his evidence upon the authority of lord Duffus's Case, reported in Com. 440, but that case differeth from this. Lord Duffus was not amenable to justice before the expiration of the time given by the Act ; nor, merely through his own default, could be : but I doubt lord Duffus's Case savoured too much of the *summum jus*.” *Former Edition*.

As to the right in general of accomplices to a pardon, or to a recommendation to the king's mercy, see *Rudd's Case*, O. B. March 1775, B. R. 15 G. 3. *Leach's Crown Cases*.

In that case it appeared, that a woman who was offered as a witness against the prisoner, hoped and supposed that the conviction of the prisoner might and would be the means of procuring the pardon of the husband of the proposed witness, and thereupon it was objected that her testimony was inadmissible. But the Court (Aston, J., Burland, B. and Glynn, Serj. Recorder), after elaborate arguments, held that the objection would not go to her competency, though it would go very strongly to her credit, and her testimony was accordingly received.

See, also, in the same book, *Dr. Dodd's Case*, O. B. February 1777 ; and for more connected with the subject, *Peake's Law of Evidence*, c. 3, § 2, 3, and the authorities there cited. Also 3 T. Rep. 29. *

and as he had before accused himself of that crime, this may be said to be a continuation of it, but cannot be said to be a fresh accusation. I should not have asked him the question, if he had not before accused himself.

L. H. S. My lords, there is no reason to spend your lordships' time upon this point; for the gentleman has already answered the question.

Lord Talbot. Are you at present a prisoner, or under confinement?

J. Murray. Yes, I am, and have been ever since I came to the Tower.

Lord Talbot. Are you, upon this occasion, a voluntary evidence?

J. Murray. I should be glad to have the meaning of that question explained; and to know what is meant by a voluntary evidence.

Lord Talbot. My lords, the meaning of the question is, whether the witness is not an evidence in hopes of a pardon? and whether, if he himself was pardoned, he would be an evidence at all?

Att. Gen. My lords, on behalf of this prosecution, I must oppose that question's being asked. The question, as I understand it, is, whether the gentleman under examination is a witness in hopes of a pardon? and whether he would be a witness, if his pardon had been obtained? My lords, this is a question, as I apprehend, not proper to be asked, because it is no question as to any matter of fact, at all, but only a question concerning what the witness would do, upon supposition of a fact which has not happened. I do not apprehend, that any question can be asked of a witness, but what concerns a matter of fact; not what a witness would, or would not do, upon a future contingency. The question must tend to a fact, and the witness either is, or is not capable of giving evidence; but, my lords, to ask questions of this kind, is entering into the recesses of a man's heart, which nobody has a right to enquire into; and it is such a sort of question as I do not remember ever to have heard asked in a court of justice: and, perhaps, it is what the witness is incapable of answering; for, till the event happens, he cannot say what he would, or would not do. We therefore hope your lordships will think, that this is an improper question; and that the thoughts, inclinations, or wishes of a witness ought not to be enquired into here, where matters of fact only are to be tried.

Lord Talbot. My lords, I asked the question for this reason, that I might know with what view his evidence was given; and so judge of the credibility of it. Do you believe your life depends upon the conformity of the evidence that you shall give on this trial, to former examinations which you have undergone?

Sir William Yonge. My lords, I presume, without troubling your lordships with any argument, that all that has been said by the worthy manager who spoke last to oppose the former question, is much more applicable to the question now proposed to be asked; and, there-

fore, without adding any thing more why this question should not be asked, I shall submit it to your lordships; and humbly apprehend, it is our duty to oppose the asking of this question.

L. H. S. Gentlemen of the House of Commons, do you oppose this last question being asked?

Att. Gen. I should beg that the question might be a little more fully explained; I do not remember to have ever heard the like.

Lord Talbot. My lords, the question to me seems extremely clear and plain; and I beg leave to repeat it to your lordships; and if you have any difficulty about it, I will readily submit. My lords, the question is, whether you (the witness under examination) believe your life depends upon the conformity of the evidence you shall give upon this trial, to your former examinations? I suppose the gentleman was examined as well by the managers for the House of Commons, as their clerk.

Lord Halifax. My lords, all that the noble lord, who asked this question, means by it, is comprehended in the former question that he asked; and that is, whether the witness is a voluntary witness, or not?

L. H. S. The witness said, he did not know what was meant by the word 'voluntary'; and desired it might be explained.

Lord Talbot. My lords, I urged the other question only as explanatory to that; and all that I meant by it was to know, whether the witness at the bar is governed by hope or fear?

J. Murray. My lords, if your lordships please, I will answer the question: I am upon my oath, and obliged to tell the truth; and I say, that possibly, and very probably, had I been in another situation of life, I should not have appeared before your lordships as a witness against the noble lord at the bar.

Lord Talbot. My lords, I am extremely well satisfied with the gentleman's answer to the question; and it gives me a much better opinion of his evidence than I had before.

Lord Barrington. My lords, I beg leave to ask this witness a question explanatory to the last question. If you had a full pardon, and were at this bar, and were obliged to answer upon oath, would you not have given the same evidence that you now have given?

Lord Talbot. My lords, I apprehend that is only asking the witness, whether he would come here voluntarily, and perjure himself?

Lord Barrington. My lords, the question I proposed is not, whether the witness would come voluntarily to this bar? but whether, if he had a full pardon, and was brought to this bar (as every man may, whether free or not free), if he had a free pardon, and was compelled to give evidence, whether he would give the same evidence upon oath as he has now given?

Lord Talbot. My lords, this is a question that no man alive, in this gentleman's circumstances, can possibly answer.

J. Murray. My lords, I beg leave to answer the question. If I were in such a situa-

tion as has been now stated to your lordships, and brought here with a pardon in my pocket, but brought here to give evidence against the noble lord at the bar, I would not add to, or impair a syllable of, or vary in the least from, what I have now said.

L. H. S. Is the evidence you have here given upon your oath true?—*J. Murray.* Yes, it is.

Sir J. Strange. My lords, I beg leave to ask this gentleman a question, relating to a transaction which has been lately mentioned. He was asked, whether he did, or did not, surrender himself voluntarily to the king's forces? His answer was, that he could, he believes, have dispatched two of the dragoons, but that he did not make any resistance. Now I desire he may acquaint your lordships, whether that was, or was not, before the 13th day of July last?

J. Murray. It was upon the 28th of June last.

Sir J. Strange. My lords, I desire to know, whether or not, from that time till now, he has not been in custody, and amenable to justice?

J. Murray. I have been in custody ever since that time.

Att. Gen. My lords, I desire to know, whether he was then brought before any judge or justice of the peace, and whom.

J. Murray. I was carried to my lord justice clerk in Edinburgh, the day I was taken into custody.

Att. Gen. Were you then committed, or no, by the justice clerk?

J. Murray. I was that night committed, by the justice clerk, to the castle of Edinburgh.

Att. Gen. On the 28th of June?

J. Murray. Yes.

Att. Gen. Did you continue in the castle of Edinburgh from that time till you were sent from thence to London?

J. Murray. I did continue there till I came to London.

Att. Gen. Did you ever make, or endeavour to make, any escape all that time?

J. Murray. I never did.

A Lord. Did you at any time since you have been in custody, receive any hopes or promise of a pardon?

J. Murray. I have never, since I have been in custody, been promised a pardon, nor have heard a word of pardon mentioned to me since I was in custody.

Then the Witness, by the direction of the Lord High Steward, withdrew.

Sir R. Lloyd. My lords, The next witness we beg leave to produce, is Hugh Fraser of Dumballech: who was called in, and sworn.

Proclamation for Silence.

Sir R. Lloyd. Do you know the noble lord at the bar?—*Hugh Fraser.* Yes, I do.

Sir R. Lloyd. How long have you known him?

H. Fraser. I have known him many years ago.

VOL. XVIII.

Sir R. Lloyd. Do you remember whether you were sent for at any time and when, to the house of my lord Lovat?

H. Fraser. I got a message from Peter Fraser of Belladrum: it was he that brought me the message.

Sir R. Lloyd. From whom was that message brought?

H. Fraser. From lord Lovat, as he told me.

Sir R. Lloyd. When was that?

H. Fraser. I think it was about the end of September 1745.

Sir R. Lloyd. Were you sent for at any other time about this part of the year?

H. Fraser. I did not go upon the first message.

Sir R. Lloyd. Did you go upon the second?

H. Fraser. Yes, I did.

Sir R. Lloyd. What distance of time was there between the first and second message?

H. Fraser. I believe there might be a day or two: thereabouts, to the best of my memory.

Sir R. Lloyd. When you came to my lord Lovat's house, pray what passed between my lord Lovat and you?

H. Fraser. Upon my word, I cannot remember particularly.

Sir R. Lloyd. Do you remember whether any particular paper was shewn you at that time, and what it was?

H. Fraser. No, I don't remember seeing any particular paper at that time.

Sir R. Lloyd. Was there any paper read, or talked of, by any body at that time relating to the Pretender's son?

H. Fraser. There was a conversation there about that time, and to the best of my remembrance, it was about the troubles in the country.

Sir R. Lloyd. Did you ever see or read a paper said to be a Manifesto from the Pretender's son? Or did you ever hear it read?

H. Fraser. Yes, I did.

Sir R. Lloyd. Where did you hear it read?

H. Fraser. I read that paper in a back room at my lord Lovat's.

Sir R. Lloyd. Who gave it you to read?

H. Fraser. I cannot remember who gave it me to read.

Sir R. Lloyd. Do you remember who first shewed it you?

H. Fraser. My lord Lovat directed some person in the room to give it me: whether it was Robert Fraser, or not, I cannot say.

Sir R. Lloyd. Do you remember to have heard my lord Lovat say any thing of that paper?

H. Fraser. I have heard him say it was a pretty well wrote paper.

Sir R. Lloyd. I beg you'll inform their lordships, whether at that time you heard any conversation about the clan of the Frasers?

H. Fraser. Upon my word, I cannot remember whether I did or not, at that particular time.

2 X

Sir R. Lloyd. Did you about that time hear any thing about the clan of the Frasers?

H. Fraser. I heard them spoken of several times.

Sir R. Lloyd. Did you hear it spoken of, at any of those times, who was to command them?

H. Fraser. Yes; I heard that the master of Lovat was to command them.

Sir R. Lloyd. Who did you hear say that?

H. Fraser. I heard my lord Lovat say it.

Sir R. Lloyd. To what purpose did my lord Lovat say he was to command them?

H. Fraser. It was to go south.

Sir R. Lloyd. To join whom?

H. Fraser. To join the Pretender.

Sir R. Lloyd. What did he call the Pretender? by what name?

H. Fraser. He called him the Prince.

Sir R. Lloyd. Were there any other of the clans expected at that time to join the Frasers to march southwards?

H. Fraser. I heard my lord Lovat say, That he was uneasy about an answer to a letter which he or his son had wrote to the isle of Skye.

Sir R. Lloyd. From whom was that answer expected?

H. Fraser. From the laird of MacLeod.

Sir R. Lloyd. Did you hear my lord Lovat say what sort of answer he expected, or hoped for?

H. Fraser. By all that I could learn of the letter, it was a letter desiring that laird MacLeod's men should come and join them.

Sir R. Lloyd. A letter from whom, desiring that MacLeod's men might come and join them?

H. Fraser. I cannot be positive, whether it was from my lord Lovat, or his son.

Sir R. Lloyd. From whom did you learn the contents of the letter?

H. Fraser. I heard my lord Lovat speak of it.

Sir R. Lloyd. Was any application made to you concerning the raising of the men; or their joining?

H. Fraser. My lord Lovat asked me what number of men I could raise.

Sir R. Lloyd. Of what clan were you to raise them?

Sir William Yonge desired, that the last question might be repeated: which was done; and he made the same answer as before.

Sir R. Lloyd. What men did he speak of, and what clan?

H. Fraser. The Frasers: there are no other men in that part of the country.

Sir R. Lloyd. With what view were these men to be raised?

H. Fraser. To join the rest of the clan of the Frasers, which were to be commanded by the master.

Sir R. Lloyd. Did you tell my lord Lovat what number of men you thought you could raise?

H. Fraser. No; upon my word, I did not.

Sir R. Lloyd. Did you hear my lord Lovat say any thing about the raising his clan, and who was to raise them, or did raise them?

H. Fraser. I heard my lord Lovat say, That the master was the man that was to raise the clan, and to head them.

Sir R. Lloyd. Was he to do that by his own power or inclination, or by advice from any body else?

H. Fraser. That is a thing I can give but an opinion upon.

Sir R. Lloyd. What is your opinion upon it?

H. Fraser. That the master could not have raised the men, except my lord Lovat had countenanced the thing, and it had been done by his permission.

Sir R. Lloyd. Have you heard my lord Lovat say any thing in regard to his son's being active, or not, in raising the men?

H. Fraser. I have heard my lord Lovat say more than once, That his son was very slow in raising of the men.

Sir R. Lloyd. And did he say so as praising him for his slowness in raising the men, or as in dispraising him?

H. Fraser. I thought it was to dispraise it.

Sir R. Lloyd. Did you hear my lord Lovat say any thing of his own abilities or inabilities to raise men and head them?

H. Fraser. I have heard my lord Lovat say, That he was a tender, infirm man, and not able to go about these things himself.

Sir R. Lloyd. Have you heard him wish himself younger?

H. Fraser. I have heard him say, He wished himself younger, that he might go and command the men himself.

Sir R. Lloyd. Command them in whose service?

H. Fraser. In the Pretender's service, that he was talking of.

Sir R. Lloyd. Do you know what they mean by the fiery cross in that country?

H. Fraser. I remember the fiery cross when it went about my father's ground. It was a long pole; with two cross-sticks burnt at the fore-end; and the design of it was to raise the men, and to threaten them with fire and sword; that their houses should be burnt, if they did not rise.

Sir R. Lloyd. Was the fiery cross carried through the clan, that you know of, or have heard?

H. Fraser. I have heard, that it was carried through the clan: and I did not go about all the country.

Sir R. Lloyd. You say you saw it at your father's?—H. Fraser. Yes; I did.

Sir R. Lloyd. By whose order is it that those crosses are usually carried about to raise men in the several clans?

H. Fraser. Order is given by the person that wants the men.

Sir R. Lloyd. Is it not always ordered by the chief of the clan? Does any body but the chief of the clan take upon them to order it?

H. Fraser. I am an entire stranger to that: I never saw the thing before.

Sir R. Lloyd. When you were at lord Lovat's house at the time you speak of, did you observe any tents there?

H. Fraser. Yes; I observed some bell-tents there.

Sir R. Lloyd. What number of them?

H. Fraser. I cannot be positive, whether two or three.

Sir R. Lloyd. Were they new or old ones?

H. Fraser. They were new: they seemed to me to be new.

Sir R. Lloyd. What arms were upon them?

H. Fraser. My lord Lovat's crest was upon them.

Sir R. Lloyd. Did you see any colours?

H. Fraser. I saw colours at the house of Castle Downey.

Sir R. Lloyd. What arms were upon them?

H. Fraser. There was upon one large pair of colours my lord Lovat's arms, to the best of my memory.

Sir R. Lloyd. Do you know if my lord Lovat saw them?—*H. Fraser.* I cannot tell.

Sir R. Lloyd. Was any thing said to you, and by whom, to induce you to join the Pretender, more than you have given an account of already?

H. Fraser. There were several things dropped in conversation; but it is such a distance of time, that I cannot remember what they were.

Sir R. Lloyd. Was any person present there, besides yourself and my lord Lovat, when you was at his house?

H. Fraser. There were several persons there.

Sir R. Lloyd. Did any conversation then pass or not about throwing off the mask?

H. Fraser. Yes; Mr. Alexander Mac Leod, and several others of the country there, were speaking about the Pretender; and Mr. Alexander Mac Leod said, That much depended upon my lord Lovat's throwing off the mask, or words to that purpose.

Sir R. Lloyd. To whom did he say these words?

H. Fraser. To my lord Lovat.

Sir R. Lloyd. What answer did my lord Lovat make to that?

H. Fraser. My lord Lovat I saw take off his hat, and put it upon the ground, and heard him say, there it is then.

Sir R. Lloyd. Do you remember any particular healths that were drank then?

H. Fraser. I have heard the Prince's health drank several times there at the table at Castle Downey.

Sir R. Lloyd. Was my lord Lovat present, or not? Or did he drink it?

H. Fraser. My lord Lovat was present at the table.

Sir R. Lloyd. Do you know of any force that was made use of in that clan to make them rise?

H. Fraser. I know there went parties about.

Sir R. Lloyd. Did you hear my lord Lovat say any thing about his expectation which side would prevail?

H. Fraser. I heard my lord Lovat say, He was sure the Prince would prevail.

Sir R. Lloyd. Who did he mean? Who did he call the Prince? Who was he speaking of?

H. Fraser. Of the young Pretender.

Sir R. Lloyd. Do you know of any subsistence that was given by lord Lovat to any body?

H. Fraser. I have heard my lord Lovat say, that he had ordered his factor to give an allowance monthly or weekly to the wives and children of the men.

Sir R. Lloyd. Of whom?

H. Fraser. Of those that went with his clan.

Sir R. Lloyd. Upon what occasion did they go?

H. Fraser. Those men that were to go south with the young Pretender.

Sir R. Lloyd. Was it all, or only those that were to be in his clan?

H. Fraser. There were a great many in the country, that perhaps had nothing to support their families in their absence, when they were gone south.

Sir R. Lloyd. Do you know of any letter that was shewn you from the young Pretender, dispensing with my lord Lovat's personal presence?

H. Fraser. Yes; I remember to have read the letter.

Sir R. Lloyd. Who gave it you to read?

H. Fraser. My lord Lovat.

Sir R. Lloyd. From whom was that letter?

H. Fraser. He said it was from the marquis of Tullibardin.

Sir R. Lloyd. How was the letter signed?

H. Fraser. The letter was signed Athol, in large letters.

Sir R. Lloyd. What were the contents of it?

H. Fraser. I don't remember the particular contents of it. To the best of my memory, it appeared to be in return to another letter, which had been sent by my lord Lovat; and it was to excuse his personal attendance.

Sir R. Lloyd. Whose personal attendance?

H. Fraser. My lord Lovat's.

Sir R. Lloyd. His attendance where?

H. Fraser. To go south in the Pretender's service.

L. H. S. Where is that letter?

H. Fraser. I don't know.

L. H. S. You say my lord Lovat gave it you?—*H. Fraser.* Yes.

L. H. S. What did you do with it?

H. Fraser. I returned it again.

L. H. S. To whom did you return it?

H. Fraser. To my lord Lovat, or his secretary; I don't know which.

Sir R. Lloyd. Do you know whether there was any reward given to the clans, when they were raised, for their subsistence?

H. Fraser. I know there was meat, cows, and mutton given them.

Sir R. Lloyd. For what was it given them?

H. Fraser. To maintain those men.

Sir R. Lloyd. Where were they then?

H. Fraser. There were several of them about Castle Downey.

Sir R. Lloyd. By whose order were those things given?

H. Fraser. That I don't know, indeed.

Sir R. Lloyd. Did you ever hear my lord Lovat say any thing about their being maintained by his, or any body else's order?

H. Fraser. I don't remember, indeed.

Mr. Noel. My lords, the witness has already told your lordships what the noble prisoner at the bar declared about the person's success, whom he called the Prince: I beg he may inform your lordships, whether my lord Lovat, when he spoke about that success, did, or did not, say any thing about his sending for men, and for what purpose?

H. Fraser. I don't remember what he said at that particular time.

Mr. Noel. Do you at any other time?

H. Fraser. Yes, indeed: I heard my lord Lovat say, He would send his son and men.

Mr. Noel. For what?

H. Fraser. To serve the Prince.

Mr. Noel. Who did you understand he meant by the Prince?

H. Fraser. The Pretender's son.

Mr. Noel. You mentioned the particulars about pulling off the mask: You said, that Mr. Alexander Mac Leod said, That much depended on lord Lovat's throwing off the mask; that my lord Lovat, upon that, threw his hat upon the floor, and said, Then theret is: Pray what was the subject-matter of the conversation when that was done?

H. Fraser. The subject-matter of the conversation was the young Pretender's cause; and it was about that they were speaking at that time.

Att. Gen. My lords, the Managers have done with their examination of this witness.

L. H. S. My lord Lovat, has your lordship any questions to ask this witness?

Lord Lovat. My lords, there have been such proceedings against me since I was ordered to be tried, as never were heard of in Scotland or England.

L. H. S. In what respect does your lordship mean?

Lord Lovat. I mean, that after I was brought up to be tried before your lordships, the Impeachment had been read against me, my Answer put in to it, and the Commons had replied to it, and after I had leave to summon witnesses in my defence, I had summoned a great many witnesses out of Scotland to come here in my defence, I did not imagine there would be the least difficulty in their coming up: But, my lords, I find there was a person there, who was a kind of a deputy-sheriff, but never was known as an officer of justice, went to several private meetings, and endeavoured to prevent my witnesses coming up.

L. H. S. My lord Lovat, I would not interrupt you, if it were not for your own sake.

If your lordship has any matter of complaint, my lords will be ready to hear you at a proper time, upon a proper application: but this is not a proper time for such an application. You have counsel to advise you as to the proper method and time of doing it, with whom you must advise.

Lord Lovat. My lords, I was going to object to this witness before he was sworn, because he had been called in by that deputy-sheriff, who threatened the men, if they offered to come up to give evidence for me; and some were put in prison, and driven from their houses, particularly those they thought would favour me, after I had your lordships' order to summon my witnesses: And therefore, I shall object to any witness that shall come from that little court. I beg this witness may be asked, whether he was examined at Inverness before he came here?—*H. Fraser.* Yes, I was.

Lord Lovat. My lords, I thought, as I was to be judged in a court of the supreme judicature, and was innocent, that I was safe in such hands; but I cannot think myself safe, when such officers as those shall manage the witnesses, and threaten those who will not say as they say.

L. H. S. I have already told your lordship, that if you have any complaint to make, you must make it at a proper time, and in a proper manner; and my lords will hear it. You may go on to ask this witness any questions concerning any practices that he knows of.

Lord Lovat. My lords, I beg this witness may be asked, if he was examined upon oath, in December or January last, and by whom?

H. Fraser. Yes, I was examined at Inverness by one Killravock.

Lord Lovat. What is Killravock?

H. Fraser. He is a gentleman that lives about four miles from Inverness.

Lord Lovat. What is he?

H. Fraser. He had substitution from the sheriff-depute.

Lord Lovat. Did you see Chevis of Murtoun? What part did he act there?

H. Fraser. This gentleman had got a copy of the charge sent into the country; and he came in obedience to that charge, among the rest.

Lord Lovat. What is a charge?

H. Fraser. A kind of summons.

Lord Lovat. Were you threatened by any person, to give evidence against me? and by whom?

H. Fraser. I was not, indeed.

Lord Lovat. Were you promised any favour, or reward, for being evidence against me?

H. Fraser. No, indeed.

Lord Lovat. By whom have you been maintained since you came to London?

H. Fraser. I have been, since I came to London, in the custody of a messenger.

Lord Lovat. By whom were you maintained?

H. Fraser. I do not know at whose expence it was: I have had victuals and drink, and a bed; and never was asked for any thing.

Lord Lovat. Have you been in custody by any order, force or compulsion?

H. Fraser. No, not at all: I have not been under any order, force, or compulsion?

Lord Lovat. Since you have been at the house of the messenger, have you been at liberty to go where you pleased?

H. Fraser. I have gone abroad, walked in the park, and about Kensington; and I go out at night to take a glass.

Lord Lovat. When you went out, did not a messenger attend you?

H. Fraser. Yes, he went to take a walk with me.

A Lord. When was it that you were at lord Lovat's house, that he said he would send his son and clan into the Pretender's service?

H. Fraser. I think it was the beginning of October 1745; it was after the rebellion broke out.

A Lord. Where was it? and what persons were then present?

H. Fraser. It was in my lord Lovat's room, at Castle-Downey.

Sir J. Strange. My lords, I would beg leave to ask this witness one question for form's-sake: Pray what county is Castle-Downey in?

H. Fraser. It is in the county of Inverness.

A Lord. Pray, which of the prisoner's servants was present then?

H. Fraser. Upon my word, I can't remember that.

Lord Lovat. Did you receive any money, or were you promised any money, for your expences in coming to London, to be a witness against me?

H. Fraser. There was money given to bear our expences.

A Lord. Pray, who was present, when my lord Lovat said, that he would send his son, with his men, into the Pretender's service?

H. Fraser. I think there were several present; but I cannot condescend upon whom they were.

A Lord. Name any one of them: Was Alexander MacLeod there?

H. Fraser. I don't remember.

L. H. S. My lord Lovat, have you any more questions to ask this witness?

Lord Lovat. Not till I make my defence; and then I hope your lordships will give me liberty.

L. H. S. Does your lordship mean, that when you come to your defence, you would ask this witness any questions?

Lord Lovat. No, I don't mean that.

L. H. S. Your lordship will be at liberty to ask any other witness what questions you please.

Sol. Gen. Was the proposal of my lord Lovat, to send his son and clan into the Pretender's service, as you have mentioned, before or after the news of the battle of Preston-Pans came into that country?

H. Fraser. It was after.

Sol. Gen. Did you observe any difference in the behaviour of my lord Lovat, in regard

to his raising his clan, or taking any steps towards it, after the news of that battle, from what his behaviour was before?

H. Fraser. I did not see my lord Lovat before the battle of Preston Pans.

Sol. Gen. How long was it after the battle of Preston-Pans that you saw him?

H. Fraser. I don't remember.

Sol. Gen. Was it before the news came to Castle-Downey, of the troops from France being landed?

H. Fraser. Upon my word, I don't remember.

Then the Witness, by order of the Lord High-Steward, withdrew.

Lord Lovat. My lords, I beg your lordships' leave to withdraw for a little time.

The prisoner was carried from the bar accordingly.

Serj. at Arms. Our sovereign lord the king strictly charges and commands all manner of persons to be uncovered, on pain of imprisonment.

In about a quarter of an hour, the prisoner was again brought to the bar.

Att. Gen. My lords, the next witness we shall beg leave to produce, is John Riddell: who was called in, and sworn.

L. H. S. My lord Lovat, have you any objections against this witness John Riddell?

Lord Lovat. No.

Att. Gen. My lords, I beg this witness may give your lordships an account, whether he knows the noble lord at the bar.

Riddell. Yes, I do.

Att. Gen. Do you remember if you were at Castle-Downey soon after the battle of Preston-Pans?—Riddell. Yes, I was.

Att. Gen. Did you before that time see Barisdale, or any other person, there?

Riddell. Yes.

Att. Gen. Did he come there first by himself, or not?

Riddell. I saw Kinloch Moidart there.

Att. Gen. At that time?

Riddell. I cannot remember whether it was the same time, or not.

Att. Gen. How long was Barisdale there?

Riddell. Two nights.

Att. Gen. Did he bring any horses with him?

Riddell. Four dragoon horses.

Att. Gen. Whose arms were upon the furniture?

Riddell. The king's arms were upon them, and R and G, or a G and an R.

Att. Gen. Did you see any of the clan of the Frasers there?

Riddell. At the same time some of them were there.

Att. Gen. Was my lord Lovat there at that time?—Riddell. Yes.

Att. Gen. Did you ever see any of the chiefs of the clans dine at my lord Lovat's table?

Riddell. Yes.

H. Fraser. To maintain those men.

Sir R. Lloyd. Where were they then?

H. Fraser. There were several of them about Castle Downey.

Sir R. Lloyd. By whose order were those things given?

H. Fraser. That I don't know, indeed.

Sir R. Lloyd. Did you ever hear my lord Lovat say any thing about their being maintained by his, or any body else's order?

H. Fraser. I don't remember, indeed.

Mr. Noel. My lords, the witness has already told your lordships what the noble prisoner at the bar declared about the person's success, whom he called the Prince: I beg he may inform your lordships, whether my lord Lovat, when he spoke about that success, did, or did not, say any thing about his sending for men, and for what purpose?

H. Fraser. I don't remember what he said at that particular time.

Mr. Noel. Do you at any other time?

H. Fraser. Yes, indeed: I heard my lord Lovat say, He would send his son and men.

Mr. Noel. For what?

H. Fraser. To serve the Prince.

Mr. Noel. Who did you understand he meant by the Prince?

H. Fraser. The Pretender's son.

Mr. Noel. You mentioned the particulars about pulling off the mask: You said, that *Mr. Alexander Mac Leod* said, That much depended on lord Lovat's throwing off the mask; that my lord Lovat, upon that, threw his hat upon the floor, and said, Then there it is: Pray what was the subject-matter of the conversation when that was done?

H. Fraser. The subject-matter of the conversation was the young Pretender's cause; and it was about that they were speaking at that time.

Att. Gen. My lords, the Managers have done with their examination of this witness.

L. H. S. My lord Lovat, has your lordship any questions to ask this witness?

Lord Lovat. My lords, there have been such proceedings against me since I was ordered to be tried, as never were heard of in Scotland or England.

L. H. S. In what respect does your lordship mean?

Lord Lovat. I mean, that after I was brought up to be tried before your lordships, the impeachment had been read against me, my Answer put in to it, and the Commons had replied to it, and after I had leave to summon witnesses in my defence, I had summoned a great many witnesses out of Scotland to come here in my defence, I did not imagine there would be the least difficulty in their coming up: But, my lords, I find there was a person there, who was a kind of a deputy-sheriff, but never was known as an officer of justice, went to several private meetings, and endeavoured to prevent my witnesses coming up.

L. H. S. My lord Lovat, I would not interrupt you, if it were not for your own sake.

If your lordship has any matter of complaint, my lords will be ready to hear you at a proper time, upon a proper application: but this is not a proper time for such an application. You have counsel to advise you as to the proper method and time of doing it, with whom you must advise.

Lord Lovat. My lords, I was going to object to this witness before he was sworn, because he had been called in by that deputy-sheriff, who threatened the men, if they offered to come up to give evidence for me; and some were put in prison, and driven from their houses, particularly those they thought would favour me, after I had your lordships' order to summon my witnesses: And therefore, I shall object to any witness that shall come from that little court. I beg this witness may be asked, whether he was examined at Inverness before he came here?—*H. Fraser.* Yes, I was.

Lord Lovat. My lords, I thought, as I was to be judged in a court of the supreme judicature, and was innocent, that I was safe in such hands; but I cannot think myself safe, when such officers as those shall manage the witnesses, and threaten those who will not say as they say.

L. H. S. I have already told your lordship, that if you have any complaint to make, you must make it at a proper time, and in a proper manner; and my lords will hear it. You may go on to ask this witness any questions concerning any practices that he knows of.

Lord Lovat. My lords, I beg this witness may be asked, if he was examined upon oath, in December or January last, and by whom?

H. Fraser. Yes, I was examined at Inverness by one Killravock.

Lord Lovat. What is Killravock?

H. Fraser. He is a gentleman that lives about four miles from Inverness.

Lord Lovat. What is he?

H. Fraser. He had substitution from the sheriff-depute.

Lord Lovat. Did you see Chevis of Murtoun? What part did he act there?

H. Fraser. This gentleman had got a copy of the charge sent into the country; and he came in obedience to that charge, among the rest.

Lord Lovat. What is a charge?

H. Fraser. A kind of summons.

Lord Lovat. Were you threatened by any person, to give evidence against me? and by whom?

H. Fraser. I was not, indeed.

Lord Lovat. Were you promised any favour, or reward, for being evidence against me?

H. Fraser. No, indeed.

Lord Lovat. By whom have you been maintained since you came to London?

H. Fraser. I have been, since I came to London, in the custody of a messenger.

Lord Lovat. By whom were you maintained?

H. Fraser. I do not know at whose expence it was: I have had victuals and drink, and a bed; and never was asked for any thing.

Lord Lovat. Have you been in custody by any order, force or compulsion?

H. Fraser. No, not at all: I have not been under any order, force, or compulsion?

Lord Lovat. Since you have been at the house of the messenger, have you been at liberty to go where you pleased?

H. Fraser. I have gone abroad, walked in the park, and about Kensington; and I go out at night to take a glass.

Lord Lovat. When you went out, did not a messenger attend you?

H. Fraser. Yes, he went to take a walk with me.

A Lord. When was it that you were at lord Lovat's house, that he said he would send his son and clan into the Pretender's service?

H. Fraser. I think it was the beginning of October 1745; it was after the rebellion broke out.

A Lord. Where was it? and what persons were then present?

H. Fraser. It was in my lord Lovat's room, at Castle-Downey.

Sir J. Strange. My lords, I would beg leave to ask this witness one question for form's sake: Pray what county is Castle-Downey in?

H. Fraser. It is in the county of Inverness.

A Lord. Pray, which of the prisoner's servants was present then?

H. Fraser. Upon my word, I can't remember that.

Lord Lovat. Did you receive any money, or were you promised any money, for your expences in coming to London, to be a witness against me?

H. Fraser. There was money given to bear our expences.

A Lord. Pray, who was present, when my lord Lovat said, that he would send his son, with his men, into the Pretender's service?

H. Fraser. I think there were several present; but I cannot condescend upon whom they were.

A Lord. Name any one of them: Was Alexander MacLeod there?

H. Fraser. I don't remember.

L. H. S. My lord Lovat, have you any more questions to ask this witness?

Lord Lovat. Not till I make my defence; and then I hope your lordships will give me liberty.

L. H. S. Does your lordship mean, that when you come to your defence, you would ask this witness any questions?

Lord Lovat. No, I don't mean that.

L. H. S. Your lordship will be at liberty to ask any other witness what questions you please.

Sol. Gen. Was the proposal of my lord Lovat, to send his son and clan into the Pretender's service, as you have mentioned, before or after the news of the battle of Preston-Pans came into that country?

H. Fraser. It was after.

Sol. Gen. Did you observe any difference in the behaviour of my lord Lovat, in regard

to his raising his clan, or taking any steps towards it, after the news of that battle, from what his behaviour was before?

H. Fraser. I did not see my lord Lovat before the battle of Preston Pans.

Sol. Gen. How long was it after the battle of Preston-Pans that you saw him?

H. Fraser. I don't remember.

Sol. Gen. Was it before the news came to Castle-Downey, of the troops from France being landed?

H. Fraser. Upon my word, I don't remember.

Then the Witness, by order of the Lord High-Steward, withdrew.

Lord Lovat. My lords, I beg your lordships' leave to withdraw for a little time.

The prisoner was carried from the bar accordingly.

Serj. at Arms. Our sovereign lord the king strictly charges and commands all manner of persons to be uncovered, on pain of imprisonment.

In about a quarter of an hour, the prisoner was again brought to the bar.

Att. Gen. My lords, the next witness we shall beg leave to produce, is John Riddell: who was called in, and sworn.

L. H. S. My lord Lovat, have you any objections against this witness John Riddell?

Lord Lovat. No.

Att. Gen. My lords, I beg this witness may give your lordships an account, whether he knows the noble lord at the bar.

Riddell. Yes, I do.

Att. Gen. Do you remember if you were at Castle-Downey soon after the battle of Preston-Pans?—Riddell. Yes, I was.

Att. Gen. Did you before that time see Barisdale, or any other person, there?

Riddell. Yes.

Att. Gen. Did he come there first by himself, or not?

Riddell. I saw Kinloch Moidart there.

Att. Gen. At that time?

Riddell. I cannot remember whether it was the same time, or not.

Att. Gen. How long was Barisdale there?

Riddell. Two nights.

Att. Gen. Did he bring any horses with him?

Riddell. Four dragoon horses.

Att. Gen. Whose arms were upon the furniture?

Riddell. The king's arms were upon them, and R and G, or a G and an R.

Att. Gen. Did you see any of the clan of the Frasers there?

Riddell. At the same time some of them were there.

Att. Gen. Was my lord Lovat there at that time?—Riddell. Yes.

Att. Gen. Did you ever see any of the chiefs of the clans dine at my lord Lovat's table?

Riddell. Yes.

Att. Gen. Did you hear any healths drank there?—*Riddell.* Yes.

Att. Gen. Whose health did you hear drank?

Riddell. Prince Charles's health.

Att. Gen. Was my lord Lovat present at the time, or not?—*Riddell.* Yes.

Att. Gen. Did you ever hear my lord Lovat drink any of those healths?

Riddell. I cannot say that; I am not sure, it is so long since.

Att. Gen. Did you ever hear my lord Lovat drink any other healths relating to the rebel army?

Riddell. Never, to the best of my knowledge.

Att. Gen. Did you ever hear him say any thing, relating to his countenancing the rebel army?

Riddell. No, I do not remember.

Att. Gen. Pray give my lords an account, whether you ever saw any meal delivered out at my lord Lovat's.

Riddell. My lord Lovat has given precepts for meal several times.

Att. Gen. What do you mean by precepts?

Riddell. Precepts for so much oats for the horses, or meal.

Att. Gen. Do you mean by that an order?

Riddell. Yes.

Att. Gen. Pray, what was done with the meal that was ordered to you?

Riddell. I got a precept for two bolls of meal, in part of my wages.

Att. Gen. Do you know of any precept that was given to Thomas Fraser?

Riddell. Yes, for four bolls.

Att. Gen. For what?

Riddell. It is more than I can tell.

Att. Gen. Do you know any thing of bell-tents being made?

Riddell. Yes, I saw them made.

Att. Gen. Where were they made?

Riddell. At Castle-Downey.

Att. Gen. Was my lord Lovat there?

Riddell. Yes.

Att. Gen. What were they made for?

Riddell. I can't tell.

Att. Gen. By whose order were they made?

Riddell. I can't tell.

Att. Gen. What became of them?

Riddell. I heard they were sent to Perth.

Att. Gen. For whose use? for what purpose were they sent there?

Riddell. They went there with a company of men; I don't know for whose use they were.

Att. Gen. Who were the company of men?

Riddell. They were the Frasers.

Att. Gen. What were they collected together for?

Riddell. They marched southward, with a design to go to Perth, as I heard.

Att. Gen. Whose people were at Perth then?

Riddell. The rebel army.

Att. Gen. Did they march to join them?

Riddell. It is more than I can tell.

Att. Gen. Had you any orders from my lord Lovat, concerning the preparing yourself,

and horses, to go with my lord Lovat, or his son?

Riddell. Yes; he ordered me to get myself ready to go.

Att. Gen. Where were you to go to?

Riddell. With the master.

Att. Gen. Did not my lord Lovat tell you where he was to go to?

Riddell. No, he did not, to the best of my knowledge.

Att. Gen. Where did you understand he was to go to?—*Riddell.* To Perth.

Att. Gen. For what purpose?

Riddell. To join that army.

Att. Gen. What army do you mean; the king's army or the rebel army?

Riddell. I cannot tell that.

Att. Gen. How did you understand it? As you were to go to Perth, don't you know what army you were to join?

Riddell. There was no army at Perth but the rebel army.

Att. Gen. Do you remember any number of men passing by lord Lovat's house?

Riddell. Yes, very well.

Att. Gen. Did you see my lord Cromartie, or his officers there?—*Riddell.* Yes.

Att. Gen. How long did they continue there?—*Riddell.* One night.

Att. Gen. What time of the year was it?

Riddell. Hallowmass, or thereabouts.

Att. Gen. Did you hear my lord Lovat say any thing to these gentlemen, concerning his men being, or not being ready?

Riddell. I did not hear from my lord Lovat; I heard it from some of his servants.

Att. Gen. What did you hear?

Riddell. I heard the servants say, that my lord Lovat mentioned something about the men's not being ready.

Att. Gen. Did you hear my lord Lovat say any thing about it in the chamber?

Riddell. No; if it was spoken, it was in the Erse language; and I did not understand it.

Att. Gen. Was my lord Lovat present in the house when lord Cromartie was there?

Riddell. Yes.

Att. Gen. Did you see them together at table?—*Riddell.* Yes.

Att. Gen. Did you hear any of the conversation that passed betwixt them?

Riddell. No.

Att. Gen. Did you hear nothing concerning the drinking of any healths?

Riddell. No, not at that time I did not.

Att. Gen. At what time did you hear it?

Riddell. A good while before.

Att. Gen. What healths were drank? and by whom?

Riddell. The chieftains of the clans drank prince Charles's health.

Att. Gen. Was my lord Lovat present?

Riddell. Yes.

Att. Gen. Did he contradict the health?

Riddell. I did not hear he did.

Att. Gen. Were you present, or near, when a number of Frasers were drawn up?

Riddell. I saw 700 men together once.

Att. Gen. Where were they?

Riddell. In the Aird.

Att. Gen. Is that place near my lord Lovat's house?

Riddell. It is within half a mile.

Att. Gen. Was my lord Lovat there at that time?

Riddell. No, I never saw my lord Lovat there.

Att. Gen. Was he at home then?

Riddell. Yes.

Att. Gen. By whom were they drawn up?

Riddell. By my lord Lovat's chamberlain.

Att. Gen. Were there any officers among them?—*Riddell.* Yes.

Att. Gen. Where did the officers lodge?

Riddell. They went through into the country, to farmers' houses, change-houses, and ale-houses.

Att. Gen. Did any of them ever dine at my lord Lovat's house?

Riddell. Sometimes they did.

Att. Gen. Did they dine with my lord Lovat himself?—*Riddell.* Yes.

Att. Gen. Did he know, that there were 700 men drawn up there, or near that place?

Riddell. I cannot tell, whether he knew that there were 700 of them; but believe he knew they were there.

Att. Gen. Do you know what kind of mark they had upon their bonnets?

Riddell. They had a cockade, and sprigs of yew.

Att. Gen. What kind of cockades had they?

Riddell. White cockades.

Att. Gen. Was not that the distinguishing mark of the rebel army?

Riddell. Yes.

Att. Gen. Did they make use of the sprigs of yew as a distinguishing mark?

Riddell. Yes.

Att. Gen. Did you see any companies of those men there?

Riddell. Yes, three or four companies.

Att. Gen. Where did they march to?

Riddell. To the southward.

Att. Gen. Did you, at any time, see any of the officers take leave of my lord Lovat?

Riddell. Yes, I did.

Att. Gen. What passed upon that occasion? Which way did they take leave of one another?

Riddell. My lord Lovat shook hands with them, kissed them, and bid them farewell.

Att. Gen. Did my lord Lovat wish them any thing?

Riddell. I cannot say I heard that.

Att. Gen. Do you remember, that, at any time after, one Fraser of Byerly was with my lord Lovat?

Riddell. Yes, that man was always with my lord Lovat.

Att. Gen. Did you hear my lord Lovat ask him any questions about the Pretender's son?

Riddell. No, I never did.

Att. Gen. Recollect yourself, whether you did, or no?

Riddell. I cannot mind, indeed; if I did, it is out of my memory.

Att. Gen. Did you ever hear my lord Lovat ask any other person concerning the Pretender's son?

Riddell. I heard my lord Lovat once ask what sort of a man he was.

Att. Gen. Of whom did he ask that question?

Riddell. Some of the chieftains, some of them that had been at Falkirk; I do not know who they were.

Att. Gen. Do you remember what answer was given my lord Lovat to that question?

Riddell. I do not.

Att. Gen. Do you remember, whether my lord Lovat mentioned any thing to him concerning the Pretender's son's preservation?

Riddell. I do not.

Duke of Bedford. You say, that my lord Cromartie's men were at Castle-Downey, my lord Lovat's house: pray were they received there as friends; or did they come there by force?

Riddell. The men did not come to Castle-Downey; only lord Cromartie, his son, and the officers.

Duke of Bedford. Did they come there by force; or were they received as friends?

Riddell. They were in the house all night.

Duke of Bedford. Were they entertained as friends?

Riddell. I did not hear any thing to the contrary; they were lodged there all night.

Att. Gen. You say you heard my lord Lovat ask, what sort of a man the Pretender's son was? Pray, when was it that he asked that?

Riddell. I cannot name the time certainly.

Att. Gen. My lords, we have done with this witness.

Lord High Steward. My lord Lovat, the gentlemen of the House of Commons have done with this witness; will you ask him any questions?

Lord Lovat. When were you brought to town; and by whose order were you sent to town?

Riddell. I have been brought to town since the 24th of August; and was sent up by the judge-advocate.

Lord Lovat. What is the judge advocate's name?—*Riddell.* David Bruce.

Lord Lovat. Were you examined at Inverness, after the battle of Culloden? and by whom?

Riddell. I was examined by the judge-advocate, in the duke of Cumberland's lodgings.

Lord Lovat. When were you so examined?

Riddell. It was the 24th of April last.

Lord Lovat. Were you threatened by any person to give evidence against me? and by whom? and what was the expression used on that occasion?

Riddell. I was threatened to deliver up my money, but not about my being an evidence.

Lord Lovat. What were the threatenings?

Riddell. That they would put me in prison, and hang me next morning.

Sir John Strange. My lords, I would not interrupt the noble lord at the bar; but I would be glad to know who the witness speaks of.

Riddell. After I was examined, they heard I had some money: Brigadier Mordaunt demanded the money: and Mr. Bruce threatened, that if I did not give up the money to the brigadier, I must go to prison.

Lord Lovat. Were you a servant of mine?

Riddell. I served you for five years.

Lord Lovat. In what capacity?

Riddell. As a groom.

Lord Lovat. Were you taken prisoner?

Riddell. I delivered myself up to the duke of Cumberland, at Inverness, eight days after the battle of Culloden.

Lord Lovat. Who was it that threatened to hang you?—*Riddell.* The judge-advocate.

Lord Lovat. Did any person come to you, since you came to London, with a pretended letter, said to be signed by me?

Riddell. Yes; there was a man, whose name is Lesly, who came to see if I knew my lord Lovat's hand.

Lord Lovat. What was desired of you by that person? And what answer did you give him?

Riddell. I said, that I did not know, whether it was my lord Lovat's hand, or not; but that it did not look like it.

Sir William Yonge. My lords, I beg to know of this witness, whether he did, or did not, surrender himself a prisoner to the duke, at Inverness?

Riddell. Yes, I did: I delivered up myself to the duke, to get a pass to go to Edinburgh; but never was in the rebellion in my life.

Sir William Yonge. Did you come to Inverness on horseback?

Riddell. Yes; there were two of us.

Sir William Yonge. Whose horses had you?

Riddell. My lord Lovat's.

Sir William Yonge. You say there were two of you; and that you were both on my lord Lovat's horses: and that you were threatened to have your money taken from you?—*Riddell.* Yes.

Sir W. Yonge. Pray how came you by that money?—*Riddell.* By selling the horses.

Sir W. Yonge. Do you know, or were you informed of, the contents of the letter, which Mr. Lesly asked you, whether it was lord Lovat's hand?

Riddell. I never saw the letter, but the subscription; and he shewed me that, to see if I knew it.

Sir W. Yonge. Did not Lesly inform you what where the contents of the letter?

Riddell. No: to the best of my remembrance, he said it was signed by my lord Lovat in 1738.

Then the witness, by direction of the Lord High Steward, withdrew.

Sir W. Yonge. My lords, the next witness

we beg leave to produce is William Walker: Who was called in, and sworn.

L. H. S. My lord Lovat, has your lordship any objection to this witness?

Lord Lovat. No; I have none.

Sir W. Yonge. My lords, I beg leave to ask this witness, if he lived in my lord Lovat's family? and how long?

Walker. Yes; for three years and an half.

Sir W. Yonge. Do you remember any persons coming to him after the battle of Preston-Pans? and who were they?

Walker. Yes: There was Alexander MacLeod, and Mac Donald of Barisdale.

Sir W. Yonge. Was Kinloch Moidart there?

Walker. Yes.

Sir W. Yonge. Was young Glengary there?

Walker. Yes; He was there one day; [I think on a Sunday.

Sir W. Yonge. Did they dine at my lord Lovat's table?

Walker. Yes; all except Glengary.

Sir W. Yonge. Do you remember any healths that were drank?

Walker. Yes: I heard Barisdale drink the young Pretender's health.

Sir W. Yonge. By what name?

Walker. By the name of the Prince.

Sir W. Yonge. Was my lord Lovat present then?—*Walker.* Yes.

Sir W. Yonge. Do you know one Thomas Fraser, a baker?—*Walker.* Yes.

Sir W. Yonge. During the time that those persons were at my lord Lovat's house, did he give them any advice? and what was it?

Walker. I never heard it: It was always in my lord's room; and I never went in, but at dinner.

Sir W. Yonge. Did you hear them say any thing about the young Pretender, and the clan of the Frasers?

Walker. I heard my lord Lovat say, that they must take care not to let the young Pretender run into an engagement.

Sir W. Yonge. Do you know Thomas Fraser the baker?—*Walker.* Yes.

Sir W. Yonge. Was he at my lord Lovat's then?

Walker. He came to Castle-Downey, with some colours they were to make at Inverness.

Sir W. Yonge. What colours were they?

Walker. Two standard colours, four bell-tents, and two painted flags.

Sir W. Yonge. What were they painted with?

Walker. My lord Lovat's arms were upon the flags.

Sir W. Yonge. What became of those things?

Walker. Cameron sent them away, after my lord Lovat was taken.

Sir W. Yonge. Do you remember the marching of two companies to Perth?

Walker. Yes.

Sir W. Yonge. Do you remember soon after the master of Lovat's coming into the room, where you were?—*Walker.* Yes.

Sir W. Yonge. Was my lord Lovat there?

Walker. Yes.

Sir W. Yonge. What passed there between them?

Walker. When the master came into the room, my lord Lovat was speaking to him: I don't know what it was about.

Sir W. Yonge. What did the master do then?

Walker. The master rose up, and took his bonnet, and threw it upon the floor, and threw the white cockade in the fire, and damned the cockade.

Sir W. Yonge. What did the father do upon that occasion?

Walker. He rose up in a passion, and said, What could he do! and was forcing his son out.

Sir W. Yonge. I beg you'll inform their lordships, upon what occasion it was that the master of Lovat threw his cockade into the fire; and what his father had said to him to occasion it.

Walker. I don't know that, indeed.

Sir W. Yonge. Did you hear his father say any thing to him?

Walker. His father spoke to him in Erse.

Sir W. Yonge. Do you understand Erse?

Walker. No; I do not. The master of Lovat went to the door; and Mr. Fraser the minister stood up in the master of Lovat's behalf: Upon which, Mr. Fraser of Byerfield rose up, and said, What have you to do with it? You have no estate to forfeit.

Sir W. Yonge. What said my lord Lovat upon that?

Walker. I do not know what he said upon that.

Sir W. Yonge. Did they say nothing in English after that?

Walker. They spoke in a language I did not understand.

Sir W. Yonge. Did my lord Lovat say nothing in English?

Walker. Not that I know of: Only he said, What could he do more, he was forcing his son out, the very life of him?

Sir W. Yonge. Pray do you know upon what account that was said?

Walker. It was an answer he gave to Byerfield.

Sir W. Yonge. To whom did Byerfield speak, when he said, he had no estate to forfeit?

Walker. To Donald Fraser the minister.

Sir W. Yonge. Do you remember any thing about a smith and a tinker repairing any arms?

Walker. Yes; there was one Hugh Monro, and another.

Sir W. Yonge. How long was it that they were at Castle-Downey?

Walker. About a fortnight, I think.

Sir W. Yonge. Were there any arms where they were?

Walker. Yes; in the ward-room.

Sir W. Yonge. Where was the key kept of that room?

Walker. The key was very often in my lord Lovat's room, in his custody.

Sir W. Yonge. Did my lord Lovat usually give out that key to any body that went into

VOL. XVIII.

the ward-room? Or did he use to go there himself?

Walker. My lord always gave the key out to any body that wanted it, to get shoes for the horses, or the like: My lord never went there himself.

Sir W. Yonge. Do you know any thing of the smith and the tinker's going into my lord's room?—Walker. Yes.

Sir W. Yonge. What passed there? Did my lord give them any thing?—Walker. A dram.

Sir W. Yonge. Have you ever been in the ward-room?—Walker. Yes.

Sir W. Yonge. What was usually kept there?

Walker. Several sorts of things; it is more than I can tell how many.

Sir W. Yonge. Did you see any number of men rendezvoused in that neighbourhood?

Walker. Yes.

Sir W. Yonge. What number? How many companies did you see?

Walker. I don't know how many companies; the first of the rendezvous, we reckoned there were 7 or 800 men.

Sir W. Yonge. Were they armed?

Walker. Some of them were armed, and some not.

Sir W. Yonge. How far from Castle-Downey did you see those men?

Walker. About a mile from it.

Sir W. Yonge. Did you ever see them afterwards?

Walker. Yes; I saw a company of them drawn up on the green.

Sir W. Yonge. Was my lord Lovat at home then? Did he see them drawn up?

Walker. He was at home; but I believe did not see them.

Sir W. Yonge. How near is that green to my lord Lovat's house?

Walker. About 100 or 200 yards.

Sir W. Yonge. Do you know of any violence or force that was used to make the men rise?

Walker. The chamberlain forced them, and young Inverallachy.

Sir W. Yonge. In what manner did they force them?

Walker. They threatened to burn their houses, after the battle of Culloden, if they did not rise.

Sir W. Yonge. But, before that, how did they threaten them?

Walker. That they would take their cattle and plaids from them, if they did not rise. Lord Lovat was then a prisoner to my lord Loudon, and was then in his custody.

Sir W. Yonge. Do you remember when my lord Cromertie marched by my lord Lovat's?

Walker. Yes.

Sir W. Yonge. Was lord Cromertie, or his son, or any of the officers, at my lord Lovat's?

Walker. Yes: my lord Cromertie and lord MacLeod were there all night.

Sir W. Yonge. Did you hear my lord Lovat make use of any expressions, or excuse, that his men were not ready?

§ Y

Walker. My lord Lovat said, It was a shame to see lord Cromertie's men go by his nose: but what it was for, I can't tell.

Sir W. Yonge. My lords, we have done with our examination of this witness.

L. H. S. My lord Lovat, would your lordship ask this witness any questions?

Lord Lovat. Were you threatened by any one to give evidence against me? and by whom? And what were the expressions used on that occasion?

Walker. No, I was not.

Lord Lovat. Were you examined at Inverness? and by whom?

Walker. I was examined at Inverness by Mr. Bruce and brigadier Mordaunt.

Lord Lovat. What passed between you and Mr. Bruce?

Walker. I was examined: nothing passed between me and Mr. Bruce at that time.

Lord Lovat. Or at any time afterwards?

Walker. Now afterwards.

Lord Lovat. Was any force used to get out the men, while I was a prisoner, or while I was at home, or after my return from Inverness?

L. H. S. First, Was there any force used to get out the men, while my lord Lovat was at home?

Walker. I cannot truly tell that: it is more than I can tell.

L. H. S. Was any such force used while he was a prisoner at Inverness?

Walker. Lord Lovat was with lord Loudon when the force was used to raise the men.

L. H. S. Did you say that the dispute between lord Lovat and his son happened after the Frasers had marched southwards, or not?

Walker. It was the Frasers of Stratharick that had marched; there was not a man marched out of the Aird at that time.

Lord Lovat. Did I know of the marching of the men?

Walker. My lord Lovat knew nothing of it: it was Fraser of Byerfield that took as many of the Frasers as he could get to the castle of Culloden, in order to take the lord president prisoner: but my lord Lovat knew nothing of that; for when he heard of it, he was like to go mad; he cursed for a matter of two hours; and we had no peace with him.

Lord Lovat. Was that the occasion of my quarrel with my son?

Walker. No; my lord Lovat, nor the master of Lovat, knew nothing of it; for this Byerfield, as I heard, was designed to raise the men, without my lord Lovat's authority; and, if he had got the command of the house of Culloden, he would have kept them there: it was he that marched with the Stratharick men to Perth.

A Lord. Did my lord Lovat, or his son, know nothing of this?

Walker. No; they were 24 miles off.

A Lord. What was the occasion of the quarrel between lord Lovat and his son?

Walker. I cannot tell.

A Lord. Were you present in the room,

when the dispute began between my lord Lovat and his son?

Walker. No; I was not in the room: I came in with a dish in the mean time; and there was this little John Fraser of Byerfield speaking to my lord: my lord Lovat fell foul of the master, who rose up, and took his cockade off the 'scriptore, and threw the cockade into the fire, and damned it.

A Lord. What language did they talk in?

Walker. They talked in Erse, when I heard it first.

A Lord. You say, that Fraser the minister took part with the master?—*Walker.* Yes.

A Lord. Did he talk in Erse?

Walker. Yes.

A Lord. Then how do you know he spoke in favour of the master?

Walker. The reason why I knew it was, that little John Fraser flew up to Donald Fraser, and said, He had no estate to forfeit; and that, if he had got a stipend, it was all he had to take care of.

Lord Lovat. Do you know whether I used my endeavours to get my men home after they were taken out by Fraser of Byerfield, or any other person?

Walker. MacDonald of Barisdale would have my lord Lovat's men out, and was never away from the house; and there came on a great snow, that my lord Lovat's men did not go out at that time; but about two days after that, some of them went up to a hill with Barisdale's men; and they would take cattle, to maintain them upon the road: when my lord Lovat sent for them from Urquhart and brought them all back again. When there was any of them risen at all, then my lord was prisoner with lord Loudon.

A Lord. Pray what kind of servant is a chamberlain?

Walker. The steward, who gathers in the rents.

A Lord. Did you ever hear of the cross being carried about the country?

Walker. I never either saw it, or heard of it.

Lord Lovat. Do you know, whether Fraser of Dumballoch, that was here to-day, went out in arms, at the head of a company, to Urquhart, till I brought him home?

Walker. I saw him that day at lord Lovat's table; but whether he got to Urquhart, or no, I cannot tell.

A Lord. Did the men that went to Urquhart dine with my lord Lovat?—*Walker.* Yes.

Then the witness, by the direction of the Lord High Steward, withdrew.

Mr. Yorke. My lords, the next witness we shall produce, is Hugh Monro.

Hugh Monro called in.

L. H. S. My lord Lovat, has your lordship any objection against Hugh Monro's being examined as a witness?

Lord Lovat. Yes; he is my tenant.

L. H. S. Would your lordship have him examined upon that point?—*Lord Lovat.* Yes.

The witness was sworn upon a Voire Dire.

L. H. S. My lord Lovat, what questions would you ask him?

Lord Lovat. Have you any lands, houses, or yard, that you hold of me?—*Monro.* Yes.

L. H. S. What lands do you hold of my lord Lovat?—*Monro.* Six bolts a year.

L. H. S. How do you hold it of my lord Lovat, as vassal, or by lease or tack?

Monro. While I was a servant, I had it from him.

L. H. S. Do you hold it of my lord Lovat now?

Monro. Another man hath taken possession there.

L. H. S. Have you the same tenure under my lord Lovat as you had before?

Monro. Yes.

Att. Gen. My lords, I beg this witness may be asked, if he holds any lands of my lord Lovat at this time.

Monro. I have the same land that I had before; but another man hath it in possession ever since Whitsunday.

Att. Gen. What is that other man's name?

Monro. Kilbocky.

Att. Gen. How does he hold it of my lord?

Monro. I don't know.

Lord Lovat. Do you think you have any right to hold this land, though another man is in possession of it?

Monro. No, I have no right to hold it.

Lord Sandys. Why do you say you have no right to hold it?

Monro. Because the superior lord may turn me out of the land at any time.

Lord Sandys. Has the superior lord turned you out of the land?—*Monro.* No.

L. H. S. Whom do you take to be your superior lord?—*Monro.* My lord Lovat.

Sir W. Yonge. Had you any wages from my lord Lovat, while you were his servant?

Monro. Yes; I had.

Sir W. Yonge. What were the wages you had?—*Monro.* Five pounds a year.

Sir W. Yonge. Was it paid in money, or in lands of any rent?

Monro. It was paid in land.

Sir W. Yonge. Was that the land you now speak of which you hold of my lord Lovat?

Monro. Yes.

Sir W. Yonge. Have you any title to that land, now you are not his servant?

Monro. I don't know what way it is.

Sir W. Yonge. Do you think you have any claim to the land, now you are not his servant?

Monro. No; I have none.

Sir W. Yonge. How long have you left my lord Lovat's service?

Monro. I was always his servant: I did not leave his service.

Lord Lovat. The person that now is in possession of that land, has he it by my consent?

Monro. I don't know: the man that is in possession says he must have the rent this year.

Att. Gen. Did you ever hold this land by any writing?—*Monro.* No.

Att. Gen. Did you ever hold it by any contract for any certain term?

Monro. I had the land from my lord Lovat, for what I worked for him in the year.

Lord Lovat. Were you turned out of this land by force, or against your will?

Monro. No; I was not.

A Lord. By what means were you dispossessed of this land?

Monro. I have the same land yet.

Mr. Grenville. In what capacity were you a servant to my lord Lovat?

Monro. I was his blacksmith.

Mr. Grenville. Do you know the person, who, you say, is now in possession of that land?

Monro. Indeed do I.

Mr. Grenville. What is he? Is he a servant to my lord Lovat?

Monro. No: He is a gentleman.

Lord Halifax. My lords, I submit it to your lordships, as this witness has already contradicted himself several times, whether he should not be ordered to withdraw.

Sir J. Strange. I stood up to acquaint your lordships, that we should not insist on the examination of this witness; but desire it may be understood, that we only do that from the manner of his answering the questions which have been asked him; and do not thereby submit to the objection that has been made against him by the noble lord at the bar.

Then the witness, by direction of the Lord High Steward, withdrew.

The duke of Newcastle moved to adjourn to the chamber of parliament.

Lord Lovat. My lords, I have most humbly represented to your lordships every day of my trial, that I am so weak and feeble, that I am not able to attend your lordships. I fainted away thrice this morning, before I came up to your lordships' bar; but yet was determined to shew my respect to your lordships, or die upon the road. My lords, it is impossible for me to come up in the manner I have done for these three days past. I am every day obliged to get up by three or four o'clock in the morning; and therefore I beg your lordships to have compassion on me, and to give me a later hour, and a day's respite, that I may try to recover myself.

The Lord High Steward went back to his chair: and then the House adjourned to the chamber of parliament; and the Lords, and others, returned in the same order as before.

The House being there resumed,

Ordered, That this House will proceed further in the Trial of Simon lord Lovat in Westminster-hall, on Friday next, at eleven of the clock in the forenoon.

A Message was sent to the House of Commons, by Mr. Elde and Mr. Thurston, to acquaint them therewith.

Ordered, That the lieutenant of the Tower

of London, or his deputy, do take back the said lord Lovat, and bring him again to the bar of this House in Westminster-hall, on Friday next, at eleven of the clock in the forenoon.

THE FOURTH DAY.

Friday, March 13, 1746.

About eleven of the clock in the forenoon, the Lords, and others, came from the chamber of parliament, in the same order as on Monday last, into Westminster-hall: where the Commons and their Managers were in the seats prepared for them respectively, as before: and the Lords took their places in the Court; and the Lord High Steward in his chair.

L. H. S. The House is resumed. Is it your lordships' pleasure that the judges have leave to be covered?

Lords. Ay, ay.

Then the Serjeant at Arms made proclamation for silence; and afterwards the following proclamation:

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner, Simon lord Lovat, to the bar, pursuant to the Order of the House of Lords, to you directed.

The deputy governor of the Tower brought the prisoner to the bar, in the like form as before. And then he kneeled down.

L. H. S. Your lordship may rise.

The Lord High Steward desired leave to go down to the table; and went down accordingly.

L. H. S. Gentlemen of the House of Commons, you may proceed.

Mr. Yorke. My lords, the next witness we shall produce to your lordships is Thomas Fraser.

Thomas Fraser called into Court.

Mr. Yorke. My lords, we desire this witness Thomas Fraser may be sworn.

L. H. S. My lord Lovat, has your lordship any objection against Thomas Fraser being sworn as a witness?

Lord Lovat. My lords, I have no objection to him; but, my lords, I am not able to rise up, and sit down, having been ill all night, and am very ill now. I hope your lordships will excuse my rising up and down.

Thomas Fraser sworn.

Mr. Yorke. My lords, I would ask this witness, if he knows my lord Lovat? And I desire he would speak out.

T. Fraser. Yes, my lords, as well as I do myself.

Mr. Yorke. How long have you known him?—*T. Fraser.* Ever since I was a child.

Mr. Yorke. Have you been employed to work for my lord Lovat at any time about September 1745; and upon what occasion were you so employed? Answer the question distinctly.

T. Fraser. No; I never was employed by him.

Mr. Yorke. Were you employed at Castle-Downey about that time?

T. Fraser. Yes, I was at Castle-Downey, and was employed by my lord's chamberlain.

Mr. Yorke. About what business?

T. Fraser. About mending some old colours.

Mr. Yorke. And what else were you employed in?

T. Fraser. About some camp-colours.

Mr. Yorke. Were you employed in any thing else?

T. Fraser. Yes: there were some bells for arms that I was employed about.

Mr. Yorke. Who gave you directions about making these things?

T. Fraser. John Fraser, my lord Lovat's chamberlain or steward; and he paid me for my pains when I had done.

Mr. Yorke. At what house was this work done?

T. Fraser. Most of it was done at my own house at Inverness.

Mr. Yorke. Was none of the work done at Castle-Downey?

T. Fraser. There was a camp-colour, and some other things, done at Castle-Downey.

Mr. Yorke. Whose arms were put upon these colours, or bells for arms?

T. Fraser. There was no arms upon them, but the crest of lord Lovat's family, the deer's head.

Mr. Yorke. Was that crest put both upon the bell-tents and colours?

T. Fraser. It was upon the camp-colours, and bells of arms.

Mr. Yorke. Were the arms upon the colours?

T. Fraser. They were a stand of old colours that were done by Fraser.

Mr. Yorke. Where were these colours set up afterwards? Or, were they set up at all?

T. Fraser. Yes, I stuck them up on the green of Castle-Downey.

Mr. Yorke. Did my lord Lovat ever see them there?

T. Fraser. To my knowledge, he never did.

Mr. Yorke. What were those bell-tents and colours, which you painted, intended for? What was to be the use of them?

T. Fraser. I cannot tell that, upon my faith.

Mr. Yorke. Did my lord Lovat know of your being employed about these things?

T. Fraser. No; he did not, to my knowledge, as I shall answer.

Mr. Yorke. Who paid you for them?

T. Fraser. The chamberlain, or steward.

Mr. Yorke. Do you think the chamberlain would have paid you for them, without my lord Lovat's order?

T. Fraser. I can't tell that: let the judges determine that.

Mr. Yorke. Pray who used to pay you for work that you had done for my lord Lovat before that?

T. Fraser. The chamberlain.

Mr. Yorke. Was my lord Lovat in the house at the same time?

T. Fraser. Yes; he was in the house: he was very sick.

Mr. Yorke. Did you observe my lord Lovat ever look at these colours that you set up?

T. Fraser. I saw him one fair morning take a walk upon the green, and take an old colour in his hand.

Mr. Yorke. Did he see there the colours which you set up?

T. Fraser. Yes, the bells of arms and colours.

Mr. Yorke. Did he say any thing to you about them?

T. Fraser. Yes: he seemed to be very ill pleased.

Mr. Yorke. What was he ill pleased with?

T. Fraser. I don't know whether it was with the manner of doing the work, or because it was done at all.

Mr. Yorke. When his lordship expressed himself ill pleased, did he direct you to take them away, or not?

T. Fraser. No: they were to stay there till they were dried by the wind.

Mr. Yorke. When he expressed himself to be ill pleased, did he order them to be taken away?

T. Fraser. He did not speak a word to me afterwards about them.

Mr. Yorke. Do you know what became of these colours?

T. Fraser. No: I went home to Inverness, which is the place of my residence: but, when I am employed by any man, I must answer and obey.

Mr. Yorke. My lords, we have done with this witness.

L. H. S. My lord Lovat, will your lordship ask this witness any questions?

Lord Lovat. No, my lords.

Then the Witness, by direction of the Lord High Steward, withdrew.

Att. Gen. My lords, the next witness we shall produce is Hugh Fraser, who was secretary to my lord Lovat from 1741 to 1744, when Robert Fraser, who was before examined, became secretary in his room.

Hugh Fraser was called in.

L. H. S. My lord Lovat, Have you any objection to this witness?

Lord Lovat. No, my lords.

Lord Halifax. My lords, As the noble lord at the bar has complained, that he is sick and faint, I move, That your lordships may dispense with his rising up.—*Lords.* Ay, ay.

Hugh Fraser sworn.

Att. Gen. Do you know the noble lord at the bar?—*H. Fraser.* Yes.

Att. Gen. How long have you known him? and raise your voice.

H. Fraser. I've known my lord Lovat for about five years.

Att. Gen. Did you ever serve my lord Lovat, and in what capacity?

L. H. S. Raise your voice, Mr. Fraser.

Att. Gen. In what capacity did you serve lord Lovat?

H. Fraser. I served my lord Lovat in the capacity of a secretary.

Att. Gen. When did you first come into his service? and when did you quit it?

H. Fraser. I came into lord Lovat's service in April or May 1741, and left it towards the end of December 1744.

Att. Gen. Give an account to my lords, whether you were at Edinburgh in the month of September 1745?—*H. Fraser.* I was.

Att. Gen. Do you know one William Fraser of Belnain? Was he then at Edinburgh?

H. Fraser. Yes.

Att. Gen. Had you and he any, and what, conversation together? And did you come to any resolution upon it, in order to your going to my lord Lovat's?

H. Fraser. I had a conversation with Mr. Fraser.

Att. Gen. Did you two come to any resolution together concerning your going to my lord Lovat's, in relation to his son the master of Lovat?

H. Fraser. We did.

Att. Gen. Please to tell my lords what that resolution or agreement between you was.

H. Fraser. The resolution between Mr. Fraser and me was this, That as there had, at that time, a rebellion broke out in the north of Scotland, it was agreed between us to be proper, that I should go into the north country, in order to converse with my lord Lovat upon the subject of his son's going out of Scotland, to avoid any censure, or wrong interpretation that might be put upon his conduct, as he was then in that country.

Att. Gen. Had you and this Fraser, at that time any apprehensions that he might be prevailed upon to go into the rebellion?

H. Fraser. We had no grounds for any apprehensions, further than the spreading contagion there was at that time.

Att. Gen. Was there any proposal made by William Fraser, or you, to prevent his being infected with that contagion?

H. Fraser. The proposal made by Mr. Fraser, and agreed to by me, was, that he should be removed, and go abroad.

Att. Gen. Did you, or did you not, propose that he should go abroad?

H. Fraser. The thing was unanimous: I don't know which of us proposed it.

Att. Gen. To what place was he to go?

H. Fraser. We intended that he should go to Leyden.

Att. Gen. At whose expence was he to go to Leyden?

H. Fraser. The expence in the end was to fall on my lord Lovat; but it was to be defrayed by Mr. Fraser for a year, to be advanced by him.

Att. Gen. What was agreed upon, with res-

spect to making any proposal of this kind to my lord Lovat?

H. Fraser. It was agreed, that it should be proposed to my lord Lovat, and his son; and was not to be done without my lord's consent.

Att. Gen. Was it agreed upon, that you should go to my lord Lovat upon this proposal?

H. Fraser. Yes; it was.

Att. Gen. And did you go to him?

H. Fraser. Yes.

Att. Gen. And did you deliver the message to him?—*H. Fraser.* I did.

Att. Gen. And what answer did he give you?

H. Fraser. He approved very much of the proposal, and agreed to the thing.

Att. Gen. How long did he continue in that agreement to this proposal?

H. Fraser. Some days after, he said, He did not think it quite so convenient a thing; and that he had altered his mind in regard to that.

Att. Gen. Pray did he say any thing concerning his intention about the master his son's going into the rebellion?

H. Fraser. He communicated his design to me, when he talked to me on the subject; which was, that the master should.

Att. Gen. Should do what?

H. Fraser. Should go into the rebellion; that is to head the clan of the Frasers.

Att. Gen. Did you hear my lord Lovat say any thing, or no, concerning his own intentions originally to head the clan in the rebellion?

H. Fraser. My lord Lovat told me then, That he had intended to head them himself; but that he had altered his resolution.

Att. Gen. For what purpose, or with what view, did he alter his resolution?

H. Fraser. In order to stay himself at home, I suppose.

Att. Gen. And who was intended to go in his room?

H. Fraser. I said before, that the master was to head the Frasers.

Att. Gen. Did you mean by saying he altered his resolution, that he had resolved the master should go?—*H. Fraser.* Yes.

Att. Gen. Did you hear my lord Lovat say any thing concerning the number of men that he had thought might have been raised, or that would rise?

H. Fraser. My lord Lovat did talk to me of a greater number of men he thought might be raised, than was likely to rise.

Att. Gen. What number did he mention?

H. Fraser. If I remember right, he talked of 4 or 5,000.

Att. Gen. Did he give any reason, in relation to his resolution, concerning the master's going out, instead of himself?

H. Fraser. He told me, That he had once intended to have headed them himself, in expectation that there would be a rising of 4 or 5,000 men; but, as that was not then likely to happen, he intended that the master of Lovat should go with the clan, to head them.

Att. Gen. Please to give an account to my lords, if he, at that time, told you of any disappointment he met with from other people?

H. Fraser. He talked in general, that some people had not acted up to their engagements, or to that purpose.

Att. Gen. Please to give an account to my lords, if you remember the time when the battle of Preston-Pans happened?

H. Fraser. Yes: I remember the time very well.

Att. Gen. Were you at Castle-Downey after, or before that?—*H. Fraser.* After that battle.

Att. Gen. How long were you there after that battle?

H. Fraser. It may be about eight days after.

Att. Gen. Did any body come to Castle-Downey when you were there, and give an account to my lord Lovat of that battle; and who was it?

H. Fraser. There were several gentlemen came to Castle-Downey while I was there; who said they had been in that action.

Att. Gen. What did they say concerning it?

H. Fraser. What they said of it was, giving a history of the matter of fact.

Att. Gen. Whom did they give the history to?

H. Fraser. To the company, where I was present: I don't know to whom in particular.

Att. Gen. Was lord Lovat present at any conversation of that kind?

H. Fraser. I do not doubt but he was.

Att. Gen. Do you remember whether he was, or not?—*H. Fraser.* I believe he was.

Att. Gen. Did you hear lord Lovat say any thing, and what, concerning that battle?

H. Fraser. I remember to have heard my lord Lovat say, That it was a victory obtained, not to be paralleled in history.

Att. Gen. I beg you will give an account to their lordships, who the persons were that came to my lord Lovat's with this account of the battle? Please to name them.

H. Fraser. That they came with an account of the battle, is more than I can say.

Att. Gen. Who were the persons that told it; and who were there?

H. Fraser. Mac Donald of Barisdale was there.

Att. Gen. Was any other person there?

H. Fraser. There were with him servants, and one gentleman, I think, that was in company.

Att. Gen. Was young Glengarie there?

H. Fraser. Yes: The son of Glengarie was there.

Att. Gen. Were Barisdale and Glengarie in the rebellion, or no?

H. Fraser. So they said themselves.

Att. Gen. Are these the persons that said they had been in the battle?

H. Fraser. They said they had been there; and gave an account of their own conduct in it.

Att. Gen. What did they say they came northward for?

H. Fraser. That they told their real business, I cannot affirm. What they gave out

was, That they intended to levy more men, in order to prosecute the affair they had undertaken.

Att. Gen. What affair do you understand that to have been?

H. Fraser. The rebellion, sure enough.

Att. Gen. Was my lord Lovat present, or no, at the time when they declared what they came into the north for?

H. Fraser. He must have been present; because, where I heard them speak of it, was in his room.

Att. Gen. Do you remember my lord Lovat said any thing, and what, upon his being told of the views of Barisdale and Glengarie's coming into the north?

H. Fraser. He said, they might raise five thousand men: and I don't remember I heard him say any more upon this subject.

Att. Gen. How long did you continue at Castle-Downey this time that you went there?

H. Fraser. For a matter of twelve or fourteen days, I believe, at first.

Att. Gen. Whither did you go when you went from Castle-Downey?

H. Fraser. I returned to Edinburgh.

Att. Gen. Did my lord Lovat charge you with any thing to be communicated at Edinburgh, as from him?

H. Fraser. I am sorry to say he did.

Att. Gen. What was that charge my lord Lovat gave you to communicate? and to whom were you to communicate it?

H. Fraser. What my lord Lovat gave me in charge to communicate, was in import, the conversation I before mentioned to have passed at Castle-Downey, that he had once intended to have raised and headed such a number of men as I mentioned.

Att. Gen. What number was that?

H. Fraser. Four or five thousand, the number I have mentioned already.

Att. Gen. Pray give an account to my lords, of the remainder of the messages which my lord Lovat sent by you to Edinburgh.

H. Fraser. It was this: that he intended to have headed such a number of men; but that his age and infirmities would not allow him to do that; and that he had resolved his son should head the Frasers, and go into the rebellion.

Att. Gen. Did my lord Lovat add any thing to what you have now mentioned? Did he give any reason why he chose to send his son rather than go himself?

H. Fraser. I have given the reason already: to the best of my remembrance, that was the principal reason.

Att. Gen. Did he give any other? Did he mention any thing relating to his marks of affection for the cause?

H. Fraser. He said, the master of Lovat's going, for whom he had such regard, was a greater mark of his attachment and affection, than if he had gone himself.

Att. Gen. Did he, at that time, mention any thing of the danger there might be of

his going himself personally? and what danger was it?

H. Fraser. He talked much of the inconvenience and danger that would attend it; and mentioned the inconvenience of crossing the Forth; and that it could be done no other way than by the bridge of Stirling.

A Lord. I desire to know to whom the message was sent?

Att. Gen. I intended to ask the question the noble lord mentions. You were giving an account of some inconveniences that lord Lovat had mentioned; go on with it.

H. Fraser. I have given the reason why he did not go himself; I mentioned Stirling bridge; and he said it was impossible for him to cross the Forth elsewhere; and that might be very dangerous to him.

Att. Gen. To whom did he charge you with that message? or to whom was it to be delivered?

H. Fraser. To the Pretender's son.

Att. Gen. Did you, or did you not, deliver that message to the Pretender's son?

H. Fraser. I did deliver it to him.

Att. Gen. What answer did the Pretender's son give you to it?

H. Fraser. The answer he gave, was no more than that it was very well, or to that purpose.

Att. Gen. Who was it gave that answer to you?—*H. Fraser.* The Pretender's son.

Att. Gen. How long did you continue at Edinburgh after this, before you went from thence?

H. Fraser. I continued at Edinburgh from that time, which was the time of my arrival from the north, in the beginning of October, till the beginning of November after.

Att. Gen. Before you left Edinburgh, did any person, in behalf of the Pretender's son, come to you, and who, in order to employ you upon any message to my lord Lovat?

H. Fraser. I left Edinburgh twice; which of the times is meant?

Att. Gen. When you left Edinburgh at the beginning of November.

H. Fraser. Before I left Edinburgh in November, I was called upon by one who appeared to me to be in the service of the Pretender, and by him carried to Holyrood-House.

Att. Gen. Who was at Holyrood-House then?

H. Fraser. The Pretender's son was the principal tenant.

Att. Gen. When you came to Holyrood-House, who was the person you were brought before? and what conversation passed between you?

H. Fraser. I was brought before Mr. Murray.

Att. Gen. Who is he?

H. Fraser. John Murray of Broughton, who then took upon him the name of secretary to the Pretender's son.

Att. Gen. Was any body with Mr. Murray.

at the time you had this meeting with him, when you went to Holyrood-House?

H. Fraser. There were two or three gentlemen in the house.

Att. Gen. Can you name them?

H. Fraser. Some of them I can.

Att. Gen. Who were they?

H. Fraser. Cameron of Lochiel was one.

Att. Gen. Who was there else?

H. Fraser. Mac Donald, and Stuart of Ardshields; these three were in the room with Mr. Murray.

Att. Gen. Was Mac Donald of Keppoch there?

H. Fraser. Yes.

Att. Gen. What did Mr. Murray say to you upon that occasion?

H. Fraser. He told me, that there had been a letter intercepted from the north, which was directed to me; and that he understood, from that letter, that it was owing to me that the Frasers had not already marched.

Att. Gen. Marched whither?

H. Fraser. Marched, and gone into the rebellion; and that the letter bore, that none of them would march till I should go into the north country.

Att. Gen. Was any thing said concerning my lord Lovat upon that occasion?

H. Fraser. I believe Mr. Murray told me, that he had heard from a gentleman who was one of their own party, that my lord Lovat was very well disposed towards supporting the cause.

Att. Gen. Did he say any thing concerning my lord Lovat's intention to raise men, or no?

H. Fraser. I can't tell.

Att. Gen. In the letter was any thing of it mentioned?

H. Fraser. The letter I never saw: it was not given to me: I asked for a sight of the letter, and asked from whom it was written; and they told me it was from one of the Frasers.

Att. Gen. Did you give any answer to this, or no?

H. Fraser. The answer I gave was, that it was a misrepresentation of me, and a falsehood.

Att. Gen. In what respect was it a misrepresentation?

H. Fraser. Because the moving, or not moving of the Frasers, no way depended on me.

Att. Gen. Please to give an account, and go on with what passed between Mr. Murray and you.

H. Fraser. Mr. Murray said, that it was possible it might be so; but that it was necessary for the vindication of my character, that I should go into the north country.

Att. Gen. Go on.

H. Fraser. I told him that my business would not allow me to do it.

Att. Gen. What was agreed upon then?

H. Fraser. That I should write such an account of the situation of the rebel army at Edinburgh, as he then gave me; and they would be satisfied with such account.

Att. Gen. Did you, or did you not agree to this?

H. Fraser. I did agree to it.

Att. Gen. What was the consequence of that agreement?

H. Fraser. I agreed to it, and obtained a pass for the bearer of it; and, in consequence of that pass, I meant to send what I took to be the real state of the matter on both sides.

Att. Gen. Did you, or did you not write, according to this proposal?

H. Fraser. I went to write, and was about doing it, when I was called upon a second time by the same person who had called upon me before, and was brought by him to the same place.

Att. Gen. What passed when you were thus brought back to the same place?

H. Fraser. I was told that writing would not do, but I must go myself.

L. H. S. Who told you so?

H. Fraser. Mr. Murray.

Att. Gen. Be pleased to inform their lordships, what was done upon that. Did you, or did you not agree to go?

H. Fraser. In the end, I did agree to it, because I understood, if I had not, I must have expected a worse service.

Att. Gen. What was the message you were to go upon?

H. Fraser. The message I was charged with was to give such an account of their own situation as they had given me.

Att. Gen. Were you charged with any letter for my lord Lovat; and from whom?

H. Fraser. There was a letter from Mr. John Murray delivered to me, and directed to my lord Lovat.

Att. Gen. Was it delivered to you open or sealed?

H. Fraser. The letter was open when it was delivered to me.

Att. Gen. Did you or did you not read it?

H. Fraser. I did read it.

Att. Gen. Who delivered it to you?

H. Fraser. Mr. Murray.

Att. Gen. Pray, give an account to my lords of the contents of that letter that was thus delivered to you by Mr. Murray.

H. Fraser. The import, or contents of the letter, was, to the best of my remembrance, that Mr. Murray was extremely glad of the accounts he had received, with respect to my lord Lovat's intentions; and that he begged of him to persevere in them; and that he earnestly desired, that the Frasers should march forthwith: and I think, to the best of my remembrance, there was a route directed for them.

Att. Gen. Was there any place mentioned where they were to meet the army?

H. Fraser. The place where it was intended, according to that route, they should join the rebel army, was about Moffat or Carlisle.

Att. Gen. Did you go with that letter or not to my lord Lovat?

H. Fraser. I went into the north country;

and some time after my arrival at that place, I delivered that letter.

Att. Gen. To whom did you deliver that letter?—*H. Fraser.* To my lord Lovat.

Att. Gen. When you delivered lord Lovat that letter, did you give him any account of the situation either of the rebels, or the king's army, or of the affairs relating to the rebellion?

H. Fraser. I gave him the account, which I intended to have wrote, of the situation on both sides of the question, so far as I knew of it.

Att. Gen. What was that representation that you made, and did, in fact, deliver or give to my lord Lovat?

H. Fraser. The representation I delivered to my lord Lovat at that time was this, That with respect to the government, there were above 21 battalions of forces arrived from Flanders: that there were two regiments arrived from Ireland: that the Dutch auxiliaries were expected: and that the rebels did not seem to be a party sufficient, according to their number, to engage with such a number of regular and well disciplined forces.

Att. Gen. What did my lord Lovat say to this representation of yours, that you thus made to him?

H. Fraser. My lord Lovat said, that he conceived what I had said, with respect to the situation of affairs on both sides of the question, to be very true.

Att. Gen. What did he say, as the consequence of that belief of his?

H. Fraser. He further said,—But that he thought himself too far engaged to look back.

Att. Gen. Did he say any thing else relating to that matter?

H. Fraser. Yes, I believe it was part of the conversation, that he forbid me to mention or intimate any thing of the conversation that had thus passed between us to his son.

Att. Gen. Can you tell the reason why he was unwilling that his son should know of it?

H. Fraser. As for the reason that must depend upon my own conjecture, since lord Lovat expressed none.

Att. Gen. Did you continue at my lord Lovat's house after this for any, and what time?

H. Fraser. I continued from my arrival there, which was the beginning of November, till the middle or towards the end of December.

Att. Gen. You had by that an opportunity of seeing some of my lord Lovat's conduct, and hearing his conversation: please to give an account to my lords, whether there was any rendezvous of the Frasers, my lord Lovat's clan, during the time you were there?

H. Fraser. I heard there was a rendezvous before I came into the country; but I was present at none, nor saw any while I was there. I suppose by the word rendezvous, you mean a gathering of men.

Att. Gen. Have you ever seen any of them?

H. Fraser. I never saw an universal one, or general one: perhaps I might see forty or fifty men together at a time.

VOL. XVIII.

Att. Gen. Have you seen forty or fifty men at a time gathered together there, as a body of men in arms?

H. Fraser. No, I cannot say I did see, or was present at any gathering of men in arms.

Att. Gen. Did you ever see a list of the officers appointed out of my lord Lovat's clan?

H. Fraser. I have seen such a list.

Att. Gen. By whom was that list shewn to you?

H. Fraser. It was shewn to me by the master of Lovat.

Att. Gen. Do you know, whether my lord Lovat saw that list?

H. Fraser. I do not know that, indeed.

Att. Gen. Were you yourself appointed or named as one of the officers in that list?

H. Fraser. I was.

Att. Gen. What was the office or post you had there?

H. Fraser. I was named there a captain-lieutenant.

Att. Gen. Did my lord Lovat call you by that name or title, or by any other, after this time?

H. Fraser. My lord Lovat has called me by that name after this.

Att. Gen. Was it or was it not the usual name he called you by?

H. Fraser. Yes, very often.

Att. Gen. Did he ever call you by the name of captain before that time?

H. Fraser. No.

Att. Gen. What did you understand by your being called by that name by my lord Lovat? Did you understand by that, that he looked upon you as a captain or officer in his son's regiment?

H. Fraser. I understood by that, that my lord Lovat apprehended it was so wrote in that list.

Att. Gen. Did my lord Lovat understand by it, and so express himself, that you were actually a captain, as well as wrote so in that list?

H. Fraser. Actually a captain I was not; he could not understand what was not, because as I had not undertaken or done any thing, all the foundation he had for calling me captain, was owing to my name being in that list.

Att. Gen. Have you had any conversation with my lord Lovat concerning his dissatisfaction at his son's backwardness in raising the Frasers?

H. Fraser. I have heard my lord Lovat complain sometimes of his son's backwardness to raise the clan, and sometimes of his too much forwardness.

Att. Gen. Did you ever hear him say any thing concerning the consequence of this engagement of his in the rebellion, in respect to himself?

H. Fraser. I have heard him say, that he apprehended the conduct of his clan, upon this occasion, would be his ruin, and very probably cost him his life.

Att. Gen. I beg you will inform their lordships, whether the officers of this clan, or of

the master of Lovat's regiment, did or did not use to live or dine with my lord Lovat?

H. Fraser. I have dined at my lord Lovat's table several times, with the officers who were named in that list.

Att. Gen. Did you ever hear the Pretender's son spoken of at dinner, or at any other time, in my lord Lovat's house?

H. Fraser. Any particular conversation, with respect to the Pretender's son, I cannot recollect; but that he has been spoken of, there is little reason to doubt, because it was the topic of conversation in all the country.

Att. Gen. By what name or title was the Pretender's son usually called in the conversation between my lord Lovat and those officers?

H. Fraser. To the conversation between my lord Lovat and those officers, I cannot answer; but in the conversation upon that subject, in my lord Lovat's presence, I can say he was called prince Charles.

Att. Gen. Now, my lords, I will beg leave to ask the witness concerning another matter of fact: did you ever hear my lord Lovat say any thing concerning a patent to create him duke of Fraser, by the Pretender?

H. Fraser. I have heard him say there was such a thing in being.

Att. Gen. Did he ever say, whether he had or had not seen the original patent, or any copy of it?

H. Fraser. He did not say that he had seen the patent; I think he said he had never seen it.

Att. Gen. Did you ever hear him say any thing concerning any copy of it which he had?

H. Fraser. He shewed me half a sheet of paper, whereon was wrote what had been shewn or given to him, as a copy of such a patent.

Att. Gen. What patent do you mean?

H. Fraser. The patent to create him a duke.

Att. Gen. By whom was that patent said to be granted?

H. Fraser. The copy that I saw was in the name of one whom I took to be the old Pretender, who called himself James the 8th.

Att. Gen. How was that subscribed, do you recollect?

H. Fraser. I don't remember it was subscribed, or superscribed.

Att. Gen. Was there any name at the top of it?

H. Fraser. I really cannot say.

Att. Gen. That copy which you saw, by whom was it shewn to you?

H. Fraser. It was shewed me by my lord Lovat.

Att. Gen. You were saying, that you continued with my lord Lovat, from the second time you came to Castle Downey, to the latter end of December: Please to inform their lordships, if during that interval of time, any of the men of the Frasers did actually march, in order to go to the Pretender's army, or to join them?

H. Fraser. Yes; there were men that marched: about six or seven companies of men

marched about six or seven miles from their own country, to an adjacent country.

Att. Gen. What place was that they went to?

H. Fraser. It was a place called Urquhart.

Att. Gen. What became of those men? How far did they march?

H. Fraser. I said before, about six or seven miles.

Att. Gen. Were they afterwards recalled?

H. Fraser. They were.

Att. Gen. Who were they recalled by?

H. Fraser. They were recalled by a letter from my lord Lovat, directed to his son, the master of Lovat.

Att. Gen. Did, or did not, they comply with that letter which recalled them?

H. Fraser. The son complied; and they, in consequence, I suppose, complied with the son's orders.

Att. Gen. Did the whole clan comply?

H. Fraser. All, except about twenty five of them.

Att. Gen. Did they return to their own habitations?

H. Fraser. They returned.

Att. Gen. At or about what time was this?

H. Fraser. I believe it was in the month of November.

Att. Gen. Now, Sir, I would ask you, Did you take it, that the master of Lovat marched with them, by order of my lord Lovat; or was it out of his own head that he thus marched?

H. Fraser. The men had marched, and were in that country, before the master of Lovat went from Castle Downey: when he went from Castle Downey, it was not with a view to proceed upon that march, in case he should be able to prevail on the men to return. I went along with the master; and after we came where the men were, we called the officers together, and proposed to them that they should return: the only reason we gave them for this advice was, a storm of snow which then fell, and which would probably render their march very troublesome: but, by the influence of Mac Donald of Barisdale, it was carried against the master's sentiments that they should march. Upon that resolution, I returned to Castle Downey; and a few hours after my return, my lord Lovat wrote the letter I mentioned himself; which occasioned their coming back.

Att. Gen. Please to inform their lordships, whether you were sent at any time, by my lord Lovat, to the President of the session of Scotland: or mention first, if my lord President was at Inverness.

H. Fraser. He then was at his own house at Culloden.

Att. Gen. Was my lord Loudon there?

H. Fraser. He was at Inverness.

Att. Gen. Were you sent by my lord Lovat to the lord President, or to my lord Loudon, with any, and what message?

H. Fraser. I was sent by my lord Lovat to my lord President and my lord Loudon both.

Att. Gen. What was the message that you were sent with?

H. Fraser. The intention of the message was, to see to discover from those gentlemen, what would be the result of the Frasers marching, and going into the rebellion.

Att. Gen. Was that the intention of the message?—*H. Fraser.* Yes; it was.

Att. Gen. Did you carry any letter or letters from my lord Lovat to the lord President, or my lord Loudon?

H. Fraser. There was a letter I carried from my lord Lovat to the lord President.

Att. Gen. Did you know what were the contents of that letter? Did you read it?

H. Fraser. I did.

Att. Gen. What were the contents of it?

H. Fraser. The contents of it were, informing my lord President, that the master of Lovat had gone off in a headstrong way, and carried the Frasers into the rebellion.

Att. Gen. What did my lord Lovat mean by the word 'headstrong'?

H. Fraser. I suppose he meant, that it was contrary to his advice.

Att. Gen. When you came to my lord President, did you deliver that letter?

H. Fraser. Yes; I did.

Att. Gen. What answer did my lord President give to it?

H. Fraser. He told me by word of mouth, that the consequence that would arise to my lord Lovat from such a step taken by his clan, would in all probability be the seizing of his person, and making an enquiry into his conduct.

Att. Gen. Did you, or did you not, return with that answer of my lord President, and deliver it to my lord Lovat?

H. Fraser. I returned with that answer of lord President, and with an answer to the same purpose from my lord Loudon; and delivered them both to my lord Lovat.

Att. Gen. Were you likewise charged with a letter from my lord President to lord Lovat?

H. Fraser. My lord President did write to my lord Lovat,* in return to his letter.

* In former editions, the following Letter of the Lord President Forbes to Lord Lovat, and the Reply of the latter, were at a distance from the report of this Trial inserted from the "Memoirs of the Life of Lord Lovat, published in 1746." (They are to be found in several other publications):

**LORD PRESIDENT'S LETTER TO LORD LOVAT,
DATED AT INVERNESS, OCT. 28, 1745.**

"My lord; As I have now the honour of being charged with the public affairs in this part of the kingdom, I can no longer remain a spectator of your lordship's conduct, and see the double game you have played for some time past, without betraying the trust reposed in me, and at once risking my reputation, and the fidelity that I owe to his majesty as a good subject. Your lordship's actions now discover

Att. Gen. Did you see that letter?

H. Fraser. I saw it.

Att. Gen. Can you give my lords an account of the contents of it?

evidently your inclinations, and leave us no further in the dark about what side you are to choose in the present unhappy insurrection: you have now so far pulled off the mask, that we can see the mark you aim at, though, on former occasions, you have had the skill and address to disguise your intentions in matters of far less importance. And indeed, methinks, a little more of your lordship's wonted artifices would not have been amiss, whatever had been your private sentiments with respect to this unnatural rebellion. You should, my lord, have duly considered and estimated the advantages that would arise to your lordship from its success, and balanced them with the risks you run if it should happen to miscarry; and above all things, you ought to have considered your own safety, and allowed that the chief place in your system of politics; which, I persuade myself, would have induced your lordship to have played the game after a quite different manner, and with a much greater degree of caution and policy. But so far has your lordship been from acting with your ordinary *finesse* and circumspection on this occasion, that you sent away your son and the best part of your clan to join the Pretender, with as little concern as if no danger had attended such a step: I say, sent them away; for we are not to imagine they went of themselves, or would have ventured to take arms without your lordship's concurrence and approbation: this, however, you are pretty sure cannot be easily proved, which I believe indeed may be true: but I cannot think it will be a difficult matter to make it appear, that the whole strain of your lordship's conversation in every company where you have appeared, since the Pretender's arrival, has tended to pervert the minds of his majesty's subjects, and seduce them from their allegiance: and give me leave to tell you, my lord, even this falls under the construction of treason, and is no less liable to punishment than open rebellion; as I am afraid your lordship will find when once this insurrection is crushed, and the government at leisure to examine into the affair. And I am sorry to tell you, my lord, that I could sooner undertake to plead the cause of any of those unhappy gentlemen, who are just now actually in arms against his majesty, and I could say more in defence of their conduct, than I can in defence of your lordship's. The duke of Perth and lord Ogilvy never qualified, nor did they ever receive the smallest favour from the present government; but, on the contrary, were both stripped of their titles and honours, and from men of the first quality, reduced to the state of private gentlemen, since the Revolution, and may both be supposed to act from a principle of resentment, and only take up arms to recover what they thought themselves un-

H. Fraser. The import of it was what I already told their lordships.

Att. Gen. Did you; or did you not, go to my lord Lovat with those messages and this letter?—*H. Fraser.* I did.

justly deprived of. Lord George Murray never had any place or pension from the public, and was, no doubt, drawn in by the influence of the marquis of Tullibardin, perhaps, touched with pity and commiseration for his eldest brother, who has spent the best part of his life in exile, and undoubtedly upon an allowance much inferior to his dignity. These and such-like apologies may be offered in defence of most of the leading men in the present rebellion: but what shall I say in favour of you, my lord? You, who have flourished under the present happy establishment; you, who in the beginning of your days, forfeited both your life and fortune, and yet, by the benignity of the government, was not only indulged in the liberty of living at home, but even restored to all you could lay claim to! Nay, his majesty's goodness went so far as to employ your lordship in his service, and was pleased to honour you with the command of one of the independent companies that were raised some years ago in the Highlands, which you enjoyed for a very long time: so that both duty and gratitude ought to have influenced your lordship's conduct at this critical juncture, and disposed you to have acted a part quite different from what you have done. But there are some men whom no duty can bind, nor no favour can oblige; and, I am afraid, if a timely repentance do not prevent it, your lordship will, not unjustly, be ranked among that number. You now see, my lord, how unanimous the people of England are against the Pretender; and what forces they are mustering up to oppose him. The king has ordered home his troops; several noblemen have raised regiments at their own expences; and every county and corporation throughout the kingdom are entering into associations in defence of the present establishment: so that these few unhappy gentlemen, who are engaged in this rebellion, will have armies after armies to encounter, and if your lordship entertains any hopes of their success, you will find your mistake, when it is too late to amend it. What I would therefore propose to your lordship, as the only expedient left to rescue you from the hazard of a rigorous prosecution, is to recall your son and his men immediately. This step, I am persuaded, would produce several good consequences; for, on the one hand, it would prevent numbers from joining the rebels who now hang in suspense; and, on the other, occasion a great many of those already engaged to desert and retire to their respective habitations, and, perhaps, may be the means of crushing the rebellion, without further bloodshed; which would do your lordship a great deal of honour, and such a remarkable piece of service would be amply rewarded by the government. If you shall judge

Att. Gen. Before you delivered this letter, or these messages, had you any meeting with the master of Lovat?

H. Fraser. I had a meeting with the master of Lovat upon the way. It was concerted

it proper, my lord, to follow this advice, it will give me a great deal of pleasure, as it will contribute to stop the progress of an unhappy civil war, that threatens us with endless calamities; but if your lordship continues obstinate, and will not order your men to disband and return home, I shall be obliged to take you into custody, be the event what it will: and then your lordship will run the risk of having your family extirpate as well as others of the Highland chiefs. Now, my lord, I have told your lordship my sentiments pretty freely, and no less out of friendship to your lordship than duty to the public. I might have advanced many other arguments, to induce your lordship to follow my advice; but, methinks, what I have already said is sufficient; and so I shall only further add, that I am, "Your's, &c."

LORD LOVAT'S LETTER IN ANSWER TO THE ABOVE, DATED AT BEAUFORT, OCTOBER 29, 1745.

"My dear lord; I received the honour of your lordship's Letter late last night, of yesterday's date; and I own I never received one like it since I was born; and I give your lordship ten thousand thanks for the kind freedom you make with me in it: for I see by it, that for my misfortune, in having an obstinate, stubborn son, and an ungrateful kindred, my family must go to destruction, and I must lose my life in my old age. Such usage looks rather like a Turkish or Persian government, than like a British. Am I, my lord, the first father that has had an undutiful and unnatural son? Or am I the first man that has made a good estate, and saw it destroyed in his own time, by the mad, foolish actions of an unnatural son, who prefers his own extravagant fancies to the solid advice of an affectionate old father? I have seen instances of this in my own time, but never heard till now, that the foolishness of a son would take away the life and liberty of a father that lived peaceably, and was an honest man, and well inclined to the rest of mankind. But I find, the longer a man lives, the more wonders and extraordinary things he sees. Now, my dear lord, I beg leave to tell you my mind freely in my turn. I thank God, I was born with very little fear in the greatest difficulties and dangers by sea and land, and by God's assistance, I have often saved my life by the firmness and steadiness of my resolutions; and though I have now but a little remains of a life that is clogged with infirmities and pain, yet, by God's assistance, I am resolved to preserve it as long as I can. And though my son should give way with the young people of his clan, yet I will have 600 brave Frasers at home, many of them about my own age, that will lose the last drop of

between him and me before I set out upon that message, that he should meet me privately by the way in my return, in order to know what passed between my lord President and me, and my lord Loudon and me.

their blood to preserve my person; and I do assure your lordship, if I am attacked, that I will sell my life as dear as I can. For since I am as peaceable a subject as any in the kingdom, and as ready to pay the king's taxes, and to do every thing that a faithful subject ought to do, I know no law or reason that my person should not be in safety. I did use, and will use, the strongest arguments that my reason can suggest to me, by my cousin Gortulegge, that he may repeat them to my son; and if they should not prevail, is it any ways just or equitable that I should be punished for the faults of my son? Now, my dear lord, as to the uncivil war that occasions my misfortunes, and in which almost the whole kingdom is involved, on one side or the other, I humbly think, that men should be moderate on both sides, since it is morally impossible to know the event; for thousands, ten thousands, on both sides, are positive that their own party will carry. And suppose that this venturesome prince should be utterly defeat, and that the government should carry all in triumph; no man can think that any king upon the throne would destroy so many ancient good families, for engaging in a cause that was always their principle, and what they thought their duty to support. King William was as great a king, as to his knowledge of government and politics, as safe for many hundred years upon the throne of England; and when his general, who was one of the best in Europe, was defeat, and forced to run to save his life, and all his army routed at Killcranky by a handful of Highlanders, not full 2,000 in number, king William was so far from desiring to extirpate them, that he sent the earl of Breadalbane with 25,000*l.* sterling,* and sought no other conditions from them, than that they should live peaceably at home. So, my lord, we cannot imagine, that though the Highlanders should be defeated at this time, and most of them killed, and the government full masters of the kingdom, that any administration would be so cruel, as to endeavour to extirpate the whole remains of the Highlanders. Besides, it would be a dangerous enterprize, which we nor our children would see at an end.

"I pray God we may never see such a scene in our country, as subjects killing and destroying their fellow-subjects. For my part, my lord, I am resolved to live a peaceable subject in my own house, and do nothing against the king or government. And if I am attacked by the king's guards, and his captain-general at their head, I will defend myself as long as I have breath in me: and if I

* As to this, see the Case of the Massacre at Glenco, vol. 13, p. 879.

Att. Gen. Had you that meeting before your return?

H. Fraser. Yes, I had,

Att. Gen. What passed between you two at that meeting?

am killed here, it is not far to my burial-place; and I will have, after I am dead, what I always wished, the Coronach* of all the women in my country, to convey my body to my grave; and that was my ambition, when I was in my happiest situation in the world. I am, my lord, your lordship's, &c."

In the Appendix to the Report made by the Board of General Officers, appointed to enquire into the conduct of sir John Cope and others, is inserted a most characteristic Letter, dated Beaufort, August 10th, 1745, from Lovat to General Guest, who commanded at Edinburgh.

Notwithstanding the above Letter of October 28th from the Lord President, Lovat after he was taken had the assurance in the following Letter (see p. 238 of the "History of the Rebellion," Aberdeen, 1755) to the Duke of Cumberland, dated Fort William, June 12, 1746, to refer for a character of himself to the Lord President:

"Sir; This Letter is most humbly addressed to your Royal Highness by the very unfortunate Simon Lord Fraser of Lovat.

"I durst not presume to solicit or petition your royal highness for any favour, if it was not well known to the best people in this country attached to the government, such as the Lord President, &c. and by those that fre-

* "Coranich, Correnoth, Corynoch, Corrinnoch, Cronach. A dirge, a lamentation for the dead." Jamieson.

"There were two sorts of Coronach; that properly so called was the dirge which accompanied the deceased to their grave; the other, was a sort of war song, or dismal howl, which the women set up on seeing the *fiery cross*, from the anxiety they entertained about the safety of their husbands and friends in the approaching hour of battle." Arnot's Collection and Abridgment of Celebrated Criminal Trials, p. 87, 4to Edition of 1785.

"The Coronach of the Highlanders," says Mr. Walter Scott, "like the *Ululatus* of the Romans and the *Ulaloo* of the Irish, was a wild expression of lamentation poured forth by the mourners over the body of a departed friend. When the words of it were articulate, they expressed the praises of the deceased, and the loss the clan would sustain by his death." Note X to Canto III of the Lady of the Lake. Mr. Scott has inserted in his Note a Coronach literally translated from the Gaelic, and has in his poem exhibited a happy specimen of this sort of composition: See, also, in vol. 14, p. 367, a Note to the Case of Fraser and others.

H. Fraser. I made a report to the master of Lovat of all the conversation I had with those two gentlemen.

Att. Gen. Was there any thing concerted or agreed between you two upon that occasion?

H. Fraser. The result of our comparing our sentiments on that meeting was, that the master of Lovat, if it was possible, should be got immediately sent over to Holland; and that the scheme which he had proposed some months before, should then be put in execution, with respect to the master of Lovat's following

quented the court at that time, that I did more essential service to your royal family, in suppressing the great rebellion in the year 1715, with the hazard of my life, and the loss of my only brother, than any of my rank in Scotland: for which I had three letters of thanks from my royal master by the hands of the earl of Stanhope, then secretary of state; in which his majesty strongly promised to give me such marks of his favour, as would oblige all the country to be faithful to him. Therefore the gracious king was as good as his word to me, for as soon as I arrived at court, and was introduced to the king by the late duke of Argyll, I came by degrees to be as great a favourite as any Scotsman about the court: and I often carried your royal highness in my arms, in the parks of Kensington and Hampton-court, to hold you up to your royal grandfather, that he might embrace you; for he was very fond of you and of the young princesses. Now, Sir, all that I have to say in my present circumstance is, that your royal highness will be pleased to extend your goodness towards me, in a generous and compassionate manner, in my present deplorable situation; and if I have the honour to kiss your royal highness's hand, I will easily demonstrate to you, that I can do more service to the king and government, than the destroying a hundred such like old and very infirm men like me past seventy, without the least use of my hands, legs and knees, can be of advantage in any shape to the government.

"Your royal father, our present sovereign, was very kind to me in the year 1715. I presented, on my knees, to his majesty a petition in favour of the laird of Macintosh, to obtain a protection for him; which he most graciously granted me; and he gave it to Charles Cathcart, then groom of the bed-chamber, and ordered him to deliver it into my hands, that I might give it to the laird of Macintosh. This was but one testimony of several marks of goodness his majesty was pleased to bestow on me, while the king was at Hanover; and I hope I shall feel the same compassionate blood runs in your royal highness's veins.

"Major general Campbell told me that he had the honour to acquaint your royal highness, that he was sending me to Fort William, and that he begged of your royal highness to order a litter to be made for me, to carry me towards Fort Augustus, as I am in such a

his education at Leyden, or some other University in the Low Countries.

Att. Gen. What answer did you return to my lord Lovat in regard to these messages?

H. Fraser. I reported what was agreed upon between the master and me, and agreeable to my lord President's letter, and to my lord Loudon's verbal message by me: I say, we had agreed, that there was a report to be made agreeable to this resolution between the master and me, to my lord Lovat.

Att. Gen. Please to inform their lordships, in the first place, whether you delivered my lord President's letter to my lord Lovat?

H. Fraser. I did.

Att. Gen. And did you make a report to my lord Lovat, according to what was agreed upon between his son and you?

H. Fraser. I did.

Att. Gen. Please to repeat them again to my lords; and state what was the message you delivered to my lord Lovat, besides the letter.

H. Fraser. The report I delivered to my lord Lovat, besides delivering the letter, was this, that it was my lord President's belief, that an order would be immediately sent down from London for the seizing his person, and inquiring into his conduct; and that it was my lord Loudon's determination to put that order in execution, as soon as ever it came into his hands.

Att. Gen. Do you recollect any thing more concerning it? Do you remember whether it was to be put in execution, in case the Frasers did, or in case they did not march?

H. Fraser. In case the Frasers did march.

Att. Gen. Is this the whole substance of the report that you made to lord Lovat?

H. Fraser. Yes, so far as I remember.

Att. Gen. What answer did my lord Lovat make you upon that occasion?

H. Fraser. When I made the report, I do not remember any particular conversation that passed upon it.

Att. Gen. Did he give you any answer to it at any other time? and when?

H. Fraser. There was a conversation between us soon after about it: I believe it was the next day after my return to Castle-Downey.

condition that I am not able to stand, walk, or ride. I am with the utmost submission and most profound respect, Sir, your royal highness's most obedient and most faithful humble servant,
LOVAT."

In the book published in the year 1759, under the title of "Letters from a Gentleman in the north of Scotland to his Friend in London," is related a curious anecdote of feudal power and oppression, which it has been conjectured relates to lord Lovat. It is agreeable to what is said in the *Memoirs of the Life of Lord Lovat*, printed in 1746, of his habitual conduct towards his servants and other dependents.

Att. Gen. What did my lord Lovat then say to you relating to those messages, or to that report which you made?

H. Fraser. I believe my lord Lovat said, that he thought the report of securing his person, and enquiring into his conduct, was to be considered rather as a bugbear.

Att. Gen. Was the master of Lovat present at that time?

H. Fraser. Yes, he was.

Att. Gen. What did my lord Lovat say to his son upon that occasion?

H. Fraser. My lord Lovat told his son what I have already said, that he looked upon it to be rather a bugbear: and that it was his opinion, he should proceed in the undertaking he was engaged in.

Att. Gen. Did he, upon that occasion, give or make any orders concerning what was to be done?

H. Fraser. Yes, that the men should march immediately.

Att. Gen. Did he give any orders for it?

H. Fraser. Not in the way of an order.

Att. Gen. What did he say upon the occasion?

H. Fraser. That it was his opinion, that the men should march immediately.

Att. Gen. What men did you understand by that, were to march immediately?

H. Fraser. The clan of the Frasers.

Att. Gen. What march did you understand it was to be? Or, whither were they to march?

H. Fraser. To join the rebel army.

Att. Gen. Was there any other company present at this conversation, besides my lord Lovat, and the master, and you?

H. Fraser. Yes, there were two other gentlemen.

Att. Gen. Did lord Lovat then say any thing to them concerning it, by way of asking their opinion, or their agreement to it?

H. Fraser. He asked the opinion of all the gentlemen present, after he had given his own, by saying, that it was his opinion; and that he hoped all the gentlemen present agreed to it.

Att. Gen. What did you understand by that?

H. Fraser. That he hoped all present agreed to the opinion which he had delivered himself.

Att. Gen. Did you give any answer to that? or any opinion concerning it?

H. Fraser. Yes, I did.

Att. Gen. What was it?

H. Fraser. So far as I remember, the answer I made was, that my opinion had not been asked; but that, notwithstanding that, I thought myself obliged to give it: and it was this, that if the affair could not be entirely dropped, that it should be put off for some time.

Att. Gen. Did my lord Lovat give any answer to that?

H. Fraser. When I said, that my opinion had not been asked, he told me, that some

people's opinion might be easily read in their countenances, or words to that purpose.

Att. Gen. What answer did you make upon that?

H. Fraser. The answer I have already given.

Att. Gen. What answer did lord Lovat give as to the putting off the march for a while?

H. Fraser. No answer at all, so far as I remember. The master of Lovat, upon that, burst out into tears; and said, He had been made a fool of, and a tool from first to last.

Att. Gen. Did he say any thing more?

H. Fraser. Yes; he said, that he had been one day doing, and another day undoing; but that now he was determined, that whatsoever resolution lord Lovat should come to, that he would execute it, let the consequence be what it would with respect to himself, and other people.

Att. Gen. Was there any thing more passed? Did lord Lovat say any thing upon this occasion?

H. Fraser. My lord Lovat said, that he had given his opinion already; and that he would not alter it; or to that effect.

Att. Gen. You have seen my lord Lovat and his son pretty often together, and were at his house for two or three months together; pray what was your opinion as to the backwardness of the master of Lovat? or as to his obedience or disobedience to his father, in respect to his going into the rebellion? Do you think that the master was guilty of obstinacy and disobedience to his father in going into the rebellion? or that, by so doing, he complied with his father's orders and inclinations?

H. Fraser. If I am to form my opinion, with respect to the master of Lovat, upon his own good sense and understanding, or his avowed principles, I should apprehend, that he would not have gone into the rebellion, had he been left to himself: And if I am to form my opinion upon the private conversation I had with him, and particularly one, which I remember I had in Urquhart; I say, if I am to form my opinion upon what he declared with respect to his intentions and sentiments declared to me, it is my belief, that he would not have had any concern in this rebellion, had he been entirely left to himself.

Att. Gen. I desire to ask you, Sir, whether, from your knowledge of the situation of the clan of the Frasers, and of the power and influence which either my lord Lovat or the master had over them, do you think, that the master of Lovat could have raised the clan, without the concurrence and order of my lord Lovat?

H. Fraser. I believe, had the lord Lovat and the master acted in direct opposition the one to the other, that the clan would have been divided; and part would have gone with one, and part with the other; but what part to either of them, is what I cannot determine.

Att. Gen. About what time was it that the news came first to Castle-Downey of the

landing of lord John Drummond with soldiers from France?

H. Fraser. It was about a day before I went to my lord President, or that day.

Att. Gen. I desire to know, whether, in your opinion, that news had any influence to determine my lord Lovat's conduct at that time?

H. Fraser. I cannot take upon me to say what it was that determined my lord Lovat's conduct.

Att. Gen. Did you hear my lord Lovat say any thing about that particular event of lord John Drummond's landing then?

H. Fraser. I have heard my lord Lovat report what intelligence had been returned to him on account of that landing.

Att. Gen. Please to give an account to my lords when the master of Lovat and the Frasers did march? and where they marched to?

H. Fraser. Some part of the Frasers marched at one time, and some at another: Some of them marched a short time after this conversation passed between my lord Lovat and the master, at which I was present.

Att. Gen. Where did they march first?

H. Fraser. They marched first to Perth; but the master of Lovat did not go along with them.

Att. Gen. Did my lord Lovat know, or not know, of their marching?

H. Fraser. That I don't know of my own knowledge; but that my lord Lovat must have heard of their march, is certain.

Att. Gen. Did they, or did they not, march against his orders?

H. Fraser. Truly that is what I cannot easily answer: He certainly gave orders for them not to march sometimes, and it was sometimes given out, that he gave orders for their marching; but I did not see either of these orders.

Att. Gen. Please to give my lords an account when the Frasers did march to Perth? and be as correct as you can.

H. Fraser. The times that they marched were different.

Att. Gen. Did they march in large numbers?

H. Fraser. They marched in very small numbers, not, I believe, above fifty at a time; and the number that marched in all was but very small.

Att. Gen. What number do you suppose might march?

H. Fraser. When they were strongest at Perth, they were between two and three hundred at most.

Att. Gen. Please to give an account to my lords, whether my lord Lovat was apprehended by lord Loudon's, or my lord President's order? and when?

H. Fraser. The next morning after the conversation passed between the lord Lovat and the master, as I mentioned already, I left Castle-Downey.

Att. Gen. Were the Frasers then gone, or were they going to Perth?

H. Fraser. I believe there were none of them gone at that time; but I cannot say that I remember positively; but their march was then resolved on.

Att. Gen. Do you remember when it was precisely that you came from my lord President's to my lord Lovat?

H. Fraser. I do not remember the precise day of the month.

Att. Gen. About what time of the month was it?

H. Fraser. I dare say it must be about the beginning of December.

Att. Gen. You say that you went to Perth with the master of Lovat; pray who was with you?

H. Fraser. The master and I went to Perth by ourselves alone.

Att. Gen. When you came there, where was the body of the rebel army?

H. Fraser. I believe it was in England.

Att. Gen. How soon after that did they come into Scotland again?

H. Fraser. About two or three weeks at most, after the master and I had got to Perth, there came an account, that the rebel-army had returned to Glasgow.

Att. Gen. Had you any orders from the Pretender's son about marching?

H. Fraser. There were orders given by Mr. Murray, that the rebel forces should march to Stirling, to join those coming from Glasgow.

Att. Gen. Did the Frasers go thither?

H. Fraser. They did.

Att. Gen. How far did they go?

H. Fraser. To Stirling.

Att. Gen. Was there any message sent to Glasgow, or any place thereabouts, by the master of Lovat, relating to the Frasers?

H. Fraser. Yes, there was: It was sent from Perth to Glasgow.

Att. Gen. For what purpose was it sent?

H. Fraser. In order to procure firelocks for the Frasers.

Att. Gen. Did you yourself go to Glasgow?

H. Fraser. I did.

Att. Gen. To whom did you apply there?

H. Fraser. To Mr. John Murray.

Att. Gen. Please to give an account to my lords what was the effect of that application of yours?

H. Fraser. The effect of it was, that an order was sent to lord John Drummond, in the name of one that called himself the French ambassador, that lord John Drummond should deliver arms for the Frasers out of the arms that he had in charge, that were the king of France's arms, as he himself said.

Att. Gen. How long did you stay at Glasgow?

H. Fraser. About twenty-four hours.

Att. Gen. Before your return from thence, had you any conversation or meeting with Mr. Murray of Broughton, the Pretender's secretary?

H. Fraser. I called upon him there, and saw him in his own room.

Att. Gen. What was the import of your conversation at that meeting?

H. Fraser. The business that brought me there was, to desire him to send the arms I mentioned.

Att. Gen. Was that the only subject of your conversation?

H. Fraser. No: we talked with respect to the situation of matters in the north country, and with respect to the imprisonment of my lord Lovat, and his escape from Inverness, which I had then heard of.

Att. Gen. Was there any proposal then made concerning the army's going into the north country to take Inverness?

H. Fraser. There was a proposal then made, that a detachment should be sent from the army, in order to make themselves masters of Inverness.

Att. Gen. What more passed between you relating to this proposal?

H. Fraser. That proposal was agreed to, and a resolution formed upon it, in a council that was called in the afternoon.

Att. Gen. Did you at that time hear any thing, or receive any thing, from my lord Lovat?

H. Fraser. No: I had no charge from my lord Lovat when I went to Glasgow.

Att. Gen. But, when you were there, did you receive any order from lord Lovat?

H. Fraser. I received no order or letter from my lord Lovat, while I was at Glasgow.

Att. Gen. Had you any orders or letters from lord Lovat at all relating to the sending any men northward; I do not mean while you were at Glasgow, but in Stratharrick, or any other place?

H. Fraser. Before I went to Perth, there was a letter delivered to me.

Att. Gen. You say it was concerted to send a detachment to Inverness, or that a detachment of the army should go thither: what was done in pursuance of that resolution?

H. Fraser. Nothing at all.

Att. Gen. You say, that you received a letter from my lord Lovat at Stratharrick; pray what were the contents of it?

H. Fraser. I did say so; there was a letter delivered to me: it was not signed; but it appeared to me to be the hand-writing of Robert Fraser, who then acted as secretary to my lord Lovat; but it had no name subscribed to it.

Att. Gen. What was the import of that letter?

H. Fraser. The request of the letter was, That I should have gone to Perth, in order to have prevailed with the gentlemen who commanded at that place, to send a number of forces to Inverness, in order to make themselves masters of that place by dislodging my lord Lovat, and to rescue my lord Lovat.

Att. Gen. Was any thing done upon this?

H. Fraser. Nothing: I refused to do it.

VOL. XVIII.

Att. Gen. Before you went from Glasgow, and returned with the answer to the message you had delivered there, did you receive any message from Mr. Murray the secretary, or any packet? and what was it?

H. Fraser. Mr. Murray proposed me to carry a packet from Glasgow to Perth.

Att. Gen. Did he deliver you any packet?

H. Fraser. I refused to take it; because, I told him, that very probably his packet would require dispatch; and that I rid my own horses, and did not incline to abuse them.

Att. Gen. Did you, or did you not, receive the packet?

H. Fraser. When he told me afterwards, That he had no other person to carry it, and that it did not require dispatch, I accepted of the packet.

Att. Gen. Do you know what that packet contained?

H. Fraser. I came to know it afterwards.

Att. Gen. And what were the contents of it?

H. Fraser. There was a separate letter, directed to the master of Lovat only, with respect to the army; and there was a large packet of papers, not directed to any person, but which Mr. Murray told me, I was to deliver to the master of Lovat.

Att. Gen. Do you know what that letter, or packet, did contain?

H. Fraser. Upon my return to Perth, as the master of Lovat happened not to be there, at that time, another gentleman and I took the freedom to open the large packet.

Att. Gen. What did you find in it?

H. Fraser. There was in it a commission of lieutenant-general to my lord Lovat, that is, in my lord Lovat's name; and it was granted in the name of James the 8th.

Att. Gen. What was there in it else?

H. Fraser. There was another commission in it, to my lord Lovat, of lieutenant of some northern county, granted in the same manner.

Att. Gen. Did that appear to be signed and sealed by the Pretender?

H. Fraser. It had a subscription and superscription, and a seal.

Att. Gen. Was there any thing else contained in that packet?

H. Fraser. There was another commission to a gentleman of the name of Fraser.

Att. Gen. What did that commission import to be?

H. Fraser. It was a colonel's commission.

Att. Gen. Do you recollect to whom it was made?

H. Fraser. The gentleman was named Fraser: one who was called Inverlacky, and a gentleman of that name was then acting in that capacity among the Frasers.

Att. Gen. Did that commission appear, upon the face of it, to be signed and sealed? and by whom?

H. Fraser. Yes, it was signed and sealed in the same manner as the other commissions were.

3 A

Att. Gen. Was there any thing else in the packet?

H. Fraser. There was a letter under the hand of the Pretender's son.

Att. Gen. To whom was that directed?

H. Fraser. It was directed to my lord Lovat.

Att. Gen. Was there any other paper there?

H. Fraser. Yes; there was a letter from Mr. Murray, Cameron of Lochiel, and MacPherson of Clunie.

Att. Gen. To whom was that letter directed?

H. Fraser. That letter had no direction, or cover; it was in the large cover.

Att. Gen. Were those all that were in the large cover?

H. Fraser. All that I remember.

Att. Gen. Was the large cover addressed to any body?—*H. Fraser.* No.

Att. Gen. What was the reason of that?

H. Fraser. The reason given me by Mr. Murray was, that it was intended for my lord Lovat; but could not be directed, because he could not ascertain by what title to write it.

Att. Gen. What was the doubted title?

H. Fraser. The doubted title was that of a duke.

Att. Gen. Duke of what?

H. Fraser. Duke of Fraser, or Beaufort; Fraser, I believe.

Att. Gen. Does not my lord Lovat's house go by two names?

H. Fraser. Yes, by the name of Castle-Downey and Beaufort.

Att. Gen. Do you know, whether that letter, that was signed by Clunie MacPherson, Lochiel, and Mr. Murray, was referred to in the letter that was sent by the Pretender's son?

H. Fraser. I don't know that it was.

Att. Gen. Do you recollect the substance of the letter from the Pretender's son to my lord Lovat?

H. Fraser. The substance of the letter, as far as I can recollect, was requesting my lord Lovat to come and join with him in person.

Att. Gen. My lords, these are all the questions we have to ask of this witness.

L. H. S. My lord Lovat, the gentlemen of the House of Commons have done with this witness: would your lordship ask him any questions?

Lord Lovat. My lords, I have told your lordships already, that I am so ill that I am not able to speak, or to get up, or sit down; and therefore hope your lordships will indulge me to retire a little, and refresh myself.

L. H. S. My lords, my lord Lovat desires leave to withdraw for a little while.

Lords. Ay, ay.

Upon which lord Lovat withdrew for a little while: and being returned,

Lord Lovat. I desire, that your lordships will indulge me in permitting your clerk to read the questions I would ask.—*Lords.* Ay, ay.

Lord Lovat. Were not you taken prisoner by the king's forces, after the battle of Culloden?

H. Fraser. I was.

Lord Lovat. Have you not been in custody ever since? and are not you so now?

H. Fraser. I have been, and I am.

Lord Lovat. Have you as yet obtained any pardon?—*H. Fraser.* I know of none.

Lord Lovat. Are you in expectation of a pardon from what you shall depose against me?

H. Fraser. I will answer that question very readily. I do not expect punishment will be inflicted; but I assure your lordship, it is no condition or paction made with me.

Lord Lovat. Have you ever had any offer made to you of a pardon, upon this or any other condition? and what was that condition?

H. Fraser. I have had no offers made to me of a pardon upon any condition whatever.

Lord Talbot. My lords, I have taken a particular account of the evidence of this witness; which I beg leave to repeat to your lordships, in the presence of the witness, that in case I misrepresent any part, he may correct it. I having been already accused of unfairness, in the manner of stating my questions. My lords, the witness says, that the men marched before the master of Lovat went from Castle-Downey: that he and the master of Lovat followed the men, and endeavoured to prevail upon them to return: but that Barisdale prevailed upon them to advance, contrary to the desire and advice of the master of Lovat: that my lord Lovat afterwards wrote a letter to them to return, and that they did return: that my lord Lovat certainly gave orders sometimes, that they should not march. Am I right in this state of the evidence?

H. Fraser. Yes; my lord Lovat certainly gave orders for them sometimes not to march; and, I believe, he gave orders, at other times, for them to march.

Lord Talbot. My lords, he says, that he believes that, at other times, my lord Lovat ordered them to march: but, my lords, this might be only a general report, without any foundation, as it might be the report of Barisdale, in order to prevail on them to march.

L. H. S. My lords, the noble lord is in the right, to state the evidence to the witness, in order to introduce questions, by way of explanation; but to observe upon that evidence now, is not regular.

Lord Talbot. My lords, all that I mean is to come at the truth; which I cannot do from my own knowledge.—(Then to the witness:) You have said, that you have heard my lord Lovat say, that the conduct of his clan might cost him his life.

H. Fraser. I did.

Lord Talbot. Now, my lords, the question I would ask him, from all this put together, is, whether he did understand, by these expressions of my lord Lovat, that he disapproved of the conduct of his clan?

H. Fraser. That my lord Lovat disapproved to me in private, and that I have heard him disapprove, and condemn in public, the conduct of his clan, is truth: that I affirm before Almighty God.

Lord Talbot. Have you been examined by any body relating to this trial, since you were a prisoner, before you came to this place?

H. Fraser. I have.

Lord Talbot. My lords, I will beg leave to ask him, whether the confessions he made upon that examination, or the answers he gave there, proceeded from the hope of a pardon?

H. Fraser. I cannot say that I would have done it, had I been convinced that I should meet with no mercy; though, at the same time, I had no assurance given me of mercy; neither had I any promise of pardon.

Lord Talbot. Do you believe, that your pardon may depend upon the consistency of the evidence you shall give here, with what you have said upon those former examinations?

Duke of Bedford. My lords, I do not think that is a proper question to be asked of any witness; and, if it is insisted upon to be asked, I shall beg your lordships may adjourn to the Chamber of Parliament, to determine that question: And I will there give my reasons against it.

Lord Talbot. My lords, I have no partiality for the noble lord at the bar: but what I have said proceeded from a principle of humanity, a principle of honour, and a principle of justice.

L. H. S. You have spoken of different orders that were given at different times: sometimes my lord Lovat ordered the men to march, and, at other times not to march. Do you know, of your own knowledge, of any of these orders being given?

H. Fraser. I have already said, that I saw an order under his hand, for the returning of seven companies of men from Urquhart, whither they had marched.

L. H. S. Whither were they to return?

H. Fraser. To their own houses.

L. H. S. When was that order given?

H. Fraser. In the month of November.

L. H. S. What orders did you ever see, or hear, from my lord Lovat, for the men to march?

H. Fraser. I never saw any order of my lord Lovat for the men to march.

L. H. S. Then why did you speak of those orders?

H. Fraser. I have given my reason for that, that I heard such orders talked of; but that I heard them given, I never did say, and never will.

Lord Orford. When my lord Lovat declared himself dissatisfied with the conduct of his clan, was it for their being too forward, or too backward, in going into rebellion?

H. Fraser. I have said already, that I have heard him dissatisfied for their too great forwardness, and I have likewise heard him dissatisfied for their too great backwardness.

Att. Gen. My lords, in consequence of some questions that have been asked, I beg leave to know of this witness, Whether what he has said in evidence before your lordships, notwithstanding his having said it under the circum-

stances of his being now a prisoner, is, or is not true?

H. Fraser. I say, that what I have said, is literally fact.

Att. Gen. Then I beg he may inform your lordships, whether, supposing he had been called on to be a witness, and had not been a prisoner, but had been, by virtue of your lordships' summons, obliged to come before you, to give evidence upon this trial, would he have given any other evidence than what he hath given before your lordships?

H. Fraser. If I would give evidence in any case, it should be the truth; and, if the truth were such as I did not choose to disclose, I would declare positively, that I would give no evidence at all.

Att. Gen. Were not you in so dangerous a condition in point of health, when you were at Fort Augustus, that your life was not expected?

H. Fraser. At Fort Augustus I was past all hopes of recovery, and at Inverness.

Att. Gen. During that time, did not you give, in substance, the same account of these transactions as you have given now?

H. Fraser. There were questions asked me then; and the answers I gave to them were the real truth. Matters were not then so fully explicated as they have been since; so that those declarations were not so complete as the account I have given now: but the answers that I made there, were still the real genuine truth, as to those questions that I was asked; and so is the account I have now given.

Att. Gen. I beg he may inform your lordships, if, so far as his examination then went, it was not the same as his examination is now?

H. Fraser. So far as the examination was then extended, it was the same as now. Truth is always the same; it will never vary from itself.

Att. Gen. Did you not then expect to die?

H. Fraser. I expected not to live, sure enough.

Att. Gen. Was it from the condition you were in by your distemper, that you expected not to live?

H. Fraser. It was from my wounds, and the ailments that I laboured under.

Att. Gen. My lords, we have done with this witness.

A Lord. I beg this witness may inform your lordships, if the packet which he carried from Mr. Murray, containing the papers that he has mentioned, was ever delivered? and to whom?

H. Fraser. That packet was never delivered to my lord Lovat.

A Lord. I beg he may inform your lordships, to whom that packet was delivered?

H. Fraser. When I came to Perth, a gentleman, who then commanded among the Frasers, and I opened the packet, to see what it contained; and, while I was intending to shut it up again, and to forward it to the master of Lovat the master himself came into the room; and I told him the freedom we had used with those letters and packets: He said,

that we might always use that freedom, and were welcome. All those papers which I have mentioned to have been contained in that packet were then lying upon the table where we stayed. I told the master, in general, what they were; and he threw them from him; and there they continued to lie till I went from Perth, to Stirling. And, as that march was made a little precipitately, those papers, and every thing else that belonged to me, that were in the room, were thrown into my cloak-bag, and they and my cloak-bag continued in my possession till some few days before the battle of Culloden, when I lodged them in a house at Inverness, and went myself to the field of battle.

Then the witness, by the direction of the Lord High Steward, withdrew.

Sir William Yonge. My lords, The next gentleman we beg leave to call, is lieutenant Alexander Campbell.

Lieutenant Campbell called into Court.

L. H. S. My lord Lovat, Have you any objection to lieutenant Campbell being a witness?

Lord Lovat. I don't know him: I never heard of him.

Alexander Campbell sworn.

Sir W. Yonge. My lords, we beg leave to ask this witness, whether, at any time, in the year 1745, he went to Castle-Downey?

A. Campbell. Yes, I did.

Sir W. Yonge. About what time was it that you went?

A. Campbell. I don't remember particularly: it was some time in October.

Sir W. Yonge. Upon what account did you go there?

A. Campbell. To require some cattle that were carried off from some people in the shire of Ross.

Sir W. Yonge. By whom were these cattle carried off?

A. Campbell. By some of lord Lovat's people: I don't know whether it was done by his orders, or not.

Sir W. Yonge. When you came near Castle-Downey, did you see any number of armed men?—*A. Campbell.* Yes, I did.

Sir W. Yonge. How were you received by those armed men? with acclamations? or in what manner? and how many were there of them?

A. Campbell. I cannot condescend upon the number of men.

Sir W. Yonge. How were you received by them? with acclamations? or how?

A. Campbell. Yes.

Sir W. Yonge. How were you received? in what manner?

A. Campbell. They were all out with their arms; some of the Mac Leods deserters that came from Inverness.

Sir W. Yonge. How were you received there by those men? in what manner?

A. Campbell. Some of them took off their bonnets.

Sir W. Yonge. Were there any shouts, or buzzas, made use of?

A. Campbell. Yes; some of them did.

Sir W. Yonge. Upon what account?

A. Campbell. I can't tell.

Sir W. Yonge. Did not they say any thing to you of the reason of it?

A. Campbell. No; they spoke nothing to me.

Sir W. Yonge. Did you go to dine with my lord Lovat, at Castle-Downey?

A. Campbell. No; I did not.

Sir W. Yonge. Were you at Castle-Downey with him?—*A. Campbell.* Yes.

Sir W. Yonge. Had you any conversation with my lord Lovat there?

A. Campbell. Yes.

Sir W. Yonge. What conversation had you with him?

A. Campbell. I told him, I came to require the cattle; and he told me, the cattle were not brought there by his order, but his son's.

Sir W. Yonge. My lords, the witness had better go on with the rest of the conversation: I know he can, without being asked particular questions; for I would not lead him.

A. Campbell. I do not remember what passed.

Lord Talbot. My lords, I must take notice to your lordships, that I think it is a very odd expression to make use of to a witness, That he had better answer the questions; for I know he can: it is a kind of threatening the witness.

Sir W. Yonge. My lords, I stand here as a manager, on this trial, for the Commons of Great Britain; and I hope I say nothing that is offensive to your lordships; and that the manner, in which I asked the witness the question, shewed that it proceeded from a fairness in stating of it. My lords, I think, as a manager, I ought to know what a witness can say; and the whole tendency of what I said, was advising the witness, without giving your lordships unnecessary trouble, to tell all he knew, fairly and impartially, without my being obliged to put any leading questions to him: and I hope I shall have your lordships' liberty to go on.

L. H. S. My lords, every body knows, that it is the constant course and usage of parliament, that when a Committee of Managers is appointed by the House of Commons, upon an impeachment, it is their duty to examine, and they always do examine the witnesses beforehand: and the same method is used by prosecutors for the crown, upon indictments. If this was not done, it would be impossible to know, whether a witness could speak materially to the facts in question, or not.

Lord Talbot. My lords, though they are managers, I am a judge. I have as high a veneration for the representatives of this kingdom as any man in the world; I sat some time among them myself: but I am sure, my lords, the representatives of England do not desire a language may be used to a witness, that may

seem threatening. And, my lords, I took the expression used by the manager in this light. The expression was, That he had better speak; which, I apprehend, was as much as to say, That if he hoped for mercy, he must tell it. My lords, I desire a fair examination, that I may form a true judgment. My honour depends upon it.

L. H. S. My lords, I desire this may be forbore. It is my duty to acquaint your lordships, that it is irregular, and contrary to all rules of proceeding. The honourable manager explained his words in a very proper and candid manner, that he thought it was fairer in him to ask the witness general questions, to declare what he knew of the fact, than any particular questions, which might tend to lead him; and he was in the right.

Att. Gen. My lords, in order to clear up this matter, I beg leave to ask the witness, whether he is now a prisoner?—*A. Campbell.* No.

Att. Gen. Were you ever a prisoner?

A. Campbell. Yes; I was a prisoner with the rebels.

Att. Gen. Had you then the king's commission?

A. Campbell. Yes; when I was a prisoner.

Att. Gen. Were you engaged in the king's behalf against the rebels, when you were taken?

A. Campbell. Yes.

Sir W. Yonge. Your lordships now see, that the witness is no prisoner, nor under any terror or apprehension, but has now the king's commission in his pocket; and therefore I beg leave to ask him, What the conversation was that passed between my lord Lovat and him about the cattle?

A. Campbell. As I did not expect to be called here as a witness, so I do not remember what passed upon that occasion.

Sir W. Yonge. Did my lord Lovat persuade you to join the rebels or not?

A. Campbell. He did not.

Sir W. Yonge. Did he say nothing to induce you to it?

A. Campbell. He said nothing at all to induce me to join them.

Sir W. Yonge. Or his son?

A. Campbell. No.

Sir W. Yonge. My lords, I don't know whether it be so proper: but have you never said so?

A. Campbell. No; I never did say so.

Mr. Noel. My lords, I beg leave to ask him, Whether any discourse passed between my lord Lovat and him touching the rebellion?

A. Campbell. Yes.

Mr. Noel. Pray tell my lords what that was?

A. Campbell. He said, his son was engaged in the rebellion, not he; and that he was a very loyal person.

Mr. Noel. My lords, we have done with this witness.

L. H. S. My lord Lovat, Would you ask this witness any questions?

Lord Lovat. No; I have no questions, my

lord, to ask this witness: I never saw him before in my life.

Then the witness, by direction of the Lord High Steward, withdrew.

Mr. Lyttelton. My lords, the next witness we shall produce, is Peter Fraser, tutor of Belladrum.

Peter Fraser was called into court.

Lord Lovat. My lords, I have a material objection to this witness. He is my tenant in all that he possesses.

L. H. S. Would your lordship ask him that question? Or, would you prove it upon him by witnesses?

Lord Lovat. I humbly think he will not deny it. If he does, I have witnesses to prove it.

Att. Gen. My lords, I beg the noble lord at the bar may explain what he means by saying, If he denies it, that he has witnesses to prove it; for, if the noble lord puts it to the oath of the witness, and he denies it, then he cannot, without the consent of the Commons, call a witness to prove it.

L. H. S. My lords, the rule is, that, upon an objection made to the competency of a witness, the party objecting may either put it to the oath of the witness produced, or call witnesses to prove it. If he puts it to the oath of the witness produced, then he is concluded as to the point of competency, by the answer he gives to it, unless the other side consents to waive that. My lord Lovat, Do you choose to put this to the oath of Peter Fraser, or to call a witness to prove it?

Lord Talbot. My lords, I desire to know, if this witness should deny it, whether my lord Lovat may not give evidence of this man's being his tenant, when he comes upon his defence.

L. H. S. Gentlemen of the House of Commons, You hear what the noble lord says; what do you say to it?

Att. Gen. My lords, to be sure my lord Lovat may give such proof by way of objection to the credit of the witness; but not to his competency.

L. H. S. My lord Lovat, Do you choose now to put this question to the oath of the witness himself, or to call a witness to prove it?

Lord Lovat. I will put it to his own oath.

Then the witness was sworn upon a Voire Dire.

Lord Lovat. My lords, I desire to ask him, Whether or no the lands he possesses are not my lands?

P. Fraser. Yes; they are: I possess them in virtue of my nephews' right, who hold a tack under my lord Lovat.

L. H. S. How do you hold them in virtue of your nephews? Is it as their manager, or tutor?

A Lord. My lords, I will beg leave to ask a question to explain that; which is, Whether or

no the witness pays the rents of those lands to my lord Lovat's chamberlain or steward?

P. Fraser. I do.

Lord Lovat. Do you pay any part of that rent in your own right?

P. Fraser. No; I do not. I only pay it in virtue of my nephews, as taking care of them.

Att. Gen. My lords, the question, which the noble lord at the bar has now put to the witness, is that which I intended to have put to him; which is, Whether he holds any lands in his own right, or only as tutor? He has told your lordships, that he holds none in his own right, but only as tutor to his nephews.

Mr. Lyttelton. My lords, we pray the witness may be sworn in chief.

Peter Fraser sworn in chief.

Lord Lovat. My lords, I beg to ask him, Whether he does not hold a tack of land within the lordship of Lovat, of Aird, or Stratharrick?

P. Fraser. I do not.

Mr. Lyttelton. I beg this witness may inform your lordships, Whether, in the year 1745, he was at my lord Lovat's house at Castle Downey?—*P. Fraser.* Yes; I was.

Mr. Lyttelton. And whether he remembers to have seen any of my lord Lovat's men rendezvous there about that time?

P. Fraser. Yes; I did.

Mr. Lyttelton. Did you see any of the officers that headed those men go to my lord Lovat's house, and converse with him there?

P. Fraser. Yes; I did.

Mr. Lyttelton. Whom did you see there?

P. Fraser. Simon Fraser of Mac Leod.

Mr. Lyttelton. Did he talk to my lord Lovat about the regiment? or ask any orders from him?

P. Fraser. I never heard him say any thing; only that my lord Lovat desired him to go to their colonel: that is all I heard.

Mr. Lyttelton. Whom did he call their colonel?

P. Fraser. His son, the master of Lovat.

Mr. Lyttelton. How came he to be their colonel? Had not the lord Lovat the absolute power over his clan?

P. Fraser. Yes; he had.

Mr. Lyttelton. Do you imagine or believe, that the master of Lovat could have carried the Frasers into the rebellion, if his father had been against it?

P. Fraser. No; he could not; I am sure he could not.

Mr. Lyttelton. Had the master of Lovat any manner of foundation to think he could raise the men himself? Or did he, at his own charge or cost, pay those men when they went into the rebellion? Or, had he money to do it?

P. Fraser. I suppose he had no money of his own.

Mr. Lyttelton. Who do you think furnished him with the money necessary for that purpose?

P. Fraser. Really I know nothing of the money: I saw no money given.

Mr. Lyttelton. Do you know any thing of Barisdale's keeping a party of men upon my lord Lovat's ground?—*P. Fraser.* Yes.

Mr. Lyttelton. What were they to do?

P. Fraser. To overawe the country.

Mr. Lyttelton. To do what?

P. Fraser. To rise in arms.

Mr. Lyttelton. In arms for whom?

P. Fraser. For the Pretender.

Mr. Lyttelton. Had he got any of them to rise in arms then?—*P. Fraser.* Yes.

Mr. Lyttelton. Did he make any of my lord Lovat's vassals rise in arms at that time?

P. Fraser. They stayed in the country till they saw some of the men did convene.

Mr. Lyttelton. Do you know of any body's giving the men any cat's or meal?

P. Fraser. Yes: My lord Lovat gave them some cows.

Mr. Lyttelton. To whose men? To Barisdale's men?

P. Fraser. No; to my lord Lovat's men.

Mr. Lyttelton. Those that joined with Barisdale?—*P. Fraser.* Yes.

Mr. Lyttelton. Did you see Barisdale converse with my lord Lovat then?

P. Fraser. Yes; I did.

Mr. Lyttelton. Did my lord Lovat know that he was then in the rebellion?

P. Fraser. No doubt of it.

Mr. Lyttelton. Did he wear any mark of distinction to shew it?

P. Fraser. He wore a white cockade.

Mr. Lyttelton. Do you remember any part of the conversation between Barisdale, Mac Leod, and my lord Lovat, concerning any lord's declaring openly for the Pretender?

P. Fraser. I remember one day, that Alexander Mac Leod said, that all would be well, if my lord Lovat would pull off the mask: upon which my lord Lovat, by way of reply, pulled off his hat, and said, There it is then.

Mr. Lyttelton. What did that conversation relate to?—*P. Fraser.* I heard no more of it.

Mr. Lyttelton. What were they talking about?

P. Fraser. I only heard, that he said, All would be well, if my lord Lovat would pull off the mask.

Mr. Lyttelton. What did that conversation mean? What meant, All would be well?

P. Fraser. I can't tell.

Mr. Lyttelton. What did my lord Lovat mean by pulling off his hat?

P. Fraser. All that they said was, That all would be well, if my lord would pull off the mask: upon which my lord Lovat pulled off his hat, and said, Here it is then.

Mr. Lyttelton. Did he throw his hat down?

P. Fraser. I did not see that.

Mr. Lyttelton. Did my lord Lovat offer you to be an officer?

P. Fraser. No; he never did.

Mr. Lyttelton. My lords, we have done with this witness.

L. H. S. My lord Lovat, Would you ask this witness any questions?

Lord Lovat. Were you examined at Inverness? and by whom? and who were the persons you saw there?

P. Fraser. I was examined at Inverness before one Kilravock: he was a depute. And I was examined before my lord Loudon.

Lord Lovat. Were you examined upon oath?

P. Fraser. Yes: I was summoned, and strictly deponed.

Lord Lovat. Upon oath?

P. Fraser. Upon oath.

Lord Lovat. Who were the persons you saw at Inverness, when you were examined?

P. Fraser. We were examined but one by one: as soon as one was examined, another was called; and no other person heard what the examinations were.

Lord Lovat. Who were present at the examinations?

P. Fraser. Lord Loudon, Kilravock, and a clerk.

Lord Lovat. At what time were you examined at Inverness?

P. Fraser. I don't remember the day of the month, indeed.

Lord Lovat. What month was it?

P. Fraser. It was in January; the latter end of January.

Lord Lovat. In January last?

P. Fraser. Yes, in January last.

L. H. S. You say you were at Castle Downey in 1745, and saw all the men rendezvous there: In what month was that?

P. Fraser. In November.

Then the prisoner begged leave to withdraw a little: which was granted; and he soon after returned to the bar again.

Mr. Legge. The next witness we shall call is John Farquhar.

At the Prisoner's request, he was sworn upon a Voire Dire.

Lord Lovat. Are you tenant to me?

J. Farquhar. No.

Lord Lovat. What is your name?

J. Farquhar. John Farquhar.

Lord Lovat. What employment are you of?

J. Farquhar. I was servant to Mr. Murray.

John Farquhar sworn in chief.

Mr. Legge. My lords, we propose to examine this witness to the steps taken by my lord Lovat subsequent to the battle of Culloden, in order to revive and restore the Pretender's cause in Scotland.

Mr. Legge. Were not you servant to Mr. Murray of Broughton?—**J. Farquhar.** Yes.

Mr. Legge. In what capacity did you serve him?—**J. Farquhar.** I was his groom.

Mr. Legge. For what space of time did you serve him? From what time, and to what time?

J. Farquhar. From Michaelmas till the 9th of June last.

Mr. Legge. In what year?

J. Farquhar. In 1745.

Mr. Legge. Was there a meeting of the chieftains in the rebel army after the battle of Culloden?—**J. Farquhar.** Yes.

Mr. Legge. When was that meeting?

J. Farquhar. On the 10th of May last.

Mr. Legge. Who were the persons that met on that occasion?

J. Farquhar. Mr. Murray of Broughton, Lochiel, young Clanronald, Cameron of Dunggallon, doctor Cameron, and several others that I did not know, and my lord Lovat: They met at the island of Mortlaig.

Mr. Legge. Did you hear of any French ships having landed any money in Scotland then?—**J. Farquhar.** Yes.

Mr. Legge. Upon what day did you hear that they landed that money?

J. Farquhar. Upon the 4th of May.

Mr. Legge. What did you imagine was the subject-matter of the meeting you mentioned?

J. Farquhar. In order to have a second gathering of the rebel army.

Mr. Legge. Did you hear any, and what orders given to any body, and to whom, upon that occasion?

J. Farquhar. There was an order for the men to be gathered together at a place called Glenmany.

Mr. Legge. Who were the persons that gave those orders?

J. Farquhar. There was Lochiel, and the several other persons that were present at the meeting.

Mr. Legge. How did lord Lovat behave on that occasion? Did he express any satisfaction on that head?

J. Farquhar. He was present during all the time I was there.

Mr. Legge. Did he say any thing about the number of men that were to be raised?

J. Farquhar. The next morning, when the parties were going away, my lord Lovat said, they had no need to fear; and he did not doubt raising 8 or 10,000 men presently.

Some lords desired the last answer to be repeated: which was accordingly done by the witness, as follows:

J. Farquhar. The next morning, when the parties were going away, lord Lovat said, that there was no need to fear; for that he did not doubt to raise 8 or 10,000 men presently; and that those, with the Highland men, would be able to fight the elector of Hanover's troops. He said this to Lochiel's officers: when they embraced each other.

Mr. Legge. Had my lord Lovat any of his own clan there?

J. Farquhar. Yes: he had some of them to wait upon him.

Mr. Legge. Were they armed?

J. Farquhar. Yes, with swords, dicks, and pistols.

Mr. Legge. Did they wear any mark of distinction in their hats?

J. Farquhar. Some of them had sprigs of yew, and such-like things, in their hats; by which they were known to be of that party.

Mr. Legge. Did you hear my lord Lovat express any wishes that he had joined their army?

J. Farquhar. He said, he wished to God he had joined the prince, as he called him, at first when he came over.

Mr. Legge. While you were there, did you hear the Pretender's health drank?

J. Farquhar. Yes.

Mr. Legge. By what stile or title?

J. Farquhar. By the title of prince Charles, to the young one.

Mr. Legge. And what title did they give to the old one?

J. Farquhar. The title of James the eighth.

Mr. Legge. Who were the persons that drank it? Did you hear my lord Lovat drink it?—J. Farquhar. Yes.

Mr. Legge. Pray how long did this council last?

J. Farquhar. From night till next morning: I was there from two o'clock till ten in the morning.

Mr. Legge. You mention the French money's being landed on the 4th of May; do you know any thing of the disposition of any part of that money?—J. Farquhar. Yes.

Mr. Legge. To whom was it given?

J. Farquhar. To the officers of the rebel army.

Mr. Legge. For what purpose was it given them?

J. Farquhar. For a second gathering of the men.

Mr. Legge. Do you know what was the general resolution that that council came to? or what was their determination?

J. Farquhar. That they would assemble a body of the several clans to march south, so far as I could conjecture.

Mr. Legge. Why do you conjecture that?

J. Farquhar. I heard it.

Mr. Legge. Did you hear of any expectation of further assistance from France?

J. Farquhar. Yes.

Mr. Legge. What number of men did you expect?

J. Farquhar. I did not hear any particular number mentioned; but we expected a reinforcement every day.

Mr. Legge. Where was the rendezvous to have been?

J. Farquhar. At Glenmany.

Mr. Legge. Did they meet there?

J. Farquhar. Yes; several of them.

Mr. Legge. What do you think prevented the rest of them from meeting there?

J. Farquhar. The king's troops.

Mr. Legge. My lords, we have done with this witness.

L. H. S. My lord Lovat, will you ask this witness any questions?

Lord Lovat. Were you taken prisoner by the king's forces?—J. Farquhar. No.

Lord Lovat. Do you know whether the money that came over from France in the ship, was given to Mr. Murray?

J. Farquhar. I cannot tell. Mr. Murray was there when the money came.

A Lord. Do you know of any more meetings than one between Lochiel and lord Lovat?

J. Farquhar. No.

Then the witness, by the direction of the Lord High Steward, withdrew.

Mr. Grenville. My lords, the next witness we beg leave to call, is Charles Stuart.

Charles Stuart called into Court.

L. H. S. My lord Lovat, have you any objection to this witness?—Lord Lovat. No.

Charles Stuart sworn.

Mr. Grenville. My lords, we beg this witness may inform your lordships, whether he remembers the battle of Culloden?

C. Stuart. Yes.

Mr. Grenville. Did you go with Mr. Murray, the Pretender's son's secretary, after that battle, to Mortlaig?—C. Stuart. Yes.

Mr. Grenville. Was there a meeting there of any of the rebel officers?—C. Stuart. Yes.

Mr. Grenville. Who were present?

C. Stuart. There were Lochiel, Clanronald, Barisdale, and several others.

Mr. Grenville. Was my lord Lovat there?

C. Stuart. Yes, he was there.

Mr. Grenville. Where were they?

C. Stuart. In a little hut.

Mr. Grenville. Were you in the room with them?—C. Stuart. Yes, I was.

Mr. Grenville. Did you hear what passed in the room? If you did, please to give my lords an account of what passed there.

C. Stuart. Lochiel and Mr. Murray of Broughton came there, where they met with my lord Lovat, and several other of the Highland chieftains. They wanted to create an association for re-assembling the men together, in order to procure a peace, or terms of surrender with the duke of Cumberland, or to stand it out to the last. Mr. Murray ordered me to draw up the articles; which I wrote: And it was signed by every chief that was there.

Mr. Grenville. Did my lord Lovat sign it?

C. Stuart. No; all but he.

Mr. Grenville. Was it proposed to him to sign it?

C. Stuart. Yes, it was; and he would not.

Mr. Grenville. What was the purport of it?

C. Stuart. That they were to assemble again in ten days, in order to procure terms of peace from the duke, or stand it out to the last.

Mr. Grenville. What number of Frasers were proposed to be raised?

C. Stuart. I think three or four hundred.

Mr. Grenville. Did any body undertake for the Frasers?

C. Stuart. I think Lochiel did.

Mr. Grenville. At whose request did he undertake for the Frasers?

C. Stuart. When it was proposed to my lord Lovat to sign the paper, he said, he would not; and desired Lochiel to answer for his son.

Mr. Grenville. What did he say about Lochiel?

C. Stuart. He desired Lochiel to answer for his son.

Mr. Grenville. Did he, or did he not, answer for him?

C. Stuart. I can't tell.

Mr. Grenville. What reason did my lord Lovat give why he would not sign the paper himself?

C. Stuart. I don't remember he gave any reason.

Mr. Grenville. Do you remember any expressions made use of by my lord Lovat then?

C. Stuart. No.

Mr. Grenville. Was there any money given then to any of the chiefs of the clan?

C. Stuart. Yes, to all of them.

Mr. Grenville. Who delivered it to them?

C. Stuart. I did.

Mr. Grenville. Was there any delivered to my lord Lovat?

C. Stuart. No, not to him; but it was given to some of the persons about him: I don't know whether it was his servant, or no.

Mr. Grenville. Was he my lord Lovat's servant?

C. Stuart. I don't know: He was a person about him.

Mr. Grenville. For what was it delivered? For what purpose?

C. Stuart. For the master to raise the men against the time.

Mr. Grenville. You saw the money given, and were the person that delivered it?

C. Stuart. I did.

Mr. Grenville. How much was there of it?

C. Stuart. Seventy or eighty pounds.

Mr. Grenville. How came you by the money?

C. Stuart. I got it from Mr. Murray.

Mr. Grenville. What money was it?

C. Stuart. Part of 35,000*l.* that was lented some days before from France.

Mr. Grenville. Was my lord Lovat present when the money was delivered?

C. Stuart. Yes, he was.

Mr. Grenville. Did he object to any thing that was done, but to the signing of the paper?

C. Stuart. I don't remember he did.

Mr. Grenville. Was the money that was given in guineas, or in louis*d'ors*?

C. Stuart. It was all in louis*d'ors*.

Mr. Grenville. Was there any thing said about a neutrality then?

C. Stuart. I think my lord Lovat said, that he was a neutral person; so would have no concern in it.

Mr. Grenville. Do you remember Mr. Murray's being at Arisaig?—C. Stuart. Yes.

Mr. Grenville. Did he receive any letter there from a captain of any guard that my lord Lovat had?

C. Stuart. I saw a man come from the house where my lord was; and he said, he came from the captain of my lord's guards, with a letter for Mr. Murray; and asked some money of him.

VOL. XVIII.

Mr. Grenville. Did you send any money to my lord?—C. Stuart. Yes.

Mr. Grenville. How much did you send?

C. Stuart. I believe it was about fifteen guineas.

Mr. Grenville. By whose order did you send it?

C. Stuart. It was by Mr. Murray's orders I delivered the money.

Sir J. Strange. My lords, I will beg leave to ask this witness, whether he was ever abroad on any occasion?

C. Stuart. I was; but it is long ago.

Sir J. Strange. How long is it ago?

C. Stuart. It was in the year 1736.

Sir J. Strange. Do you remember to have met with a person called Roy Stuart whilst you were abroad?—C. Stuart. Yes.

Sir J. Strange. Where did you meet with him?

C. Stuart. At Boulogne in France.

Sir J. Strange. Where was he going when you saw him there?

C. Stuart. He said he was going to Rome.

Sir J. Strange. Please to recollect, as near as you can, the time when it was you saw Roy Stuart at Boulogne, and give my lords an account thereof.

C. Stuart. I think it was in 1736, as near as I can remember.

Sir J. Strange. When Roy Stuart told you he was going to Rome, did he say upon what errand he was going?

C. Stuart. He said he was going with letters of recommendation from my lord Lovat.

Sir J. Strange. My lords, I should not trouble your lordships with asking the witness any questions of this kind, if we had not laid a foundation for it already, by having proved, that a message was sent by this Roy Stuart from my lord Lovat to the Pretender at Rome; and therefore what I now enquire of him is not matter of hearsay; but it is in corroboration of the circumstance which has been proved to your lordships, that my lord Lovat did give such a message to this Roy Stuart: And therefore I will beg leave to ask this witness, what message did Roy Stuart say he was going upon?—C. Stuart. Nothing else.

Lord Lovat. My lords, I submit it to your lordships, if this, or any other witness, shall be examined upon hearsay evidence.

L. H. S. My lord Lovat, You hear in what manner the managers offer this evidence: they say, That they have proved by one witness, that you sent a message by Roy Stuart to the Pretender at Rome. Now, to corroborate that evidence, they offer to prove, that Roy Stuart, about the same time, declared to this witness, that he had such a message to carry.

Lord Lovat. What the other witness said was hearsay.

Sir J. Strange. My lords, I will set the noble lord at the bar right. It was such hearsay as he had from my lord Lovat's own mouth; for Chevis the witness said, on his examination, That after Roy Stuart had made his escape out

3 B

of Inverness gaol, when he was going away to Rome, he heard my lord Lovat charge him with a message to the Pretender at Rome, to assure him of his fidelity, and to prosecute the affair of his patent for a duke: so that was not hearsay, but positive evidence.

Lord Lovat. That positive evidence would say, That I was a natural idiot.

L. H. S. Chevis did swear, either that he heard my lord Lovat charge Roy Stuart with a message to the Pretender, to assure him of his fidelity, and to expedite his commission of lieutenant-general of the Highlands, and his patent of a duke; or else, that lord Lovat told him, That he had charged Roy Stuart with such a message: but I am not certain which it was.

Sir J. Strange. My lords, I beg leave to ask the witness, when he met with Roy Stuart, and he said he was going to Rome, what he said he was going upon?

C. Stuart. All that Roy Stuart said was, That he depended on letters of recommendation he had from my lord Lovat; and was in expectation of getting the post that colonel Allan Cameron had.

Sir J. Strange. What letters were those he mentioned?

C. Stuart. Letters, he said, he had from my lord Lovat.

Sol. Gen. My lords, in order to explain a little more particularly the affair of the meeting; as this witness says, That my lord Lovat refused to sign the paper, I desire to ask him, What part my lord Lovat took in the deliberations about raising the men, before he had an opportunity of making that refusal?

C. Stuart. I was busy at that time in distributing the money, and do not remember.

Sol. Gen. My lords, we have done with our examination of this witness.

L. H. S. My lord Lovat, would you ask this witness any questions?

Lord Lovat. No.

Then the Witness, by direction of the Lord High Steward, withdrew.

Lord Coke. My lords, the next witness we beg leave to produce, is lieutenant John Dalrymple.

Lieutenant Dalrymple called into Court.

L. H. S. My lord Lovat, have you any objections to lieutenant Dalrymple?

Lord Lovat. My lords, I do not know him; but have no objections to any Dalrymple.

Lieutenant Dalrymple sworn.

Lord Coke. My lords, I beg leave to ask this witness, where he was when my lord Lovat was taken?

Dalrymple. I was on board the Furnace sloop.

Lord Coke. Where was she.

Dalrymple. At Loch Morar.

Lord Coke. Had you any conversation with my lord Lovat after he was taken prisoner?

Dalrymple. I had frequent opportunities of

discouraging with him, as I dined and sopped with his lordship on board the sloop.

Lord Coke. What did he say upon these discourses? what was the purport of them?

Dalrymple. On the 8th of June, I heard him say, That, if his advice had been taken, the rebel army might have laughed at the king's troops, and tired them out all summer. He said, It was not their business to fight the king's troops; but that, as summer was coming on, they might have taken themselves to the mountains, and could have lived on butter, cheese, and milk; for that the duke of Cumberland's horse could be of no service to him in that country: At another time, I was asking his lordship, how he came to be engaged in this affair, after having received so many favours from the government? he said, He did it more in revenge to the ministry, for having taken away his independent company, than any thing else. And, in talking of the Pretender's son, he called him Prince: and, when he came on board, there was one Fraser taken, from whom we took about twenty-two guineas; and my lord Lovat complained, that the money had been taken from his servant, which he had given him to pay his men with.

Lord Coke. Had my lord Lovat any men in arms with him when he was taken?

Dalrymple. That I am no judge of, because I was on board.

Lord Coke. My lords, we have done with this witness.

L. H. S. My lord Lovat, Would you ask this witness any questions?

Lord Lovat. Were you in captain Fergusson's ship?

Dalrymple. Yes; your lordship may remember very well.

Lord Lovat. Then I hope you parted my money amongst you: did you see him take my strong box, in which were 700 guineas?

Dalrymple. I did not see him take the box.

Lord Lovat. Did you see it in his cabin?

Dalrymple. I saw the outside of it; I never saw the inside.

Sir J. Strange. My lords, he says he saw the outside, but did not see the inside of the strong box: he will inform your lordships whether he was present when the papers were taken out of that box afterwards?

Dalrymple. No; I was not present at the opening of it.

Then the Witness, by direction of the Lord High Steward, withdrew.

Mr. Noel. My lords, the next witness we beg leave to produce, is David Campbell.

He was called into Court.

L. H. S. My lord Lovat, have you any objection to David Campbell?

Lord Lovat. No; I have no objection to any of the Campbells.

David Campbell sworn.

Mr. Noel. Please to tell my lords, whether

you were with captain Fergusson upon any occasion, and in what capacity?

D. Campbell. I was a volunteer with general Campbell when we went to search the islands; our officers and forces that served with general Campbell in the Western Highlands were divided; a good many went by land, and a good many by sea; and it fell to my share to go with captain Fergusson; I was on board and on shore with captain Fergusson for about six weeks.

Mr. Noel. What islands did you go to search? and for what purpose?

D. Campbell. We went into several islands to search.

Mr. Noel. Do you remember your going into the island of Morar?

D. Campbell. The coast of Morar is on the continent.

Mr. Noel. Where did you search?

D. Campbell. All along the continent, and in all the islands that lie there.

Mr. Noel. Whom did you find there?

D. Campbell. We found a good many rebel gentlemen in the islands, and upon the continent.

Mr. Noel. Did you find any of the Mac Donalds there?

D. Campbell. We apprehended several of that name.

Mr. Noel. Do you remember one called the bishop, or vicar-general?

D. Campbell. We had intelligence of his being in Morar; but the day we expected to have taken him, he escaped with some others.

Mr. Noel. Were you present when my lord Lovat was taken?

D. Campbell. I was not present when he was taken, because it was ashore.

Mr. Noel. Did you see him after he was taken? and where?

D. Campbell. I saw him that morning when he was taken, and brought on board the Furnace sloop: I was then on board that ship.

Mr. Noel. Did you search for any letters belonging to my lord Lovat, on his being brought on board? and where did you search?

D. Campbell. Captain Duff, who was the captain of the Terror man of war, was the oldest officer, and, as such, was the commanding officer of all those vessels; and when my lord Lovat was brought on board, captain Duff and captain Fergusson determined to open his box, and search it.

Mr. Noel. Did they find any letters there?

D. Campbell. My lord Lovat, and the two captains, desired me to be present at the opening and examining the box; and accordingly I came off the deck, and was present, and was desired to take down a particular of every thing in the box; which I did write accordingly: and there was a bundle of papers, which seemed to be letters, and was the last thing we came to in the box; and when we came to examine those letters, I undertook to examine and read them, which I was desired to do; and I read them all.

Mr. Noel. Do you remember any particular letter that you took notice of to my lord Lovat? If you do, pray tell my lords what lord Lovat said upon it.

D. Campbell. I remember that the purport of all the letters, except the last, or the last but one, was about my lord Lovat's domestic affairs; I cannot be positive whether it was the last, or the last but one; but that was a letter directed to my lord from his son.

Mr. Noel. Did you say any thing, and what, to my lord upon that letter?

D. Campbell. I read over that letter; my lord Lovat at first had said to us, that we should not find, among those papers that we were examining, any matters of disloyalty or correspondence with the rebels: and I expected it was so; but this letter seeming to be a correspondence with the rebels, I said to my lord Lovat, after I had read the letter, I think your lordship had better not have had this letter here: My lord said, it was right, and he thought so too; or to that purpose.

Mr. Noel. Did you say any thing to my lord Lovat concerning his engaging, or not engaging, in the rebellion?

D. Campbell. Yes.

Mr. Noel. What did you say to him?

D. Campbell. I cannot be positive whether I said it in the manner of a question, or in the way of conversation; but I took notice to him the one way or the other, that I wondered his lordship should be along with the rebels, and be concerned in bringing his country into confusion. I remember I either asked him, or had conversation with him, to this effect.

Mr. Noel. What answers did you receive from my lord?

D. Campbell. What I remember of the purport and effect of it was, that he had been disobliged by the government, and angry ever since he had his independent company taken from him.

Mr. Noel. Did he give that as an answer to the question that you asked him?

D. Campbell. He answered that, immediately upon that question, or this part of the conversation, as far as I can recollect.

Mr. Noel. Did you hear my lord Lovat say any thing about his opinion of fighting the battle of Culloden?

D. Campbell. Yes; I heard my lord Lovat say, that the rebels and the Pretender's son did not behave soldier-like in fighting the duke of Cumberland at that time.

Mr. Noel. Did he say that as the opinion of others, or as his own opinion?

D. Campbell. To the best of my remembrance, the purport of the conversation seemed to be, that he thought it was an unsoldier-like and a bad manner of carrying on their affairs.

Mr. Noel. Did he say any thing about any opinion of his having been, or not been, taken?

D. Campbell. I don't remember I heard any thing of that.

Mr. Noel. Recollect yourself whether he did or not?

D. Campbell. It is so long since that happened, and I never expected to be questioned about that conversation, that I do not recollect any particular circumstances about my lord Lovat's giving any particular reasons.

Mr. Noel. Did he speak any thing of his own advice or opinion not being followed? and what was it? or to what purport or effect?

D. Campbell. I cannot recollect whether he did or not.

Mr. Noel. Did he say any thing about continuing in the Highlands? or for what purpose?

D. Campbell. I cannot charge my memory with that circumstance.

Mr. Noel. Did you hear my lord Lovat say any thing about his coming to London, after he was taken?—*D. Campbell.* Yes.

Mr. Noel. What did he say upon that occasion?

D. Campbell. In the course of conversation, sometimes my lord said, he was in hopes that he might get friends that would befriend him; and he observed, that his being dealt mildly with, might be of more service to the government than rigorous methods; and that it would be of more service if they would spare him, than treating him with rigour could possibly be.

Mr. Noel. Did he say in what respect it might be of more service?

D. Campbell. I do not remember that.

Mr. Noel. Did he mention particularly in what he could be of service, or not?

D. Campbell. I do not remember any particulars farther, than that the general tenor of his conversation seemed to imply, that he could be of service to the government, by letting them into the politics of the rebels, or some of their counsels, or to that purpose; I cannot be positive to any particular thing.

Mr. Noel. My lords, the witness says, that he was sent for down from the deck on board the *Furnace*, as he understood, at the request of my lord Lovat, to be present when the box was opened; and that accordingly he went down for that purpose: Now I desire he may inform your lordships, whether there were, or were not, many papers in that strong box?

D. Campbell. It seemed to be a bundle containing from about 25 to 30 letters.

Mr. Noel. After you had read a number of them, before you came to the letter from his son that you have mentioned, did my lord Lovat say any thing about the contents of the papers?

D. Campbell. He said, either before or after I had the letters, directing his discourse to the company, that we should find nothing in those letters that would shew any correspondence of his with the rebels.

Mr. Noel. Did he drop any thing to that purpose during your reading the papers?

D. Campbell. I cannot say whether he did, or not.

Mr. Noel. Was the paper you have spoken of at the bottom?

D. Campbell. I took them all up in course as they lay; and that was the last, or last but one.

Mr. Noel. What did you say upon having read that paper?

D. Campbell. I said, that he had better not have had that paper there; and he said, I was right.

Mr. Noel. What did my lord Lovat say, or do, upon that occasion?

D. Campbell. I remember nothing farther than what I have expressed.

Lord Halifax. My lords, this witness has told your lordships, that, among the letters which were in this box, there was a letter found from my lord Lovat's son to him; which makes me imagine there was some treasonable correspondence in that letter: I therefore pray, he may acquaint your lordships what the purport and tenor of that letter was.

Sir J. Strange. My lords, we shall produce the letter in the course of our written evidence; and therefore we do not ask him any questions about it now.

Sir J. Strange. When you said, that you believed the letter had better not have been there, did my lord Lovat say any thing to his servant how such a mistake happened?

D. Campbell. I do not recollect any such circumstance; it might have been, but I do not remember any such thing.

Sir J. Strange. Do you recollect, that he said any thing to his secretary, or any of his people about him?—*D. Campbell.* No.

Sir J. Strange. My lords, we have done with this witness.

L. H. S. My lord Lovat, would you ask this witness any questions?

Lord Lovat. Were you present when I surrendered my sword in the desert of Morar?

D. Campbell. I was not present; I was not ashore all day, I came on board the night before, and therefore could not see my lord Lovat surrender his sword.

Lord Lovat. Do you know whether it was to captain Dugal Campbell, of the Argyllshire militia, that I surrendered my sword?

D. Campbell. Captain Campbell was upon the command; he is a relation of mine; when he came on board, he said he had taken my lord Lovat prisoner. I heard captain Fergusson's boatswain mention how they came up with my lord.

Lord Lovat. Did captain Fergusson threaten captain Campbell for not delivering up my strong box; and did they not fall to logger-heads about it?

D. Campbell. Captain Fergusson never said any thing about it; captain Campbell did; but I do not apprehend they were at logger-heads. Captain Campbell told me, that when he had got lord Lovat, and the box, he did not know where captain Fergusson was; he went a different route; and afterwards captain Campbell's servant gave captain Fergusson the box, and desired him not to part with it.

Lord Lovat. Did you see my brother-in-law,

major general Campbell, in captain Fergusson's ship, when it lay there?

D. Campbell. I did not see him, because I went just before to another ship.

Lord Lovat. Do you know that I delivered up my strong box to general Campbell, and said it would be as safe as in my own hands?

D. Campbell. No; I was not there.

Lord Lovat. Do you know whether general Campbell and captain Fergusson went themselves into the cabin, to examine my strong box, and stayed there two hours?

D. Campbell. I don't know it; but I had an inventory of the things in the box; and whoever had the box, the things contained in it were in the inventory.

Att. Gen. I desire to know, if the strong box was not opened by a key delivered by my lord Lovat, just at the time it was opened?

D. Campbell. Yes, it was; and the things put in the same order they were before, and the key delivered back to my lord Lovat.

Att. Gen. Had it ever been opened before that time?

D. Campbell. This was the first opening of it.

Att. Gen. At the time you took the inventory, was not that the first opening of the box? And was not the key delivered by my lord Lovat?—*D. Campbell.* Yes.

Then the witness, by direction of the Lord High Steward, withdrew.

Att. Gen. My lords, we will now call sir Everard Fawkener.

L. H. S. My lord Lovat, have you any objection to sir Everard Fawkener?

Lord Lovat. Not any.

Sir Everard Fawkener sworn.

Att. Gen. I desire, sir Everard Fawkener, that you will please to give an account to my lords of the conversation you had with lord Lovat, after he was taken prisoner.

Sir Everard Fawkener. After lord Lovat was taken and brought prisoner to Fort Augustus, and lodged in an apartment of the fort there, his royal highness the duke ordered me to go and visit him; not with any design to examine him particularly; for his highness said, he intended to send him to London, there to receive what the laws of his country should order; but that, as in all appearance, he had been a great cause of the mischiefs brought upon his country, this visit was designed to see whether he would discover any thing that might tend to bring those mischiefs to a more speedy end. When I went to him, I thought it would be the most candid way of proceeding to inform him who I was; and accordingly I told him, that I had the honour to be secretary to his royal highness the duke: my lord Lovat said, that, notwithstanding the circumstances he then appeared in, he had formerly rendered great services to the government, and the present royal family; and that he had received

several marks of the late king's favour: and my lord imputed to marshal Wade the cause of his present misfortunes; which was, the taking away his company; which he expressed his resentment at, by saying, that if Kouli Khan had landed in Britain, he should have thought that would have justified his lordship to have joined him with his clan; and he would have done it. He said further, that he had been in a condition to render service to the government, and that he might be of future service to the government; and that mercy, as well as justice, belonged to sovereigns; and that, if his majesty would extend mercy towards him, he would shew his loyalty, and deserve more than twenty such heads as his were worth. I would have entered more particularly into the services that he would render the government, but that I found, by his own discourse, that the service he meant was no more, than to bring his clan for the future into the service of the government, instead of employing them against it. He said, the world allowed him some abilities, and he would apply them to that service; and concluded with this, saying, He was

— in utrumque paratus
Seu versare dolos, seu certæ occumbere morti.

Att. Gen. Can you charge your memory with any particular expressions he made use of?

Sir E. Fawkener. I cannot say whether what I have said was the subject of one or two conversations; but he used to send for me frequently, and I remember there was one thing he would seem to make reconcileable, which was, his principle of loyalty to the family of the Stuarts, and the services done for the late king and the royal family.

Att. Gen. What were the services he said he could render the government?

Sir E. Fawkener. Only that he would employ the Frasers in the service of the government, instead of employing them against it, and employ his talents in the support of it.

Att. Gen. Did my lord Lovat confess or deny that he had been concerned in the rebellion?

Sir E. Fawkener. He did not seem to me to take the trouble to deny it, but rather acquiesced in it that he had.

Att. Gen. Did he ever say he was not concerned in it?

Sir E. Fawkener. I cannot say he ever did.

Att. Gen. My lords, we have done with this witness.

L. H. S. My lord Lovat, would you ask sir Everard Fawkener any questions?

Lord Lovat. No; only that I am sir Everard's humble servant, and wish him joy of his young lady.

Att. Gen. My lords, we have now done with calling our *viva voce* evidence, any further than what will be necessary to prove the written evidence which we shall produce; and therefore what we propose now, is, to call a witness to prove some letters, some of them of the sig-

nature and hand-writing, and all of the dictating, of the noble lord at the bar.

Sir W. Yonge. My lords, I submit to your lordships, if it would not be better to have the whole of the written evidence together, rather than to go on to-night with part of it only: We submit it entirely to your lordships, whether we shall now go on or not.

Lord Lovat. And I hope your lordships will remember poor Lovat who cannot stand; and that you will give a little respite till Monday, or order his funeral.

L. H. S. Gentlemen of the House of Commons, is your written evidence likely to be long?

Att. Gen. My lords, it will be very long.

L. H. S. Will it take up more than one day?

Att. Gen. My lords, it is difficult to say, with certainty, how long it will take up: There is a great deal of written evidence to lay before your lordships; and there must be the summing up of the whole evidence by one of the Managers.

Lords. Go on; go on.

Sir W. Yonge. My lords, then we will beg leave to call Robert Fraser.

He was sworn and examined on this trial before, and was my lord Lovat's secretary.

Robert Fraser called into court.

Sir W. Yonge. Look upon that letter (shewing the witness a letter), and tell my lords of whose hand-writing it is.

R. Fraser. It is my own.

Sir W. Yonge. By whose order did you write that letter?

R. Fraser. By order of my lord Lovat.

Sir W. Yonge. Did my lord Lovat dictate it to you, or not?

R. Fraser. My lord Lovat dictated every word of it.

Sir W. Yonge. Look upon the signature of the letter, and tell my lords of whose hand-writing it is?

R. Fraser. It is my lord Lovat's.

Sir W. Yonge. Did you, or did you not, see him sign it?—R. Fraser. I saw him sign it.

Sir W. Yonge. As the letter is not addressed to any body, please to inform their lordships to whom it was intended to be sent?

R. Fraser. It was intended to be sent to John Murray of Broughton, the Pretender's secretary.

Sir W. Yonge. Was it sent from Castle-Downey?

R. Fraser. No; not from Castle-Downey.

L. H. S. How do you know this letter was intended to be sent to Mr. Murray?

R. Fraser. My lord Lovat told me so.

Sir W. Yonge. Was the letter sent at any time?

R. Fraser. Yes; it was sent from Gortuleg.

Sir W. Yonge. When was it sent?

R. Fraser. After my lord Lovat had made his escape from lord Loudon.

Sir W. Yonge. How long was that after the letter was writ?

R. Fraser. It was writ in December, and sent in January.

Then the Letter (marked No. III,) signed Lovat, was delivered in, and read by the clerk at the table, as follows:

N^o III.

"Honorable and dear Sir:—I received, with vast pleasure, the honour of your letter of the 31st October, by the bearer, who has the honour to be known to you. He is my relation, and was my secretary for several years; and he is now captain lieutenant in the first battalion of my son's regiment. He gave me great joy in letting me know at this time, as well as when he came from Edinburgh some weeks ago, that you was in perfect health, notwithstanding of the extreme fatigue, and constant hurry, that the essential affairs of the royal prince keeps you in day and night.

"I do assure you, dear Sir, that no man in Scotland is better pleased to hear of the continuation of your health, and the prosperity of your person in every shape, than I am, as I always found you a worthy gentleman, full of good sense and politeness, full of true loyalty and valour, and faithfully zealous for the interest of the royal family, and in the mean time, mighty civil and obliging to me, when I had the honour to see [you] on the subject of the king's affairs, which never was so well taken care of, as since they were in your hands: I would be therefore a most stupid, worthless animal, if I had not a most grateful sense of your goodness and friendship towards me: So, dear Sir, you may believe me, when I assure you, that my heart and soul is full of thanks and gratitude for the great marks of friendship, that I had the honour to receive from you; and I have laid my positive commands upon my son to love, honour, and respect you as my best friend, and to make you his patron at the prince's court, and to do nothing that is essential without your advice; and he will find it his own interest to observe exactly my instructions on that head.

"I solemnly protest, dear Sir, that it was the greatest grief of my life, that my indisposition and severe sickness kept me from going south to my dear brave prince, and never parting with him while I was able to stand, but venture my old bones, with pleasure, in his service, and before his eyes, while I had the least breath within me: but, when I found, that by pains and weakness in my knees, I lost the use of my limbs, I resolved to give a proof of my singular zeal for my dear master the king, and for my brave glorious prince, that, I truly believe, few or none in Scotland would do, but myself. I send my eldest son, the hopes of my family and the darling of my life, a youth about nineteen year old, who was just going abroad to finish his studies and education, after having learned, with applause, what is taught in our Scots universities, and was graduate master of arts. But instead

of sending him abroad to compleat his education, I have sent him to venture the last drop of his blood in the glorious prince's service; and, as he is extremely beloved, and the darling of the clan, all the gentlemen of my name and clan (which, I thank God! are numerous, and look well, and always beleived to be as stout as their neighbours) are gone with him.

"There is not the head of ane old family or trybe of my name and clan in this country, that have staid at home; only a few old gentlemen, infirm like myself, that were notable to travell: and, as my son is adored by the common people of my clan, he has brought along with him a considerable number of the best of them, in two handsome battalions; and if they were as well armed and equipped as I could wish, they would look as well as any clan that went south this year; for, as I possess the largest and best estate in the shire, I have a great number of commons on my property, about 1,500, good and bad; and that which is very singular, is, that, in that 1,500, there is not 30 but what are Frasers; which no chief in the Highlands can say of his clan, but myself; for most of them are mixed with men of all the other clans.

"I flatter myself, that my son will behave well at the head of my people; and I am sure every one of them will be ready to live and dye with him; and if he lives, I hope he will be ane useful servant to the king and prince, and ane honour to his family; for he has very good parts and learning for his age: and since I am like to make my exit very soon out of this troublesome world, and that, I thank God! I have served my king faithfully from my infancy till now; and that it is well known by all the gentlemen in the king's interest in the north, that for many years past, I was the life and spirit of the king's affairs in these countrys; and as I made it my only business to encourage and keep up the hearts of the king's friends, it was very fatiguing and troublesome to me, and vastly expensive, by my extravagant housekeeping, and giving away often a little money to the king's friends that wanted it much, and from whom I never expect any payment; and now I give the last proof of my uncommon and unalterable zeal for my dear master the king, in sending what is dearest to me in the world, my eldest son, and my clan, to venture their lives with the glorious prince royal, and under his eyes.

"As it would be ill manners to trouble you in a letter with some essentiall things that concerns my own person and family, I have entrusted my cousin, the bearer, to give you a true account of what I have to say; which, I hope, you will receive with your ordinary goodness, and friendship for me. And I earnestly entreat, after you consider what I have to say, that you represent it to the prince in the kindly and friendly manner you always behaved to me; and as I ask nothing of his royal highness, that is either expensive, dishonourable, or

disadvantageous, to his royal highness, and to his interest, I am convinced, that his royal highness will give me a just and gracious answer; which will for ever fix me, my posterity, and all concerned in me, to his royal highness person and family: and I can say without vanity, that there is not one family in the north of Scotland more capable to serve him, and his royal family, than mine, nor now that has deserved it more of the royal family of Stuarts, since their accession to the throne, than the Frasers, and the lords of Lovat. They likewise signalized themselves with honor and valour for king Robert Bruce, and his offspring: and it is likewise singular, that no lord Lovat of twenty-four that have been of my family, ever fought or voted against their king.

"I beg you ten thousand pardons for this digression; but, as I look upon you as my best friend, I thought proper to let you know this under my own hand; which, I hope, you will forgive, and the tediousness of this letter, and believe that I am, as much as any man alive, with the utmost esteem and respect, and with a most sincere and constant gratitude, while there is life in me, Honorable and Dear Sir, Your most obedient, most obliged, and most affectionate, faithful, humble servant, LOVAT."

Att. Gen. This letter will be proved to have been received by John Murray of Broughton. My lords, he is not now here; and therefore we do not call him to that particular: but the next letter we shall produce, is a letter written by my lord Lovat to the Pretender's son. The letter itself will appear to be torn in some parts, which will, in a small degree, mangle the sense; but that will be supplied by a copy of the same letter, written at the same time, by the same hand, and by the order of my lord Lovat, which we shall produce to your lordships.

Sir W. Yonge, producing the letter to the witness, asked,

Sir W. Yonge. Of whose hand-writing is that?—*R. Fraser*. It is mine.

Sir W. Yonge. By whose order did you write it?

R. Fraser. By my lord Lovat's order.

Sir W. Yonge. Was it dictated to you by him?—*R. Fraser*. Every word of it.

Sir W. Yonge. Was the letter signed by my lord?—*R. Fraser*. It was.

Sir W. Yonge. Is the signature there? Or, is it torn off?—*R. Fraser*. It is torn off.

Sir W. Yonge. Look upon that copy of a letter, and tell my lords whom that was written by?—*R. Fraser*. By me.

Sir W. Yonge. By whose order?

R. Fraser. By my lord Lovat's order.

Sir W. Yonge. For what end or purpose was it made?

R. Fraser. It was made for a copy to keep.

Sir W. Yonge. Is that a copy of the other letter which you were just now shewn?

R. Fraser. That is a copy that was drawn from the principal.

Sir W. Yonge. Was the original sent at any time?—*R. Fraser.* Yes; it was.

Sir W. Yonge. When was it sent?

R. Fraser. It was sent from Gortuleg at the same time the letter to Mr. Murray was sent.

Sir W. Yonge. Can you give an account how the signature of the original letter came to be torn off?—*R. Fraser.* I cannot.

Att. Gen. My lords, there is some part of the signature remaining: the top of the L, and the top of the t, remain.

My lords, We desire the letter may be read.

Sir W. Yonge. Deliver both the letter, and the copy to explain it.

L. H. S. Was the signature originally there?

R. Fraser. Yes.

L. H. S. You say my lord Lovat dictated it?

R. Fraser. Yes.

L. H. S. Did he sign it?

R. Fraser. Yes.

L. H. S. Was the name intire upon it, when it was sent away from Gortuleg?

R. Fraser. Yes; it was.

L. H. S. When was it sent away from Gortuleg?

R. Fraser. At the same time with the former letter, that has been read.

L. H. S. When was that sent?

R. Fraser. In January.

L. H. S. By whom was it sent?

R. Fraser. By a tenant of my lord Lovat's; one of his Stratharrick men.

L. H. S. My lords, as both the letter and the copy have been proved, it will be proper for your lordships first to hear the original read, imperfect as it is, and then the copy.

Clerk read the Letter No. I, dated Beaufort, November, 1745, and then read the copy of the same Letter, No. II.

N° I.

"Most Royal Prince;* I reckon it the greatest misfortune of my life, and which has occasioned me more grief and sorrow, than any cross accident that ever happened to me, that my long indisposition, and severe pains and tortures, [that I] suffered for a long time, deprived me of the vast [joy and] honour I would have had in kissing your [royal highness] hands, and in venturing my old [person] before your eyes. And, as my dear masters and [sovereigns], your royal father and grandfather [never had] a more faithful and zealous subject than [I have been] to their royal persons and interests, since I [had] the use of my reason; so nothing in this world could give me so much pleasure as to signalize myself, and end my days, in the service of your royal highness, where I would not be useless, having been bred to the war by the best masters

* N. B. The chasms in this letter, [inserted here in brackets] which were occasioned by tearing off the signature, are supplied from No. II, the copy of it. *Former Edition.*

in Europe these fifty years past: but now, finding myself a perfect invalid, not able to mount a horseback, nor to walk half a mile, and consequently not able to exert myself either as a soldier, or as a general officer, which my dear master, your royal father, was pleased to make me above forty years ago.

"Finding myself in this unhappy, cruel situation, of not being able to pay my duty to your royal highness in every respect, I did resolve to give your royal highness the next mark of my greatest zeal that I am capable of, if it was to gain your royal highness ten kingdoms; and that is, to send my eldest son, the bearer of this letter, and the great hopes of my family, and the darling of my soul, to venture his life, [and] his young person, in your royal highness service: And I hope, that his great zeal and for[wardness to serve] your royal highness, in every shape y[ou please to command] him, will be a proof, that he is my [true son].

I have sent along with him all [the principal] gentlemen, and heads of families, of my [clan, with] eight hundred of my common people of his own choice: And it is singular in my clan, that, of [thirteen] or fourteen hundred men that are on my proper[ty], they are all Frasers; and there is not twenty of them of any other clan. Both history and traditions tell us, that the clan of the Frasers always behaved well; and now, when they have a most glorious and brave Prince at their head, I truly rather hear of my son's death, and of all my clan that went along with him, than to hear of their misbehaviour, which would soon put my gray head with sorrow to the grave; but I do not in the least fear it. I therefore deliver my son, and my clan, most heartily and frankly to your royal highness, to do with them what in your royal highness goodness and pleasure you think fit.

"I hope there is none of your royal highness freinds, or servants, that has come to this country, but will do me the justice to declare, that I am, and always have been, the most zealous and most active partizan that [your royal highness has in the north of Scotland; and [in that I o]wn I did but my duty.

"This letter is already longer, than, in good [manners,] I ought to have troubled your royal highness [with: But] as I have a great many essential things to lay [before] your royal highness, I will make a memorial [of them,] and give them in to my good freind Mr. [Murray,] your royal highness secretary of state, that he [may] represent to your royal highness what is in [it,] when you are at leasure.

"I pray God preserve your royal highness person, and give you success and glory in all your enterprises, as you have had hitherto; and I am, while I live, ready to loose the last drop of my blood, and with as great zeal as any man on earth, Most glorious and most royal prince, Your royal highness most constant and faithful slave,

"Beaufort, Nov. 1745."

Then the copy of the above letter was read.

Lord High Steward. By whom was this letter intended to have been sent to the young Pretender?

R. Fraser. It was intended to have been sent by the master of Lovat.

L. H. S. How long had you this copy in your hands?

R. Fraser. I had it in my hands for some time after it was written: it lay in my desk.

L. H. S. How long had you it in your hands?—*R. Fraser.* I cannot be positive.

L. H. S. To whom did you deliver the copy?

R. Fraser. I do not know to whom I delivered the copy.

Att. Gen. My lords, though it is impossible for your lordships to doubt who is meant by the words Most glorious Prince, and Your Royal Highness, in the letter, yet, if your lordships please, this witness may be asked, as he wrote the letter by my lord's dictating, who was meant by these words?

R. Fraser. I took it to mean the Pretender's son.

Sir W. Yonge. My lords, the next letter we beg leave to produce, is another letter that was intended to be sent to the master of Lovat.

Look upon that letter [shewing the letter to the witness,] and tell my lords of whose handwriting it is.

R. Fraser. It is mine.

Sir W. Yonge. By whose order did you write it?—*R. Fraser.* By my lord Lovat's.

Sir W. Yonge. Was it dictated by lord Lovat to you?—*R. Fraser.* Every word of it.

Sir W. Yonge. Was it signed by my lord Lovat, when it was written?

R. Fraser. I cannot be positive whether it was signed, or not.

Sir W. Yonge. Recollect, if you can, whether it was signed, or not.

R. Fraser. To the best of my remembrance, it was signed. It was intended to be sent, with the other letters, to the laird of Lochiel, who was then at Perth. It was written by me, and dictated by my lord Lovat every word.

Sir W. Yonge. Can you take upon you to say, that it was signed, or not?

R. Fraser. To the best of my knowledge, it was.

Sir W. Yonge. Was that letter sent at the same time with the others?

R. Fraser. Yes; it was.

Sir W. Yonge. At the same time, and by the same person?—*R. Fraser.* Yes.

Sir W. Yonge. By whose orders were they sent?—*R. Fraser.* By my lord Lovat's.

Sir W. Yonge. What were you ordered to do with these four letters?

R. Fraser. To put them up in a packet; which I did, and directed them to the master of Lovat.

Sir W. Yonge. By whom were you ordered to do it?—*R. Fraser.* By my lord Lovat.

Sir W. Yonge. Were there three or four letters in all?

VOL. XVIII.

R. Fraser. There were four letters.

L. H. S. Was this letter sent in the same packet with the others?

R. Fraser. Yes; it was.

Then the Letter N^o IV. was delivered in at the table, and read by the clerk, as follows:

N^o IV.

"My dear laird of Lochiel; I could hardly believe an angel from heaven, if he had told me, that Donald laird of Lochiel wou'd forget Simon lord Lovat, as you have done: and this is the more surprizing, that you cannot say, nor justly think, that, in one article of my life, I fail'd to shew my singular affection and respect for my dear cousin Lochiel; but, on the contrary, gave you all the marks of freindship in my power, or that I was capable off; and yet, my dear cousin, since ever you joined the prince, you never did me the honour to write me one scrape of a pen, notwithstanding of the strict union and freindship that we always lived in, and our constant correspondence. I solemnly protest, that I know not what to attribute this silence to; since I cannot accuse myself of any thing that deserves it at your hands: for you never saw me fail in my loyalty to the king, or in my affection and freindship towards you; nor never will, though you should continue as unkind as you are. I therefore beg of you, my dear cousin, to let me hear from you; and be so good as to comfort my languishing soul, and drooping spirits, by assuring me that you are the same affectionate laird of Lochiel to me that ever you was: I truly never had so much need of your comfort and assistance as at this time; for I am in vast distress of body and mind.

"The base and treacherous behaviour of our wretched cousin the laird of Mac Leod has almost cost me my life already: the night before he took his journey to the isle of Sky from this house, sitting by me, he looked up seriously, and swore to me, that as he should answer to God, and wished that God might never have mercy on him, and that he might never enter into the kingdom of heaven, but that his bones might rott on earth, be burnt, and his ashes blown up in the air, if he did not come with all speed imaginable, and with all his men that was already prepared, and come and join my son, and the clan Fraser, and march south with them to the prince's service, wherever he was. He swore the same terrible oaths and imprecations next day to my son, and to your faithful servant Gortuleg: and if he had kept his oaths and word, I had so managed this part of the north, that about 6,000 men had marched south to the Prince's assistance; which I thought wou'd much encourage his own loyal party, and frighten the English to his obedience. But when I got Mac Leod's letter about twelve days after, in which he told me, that, after deliberating fully with his neighbour, sir Alexander, and weighing the arguments on both sides, he, and

his neighbour, had resolved to stay at home, and not to trouble the government.

"In reading this line, I had almost fainted, and my body swell'd with anger and vexation; so that I could not sleep nor eat for several days; and I am yet far from being recovered, for I have a severe stitch and pain in my left-side, which keeps me from my night's rest, and has entirely taken away my appetite; so that I beleive the treachery of that unnatural, ungrateful, and wicked man, will be the occasion of my death very soon: but before I die, I resolved, if possible, to give such a mark of my zeal for my good master the king, and for the glorious brave royal prince his son, that I beleive few in Scotland would do but myself.

"I send my eldest son, who is the great hopes of my family, and the darling of my life and soul, to venture his life and blood in the brave royal prince's service; and he has all the gentlemen of my clan with him, except a few old gentlemen that are not able to travel. He has Stray, Kilbokie, and Religg, the principal heads of families of the Frasers this side of Lochness; and he has Foyers, Ferraline, and Leale-Garth, as the principal heads of the families in Stratherrick and Abertorff; and he has certainly taken with him the flour of my clan. I pray God preserve him and them, and influence them to fight gallantly before the brave prince's eyes; for I had much rather hear of my son's death, and of my clans, than that they should miss-behave; since history cannot shew ane occasion in which the Frasers misbehaved; for, I thank God, they were always known to be brave.

"Now, my dear cousin Locheil, you cannot but think it just and reasonable, that I deliver my son to your care, in every respect; and that your clan, Cluny's, and mine, should be most unite, and live together like brethren; and that the quarrell of the one should be the quarrell of the other, according to our mutual engagements by word and write; in which, I hope, we will never fail. The treacherous behaviour of the monstrous laird of MacLeod should put all relations and intimate freinds on their guard not to fail to one another; for he has, by his treachery and unnatural behaviour, fixed upon himself the most infamous character of any man on earth: that traitor, instead of coming to this house, where he was always Mr. to join my son, according to his promise, has marched the other side of Kessock this day with 400 of his chosen men and gentlemen: I beleive that, hearing that my son's regiment was in arms in this country, he was afraid to pass through it, though it's the best way to Inverness. His fears was groundless; for I woud not hurt my mother's kin, though it was in my power: but if my son saw the laird, I beleive he would shoot him, or bring him prisoner to the Prince, because of his abominable breach of oath and promises to him.

"When he sent a little soaking gentleman here with his treacherous letters, my son and Gortulegg made two bitter answers to them.

When the little gentleman sought my answer, I told him to tell his chief, that he was a traitor to the king, and a murderer of my son and me, which he might be sure I would resent, if I was able; but that I would never black paper to a man that had so basely betrayed me; that since he went to the devil, I would leave him there, and have no more to do with him.

"Honest Gortuleg, who made up a company to go with my son, and who would be most usefull to him, fell very ill, eight days ago, of his old distemper, ane inflammation in the kidneys, of which he had almost dyd some years ago in Lochaber, and many times since. He lies in the next room to me; we are both much indisposed, and invalids. He joins me in assuring you, and my dear cousin the lady Locheil, and all your lovely family, of our most affectionate humble duty and best respects.

"Since you are justly the royal Prince's great favourite, I hope you'll be so kind, dear cousin, as make my court to his royal highness; for though it is my misfortune not to be able to follow him wherever he goes (which would be the delight and honor of my life,) yet you can freely assure his royal highness, that he has not a more faithfull and zealous partizan in Scotland: and though I am not able to mount a horseback, or travell a foot, yet I have done his royal highness more service than any one of my own rank in Britain; for I keep life and spirits in his affairs more than any man in the north: and though the President tells me plainly, that I have forfeit life and fortune, and that my person is not safe in this house; yet I am resolved to live and die with courage and resolution in my king and royal prince's service; but no death that they can invent can lessen my zeal, or fright me from my duty.

"I beg, my dear cousin, you may acquaint me what you know of our dear cousin Mr. William Drummond of Bochaldy; for I can get no certain accounts of him, which vexes my soul and heart; for he was one of the men in the world that I loved most, and that loved me most.

"I beg you ten thousand pardons for this very long letter; but it is to punish you for your silence, and to convince that I am always the same man towards you and yours.

"I intreat you make my most affectionate compliments to my dear son-in-law Cluny,—I am perswaded he will do honor to all concerned in him.—I am convinced that you will easily beleive, that I am, as much as any man alive, with unalterable esteem, attachment, and respect, my dear laird of Locheil,

"Beaufort, Nov. . . .

The Signature of this Letter was torn.

Att. Gen. My lords, there was another letter, which we take to be one of the four which was sent in that packet; it is not a very material one; and we shall produce it to your lordships, rather to connect the evidence

of this witness, than for any thing contained in it. It is a letter to the late marquis of Tullibardine, by the name of Duke of Athol.

Sir William Yonge producing the Letter, the signature to which, and part of the date, is torn off.

Sir W. Yonge. Of whose hand-writing is that letter?—*R. Fraser*. My own.

Sir W. Yonge. By whose directions did you write it?—*R. Fraser*. By my lord Lovat's.

Sir W. Yonge. Did he dictate it to you?

R. Fraser. Every word of it.

Sir W. Yonge. Was the letter signed by lord Lovat?—*R. Fraser*. Yes, it was.

Sir W. Yonge. Did you see my lord Lovat sign it?—*R. Fraser*. Yes, I did.

Sir W. Yonge. Is the signature torn off?

R. Fraser. Yes.

Sir W. Yonge. Was that letter sent with the others?

R. Fraser. It was sent with the former that have been read.

Sir W. Yonge. In the same packet?

R. Fraser. Yes.

Sir W. Yonge. Which was directed to the master of Lovat?—*R. Fraser*. Yes.

Sir W. Yonge. For whom did my lord Lovat say that letter was designed?

R. Fraser. For the duke of Athol.

Sir W. Yonge. Who did he mean by that?

R. Fraser. The marquis of Tullibardine, the duke of Athol that was abroad.

Sir W. Yonge. By whose order did you send that letter?

R. Fraser. By my lord Lovat's orders.

Then the Letter, N° V. dated 5th December, 1745, was delivered at the table, and read by the Clerk, as follows:

N° V.

"My good lord duke; I had the honour to receive two very ob * from your grace; for which I give you * . . . nks; and I can freely assure your grace * . . . ness and civilitys towards me, have had * pres-
 mion upon me, that I will remember *
 ays of my life with gratitude and thankf . . .
 And your grace shall always find me most
 ready to serve your person and family.

"I had the honour to return answers to both your grace's letters; one by Mr. Mac Donell, and the other by Mr. Mac Pherson, both of the army; but as the bearer has the honour to be your grace and is my relation, and one whom I trust as much as any of my family, I have put it upon him to acquaint your grace of every thing that happens in this country worth your while to hear, since I had the honour to receive your grace's letters; which I am sure he will do very exactly and very faithfully; for he knows every thing that is done in this country, and does not want understand-
 ing.

"I humbly beg the continuance of your grace's goodness and civilitys towards me; and

be so just as to beleive that I will remain, while I live, with the utmost esteem, attachment, and respect, My good lord duke, Your grace's most obedient, most oblidge, and most affectionate faithful humble servant,

"Beaufort, Dec. 5, 1745."

The Signature of this Letter was torn.

Att. Gen. My lords, the next letter we beg leave to produce, is a letter from my lord Lovat to his son. My lords, your lordships have heard already of a letter which was found in the box, from the son to the father; to which this will appear to be an answer. The father's letter we shall prove in the same manner as we have done the others; and the son's will be proved to be of his hand-writing, and to have been in the box, at the time it was examined and opened, in the manner your lordships have heard.

Att. Gen. Of whose hand-writing is that letter? [Shewing the letter to the witness.]

R. Fraser. It is of my own hand-writing.

Att. Gen. By whose orders did you write it?

R. Fraser. By my lord Lovat's.

Att. Gen. Was it signed by my lord Lovat?

R. Fraser. It was not signed.

Att. Gen. Was it ever sent by my lord Lovat's order?—*R. Fraser*. Yes.

Att. Gen. To whom?

R. Fraser. To the master of Lovat.

Att. Gen. Did my lord Lovat dictate it to you?—*R. Fraser*. Yes, every word of it.

Att. Gen. Did he order you to send it to the master of Lovat?—*R. Fraser*. Yes, he did.

Att. Gen. Did lord Lovat frequently order letters to be wrote, and order his secretary to send them, without signing them?

R. Fraser. Yes, my lords, he did.

Att. Gen. Was not that generally to people the most intimate with him?

R. Fraser. Yes, only to his intimates.

L. H. S. Do you know any thing of the sending of this letter?—*R. Fraser*. Yes.

L. H. S. By whom was it sent?

R. Fraser. By one of my lord Lovat's tenants.

L. H. S. Was it sent at the same time with the packet?

R. Fraser. Yes, I believe it was; but I am not positive as to the precise time it was sent; it was either then, or a little after: if I was to read the letter, I could tell. [The witness having looked upon the letter.]

L. H. S. Does that enable you to recollect when the letter was sent?

R. Fraser. Yes, my lords, it does; it was sent at the same time with the other letters that I spoke of.

L. H. S. With that packet which has been mentioned?—*R. Fraser*. Yes.

Att. Gen. My lords, this letter consists of two pieces; one is a postscript: therefore we beg leave to ask this witness, whether the postscript was wrote by him, and dictated by my lord, and sent at the same time with the other?

R. Fraser. Yes, it was.

Then the Clerk read the Letter, N° X. at the table: which is as follows:

N° X.

"My dearest child; I received the pleasure of your letter by the two expresses that I sent to you the first of this month, which you forgot to mark the date of. It gave me great joy, my dear Simon, to know, that you are in perfect health, and to see such a handsome letter of your own write and diction. But I must tell you, my dear child, that you advance severall things in it that are not just, and that you cannot support in reason. In the first place, your reason for your not writing to me before, since I made my escape (though I accept of your excuse) was neither just nor relevant; for it was not to be supposed, that either Loudoun or the President would be in terms with me so soon, after having so signally affronted them: but in the second place, it is impossible there could be any terms 'twixt lord Loudoun, the President, and me, that should keep you from writing to me; no, if I should be attainted: so your reason for not writing to me was ill-founded. As to your advice that comes immediately after it, in representing to me, That if I could make my peace with Loudoun and the president, and save my person and estate, that you would content yourself with a thin regiment: this thought, my dear child, was not at all digested, and entirely ignorant to my circumstances: for, in the first place, Loudoun can no more save my person and estate, than any of your subaltern officers can; nay, they cannot as much engage to make me free from prison for any time: so that it would be madness for me to make any terms with them, but to speak civilly, and to keep myself out of their way. But the fact is, my dear child, which you forgot, or perhaps that I did not take pains to inform you of it, that, above seven years ago, I was one of those that entered into a formal association to venture our lives and fortunes to restore the king, and his offspring; and we signed our mutual engagements for this purpose with our hands and seals, and sent it to France to the cardinall de Fleury, then first minister of France, by the hands of Mr. William Drummond of Bochaldu. The cardinall was so pleased with it, that he shewed our engagements and subscriptions to the king his master, and begged of his majesty to support us: and the king desired the cardinall to assure us of his protection, and that he would give us his assistance and succours to restore our king. When Mr. Drummond acquainted my own king of this proof of my loyalty, and of my constant zeal for his person and interest, from my younger years till now, gave me evident proofs of his goodness and favours towards me since, as much as to any subject. He gave Mr. Drummond a commission to carry to me of generall of the Highlanders, which I have; and severall letters writt with the king's own

hand, that his majesty would pay all the money I paid Fraserdale, and his creditors, for the estate of Lovat; and, last of all, the king was so good as to give such a singular mark of his favour to me, and to my family, that he created me duke of Fraser, &c. and sent me that patent by William Drummond; of which I have an authentick copy, signed and counter-signed by the king. I would be a monster of ingratitude, if this did not attach me to his majesty more than ever. Bochaldu, not thinking it safe to bring the patent to Britain, left it with his uncle, old Lochiel, at Bullen in France, who is now come over with lord John Drummond his colonell; and I hope he has taken my patent along with him. I beg you may assure him of my most affectionate respects. He and I always lived like two brothers, and loved one another most dearly. I am sure he still retains affectionate sentiments for me, as I do for him. I hope he will deliver you my patent, or a good account of it. So, my dear child, since that association, I made it my business, where-ever I was, to promote the king's interest, and to gain and engage faithfull subjects to serve him; so that I have done more against this government than would hang fifty lords, and forfeit fifty estates. I have therefore nothing for it now, but to promote every thing that is for my dear Prince's honour and interest: and nothing made me ever speak as much as a fair word to lord Loudoun, or the President, but to endeavour to save my person from prison, since I was not able to go to the field, and fight for my king; but, since that is over, and that I have no safety from prison, but by being in hills and woods, and inaccessible places, my greatest desire under the sun is, that you should make a good and handsome figure in the Prince's army; which I wish, and am as anxious to see done as yourself, and would do as much for it as I would do to save my life, or keep myself from prison, which would be soon death for me: and, as Loudoun told me the day before I made my escape, that he had as much to say against me as would hang all the Frasers of my clan, I have no reason to hedge or dissemble with any man of the government: so you may assure yourself, that I will put all irons in the fire to send you south, all the men thats engaged with you, and as many more as I can get.

"You are quite mistaken, my dear child, when you think, that your coming north would not engage them to go south. I am sure it would do much more than my orders; for the tenth man would not go this day at my desire, that would go first when you began this work: however, I will be working at them all I can.

"I am making up, with all the best possible, a habitation for myself in the house of Muily; for that country is the strongest hold in Scotland; for I will make 100 good men defend it against all forces that king George can have in Scotland. Besides, I ordered a boat to be made, to carry me out and in to the isle of

Minily, when I please; so that it is morally impracticable to attack me in that country, where I am resolved to go, if possible, next week, if my accommodation be finished. I keep Farraline till I go out of the country; for if he went away just now, when the people of the Aird are going south, and Simon, with some men, out of this country, I would be hunted like a fox by Loudoun up and down the country, which perhaps would cost me my life by cold and fatigue; so that I am resolved to stay at my dear Gortuleg's house, which I reckon my home as much as if I was at Castle Douny, till my accommodation is made up at Glinstrafarer.

"I shall send you my fine pistols and furniture, after I cause put them up in a new portmantua; for it would be a pity to spoil them; for they will be few so good in the army. I wonder that you are so long without writing to me; for you may be sure that it's a comfort for me to hear often from you; and when I am a week without hearing, in the situation that you are in now, you may believe that I must be very uneasie. Therefore, my dear Simon, for Christ's sake, don't be a week without writing to me; and let me know how all matters goes with you, and what situation the Prince's army is in, and write encouraging news, that may be shewn to your people.

"I shall long much for the return of this express; and I ever am, with great affection, My dearest Simon, Your dutyfull father.

"January 14th, 1746."

"P. S. I send you enclosed the four letters that you should have carried with you from Castle Douny, which, I hope, you will have occasion to deliver out of your own hand. You may tell the P. when you deliver the letter to him out of your own hand, that your father thought it the greatest misfortune of his life; that his sickness and infirmity deprived him of the honour of attending his royal highness where ever he went; and that his only comfort now is, that he is capable to give his R. H. such a mark of his zeal as to send you, and his kindred, to venture your lives for him; and that he himself is every day exposed to be made a prisoner, and be sent to London, to have his head struck off; since it can be easily proven against him, that he has done more against the government than any one of his rank in Britain; and hopes, that since, by God's help, he has made what may be called a miraculous escape out of the hands of his cruel enemy, he will yet expose his person, with his sword in his hand, to serve his R. H. and to do his duty before his eyes. You will make your court and mine to Mr. Murray, as much as you can; he is a very pretty honest fellow; and, I am very sure, would be ready to serve us. And tell young Lochell, and John Roy, that I expect that they will make my court, and yours, to his R. H. in every shape; and that they both know the entire trust and confidence I put in them.

"I hope your captain-leivt. is come home by this time; and it was very right to send him; for he is certainly one of the prettiest fellows of your clan: Give my service to him, and tell him, that I beg of him to remember all that I spoke to him about my patent; and when you talk seriously with him about it, I entreat that you both put all the irons in fire you can, to make the thing succeed. I ask nothing of his royal highness, but to give his countenance, and own publicly what his father has done for me; which if he refuse, I most keep to the oath that I gave before the duke of Perth, the earl of Traquair, Lochell, and other gentlemen, that first engaged in the present project with me, that I would never draw my sword till that was done. And I cannot suppose or imagin, that his R. H. will make the least scruple about it, since it is for his own honour and interest, as well as for that of my family. I beg over and over again, my dear child, to let me hear more often from you: I give you my affectionate blessing: I pray God, and his angels, that you may be preserved in life and health till you come to my age. Adieu, my dearest Simon!

"I need not tell you who the bearer is; he is a very honest pretty fellow; the natural head of the M'Tavishes. One of the deserters goes in company with the bearer, and the rest of them will be up with you in a day or two, in company with John Dunchea's son, and John, Thomas Gortmore's son: They came all to me here, and were insinuating complaints against their officers; but I would not hear them, as the settling the matters of your regiment is your province, not mine: But I promised them, that you would use them well; and that they would meet not only with all manner of justice, but with clemency, as this was the first fault: So I hope they won't fare the worse that I recommend them to you. I beg you may dispatch the bearer, and send a man with him here."

"To the hon. the Master of Lovat, commanding a regiment of Frasers, at Perth, or Stirling."

Att. Gen. My lords, it will now be necessary, that we should give your lordships an account of the son's letter, and likewise of his hand-writing; and therefore beg leave to ask the witness, whether he was acquainted with the hand-writing of the master of Lovat?

R. Fraser. Yes, I have seen 'him write frequently.

Att. Gen. Is that his hand-writing, as you believe, or recollect?—*R. Fraser.* Yes.

Att. Gen. Have you seen him write?

R. Fraser. Yes.

L. H. S. Have you often seen him write?

R. Fraser. Yes.

Sir W. Yonge. My lords, we shall now beg leave to call a witness to prove where this letter was found.

Captain Robert Duff called into Court.

L. H. S. My lord Lovat, has your lordship

any objection to captain Duff being sworn as a witness?—Lord Lovat. No, none at all.

Captain Duff sworn.

Sir W. Yonge. My lords, we beg leave to ask this witness, whether he was present on board the Furnace, when my lord Lovat's strong box was opened?

Captain Duff. Yes, I was present.

The Letter was produced to the witness.

Sir W. Yonge. Look upon that paper, and acquaint my lords, if that paper was taken out of my lord Lovat's strong box at that time. Look it all over, and be positive, if you can.

Captain Duff looks over the Letter.

Captain Duff. I saw this letter taken out of lord Lovat's strong box.

Sir W. Yonge. Was that letter taken out in the presence of the lord Lovat?

Captain Duff. Yes, it was.

Sir W. Yonge. Did my lord Lovat say any thing about that letter at that time? Or did any body else say any thing about it?

Captain Duff. I spoke to my lord Lovat then, and told him, that I believed that letter was not designed to fall into my hands.

Sir W. Yonge. Did lord Lovat make any answer to you?

Captain Duff. My lord Lovat made no answer that I can remember.

Sir John Strange. My lords, one witness is enough to prove this fact; but Campbell has also told your lordships, that he took this letter out of the box.

Then the Letter, N^o. IX. was delivered in at the table, and read by the Clerk, as follows:

N^o. IX.

This Letter is directed to the right hon. Simon lord Fraser of Lovat.

" My Dr. Papa; Stratherick.

" I received this day the pleasure of your lo'ps letter of the 1st. I am very glad you have no complaints of your health, notwithstanding the fatigue you have of late undergone in your escape from Inverness, which gave every body here great joy. The reason of my not writing your lo'p by the express I sent last was, that I did not know but you might be on terms with lord Loudon and the President, after making your escape.

" I'm as sorry at my bad success with the commanders here, as your lo'p can be; but there is no help for it: Nor were they altogether to blame, as the Prince's sudden return to Scotland made it dangerous for them to take any step of consequence, without his particular orders; and these they had in a very few days after I came to Perth; and the orders were, that they should all march directly to Sterling. This, your lo'p sees, put it out of their power to march northward: But as I saw your lo'ps safety, and the king's interest, required an expedition to the north, I left no stone unturned

to bring it about: I therefore, immediately upon hearing of the Prince's being at Glasgow, dispatched my captain-lieutenant (who was of great use in urging this matter to the people at Perth) to Glasgow, to negotiate the affair there. He is not as yet returned; but I make no doubt, how soon the affair at Sterling is ended, but a proper body of troops . . . ordered to clear the north, and sooner the art . . . cannot bring it about.

" As to your lo'ps conduct in the mean time, if I might give an advice, it would be, not to lose on both sides: I am far from meaning by this, that you should come to Perth; so far from it, that provided your lo'p could make conditions for your own person and estate, with I'd Loudon, and the President, I should be content with a thin regiment; but in case they have neither authority or inclination to give this, I humbly think you should immediately come to a resolution, and put it in execution: For, if your lo'ps clan do not all immediately join the Prince, the cause will soon be found out. I would not much care if your lo'ps' person and estate were preserv'd by their stay; but it will be hard, if it does not better your condition with the government, when it must evidently make it worse with the Prince.—I'm sorry for the opinion your lo'p has of the two Charles's: I really think you wrong them; but, though they had all the inclination in the world, your lo'p knows, you always accus'd me of not being very subject to advice. As to what s'r Arch'd Grant writes of Inveralachie, I have all the reason in the world to believe this a very great falshood, and I'm surpris'd your lo'p should give any notice to it. As to my going to Sterling, if it was the people at Perth that were to command in that expedition, your lo'p . . . ry right, and I would be quite a conquer . . . your argument; but the Prince's positive orders to us all, his coming there himself to command us, and venture his person with us, in my opinion, quite alters the case. As to my going north, I know your lo'ps influence over your clan too well, to think, that, where your orders fail, my presence will have any weight. I'm certain your commands, tho' only intimate by your officers, will do in a day more than my presence would in a week; and, I'm persuaded that your people will come up to a man, if you order them; and, if you do not, that they will stay at home; so that their coming, or not, entirely depends on your lo'p. Besides, my going north at this time . . u'd look a little odd, when the Prince is co . . Scotland, has sent us his positive orders, let us know, that he himself is to come and command us in person, that I should, at such a critical time, run home, would look ill; and the pretext (as it would be called) of r . . ing men, wou'd not screen me from an imputation your lo'p, I'm sure, would alwise wish me to shun. These reasons, I dare say, convince your lo'p, that my going north is not only unnecessary, but very improper, at this time.

" All your lo'ps fr . . , de here join me in

wishing that your lo'p may live for many years to serve your king and country. great affection, Your lo'ps dutiful, *

"FRASER."

Then the lord Sandys moved to adjourn to the Chamber of Parliament: and the Lord High Steward going back to his chair, the House was adjourned accordingly: And then the Lords and others returned in the same order as before.

The House being resumed in the Chamber of Parliament,

Ordered, That this House will proceed further in the Trial of Simon lord Lovat on Monday next, in Westminster-hall, at 11 o'clock in the forenoon: And

A Message was sent to the House of Commons, by Mr. Spicer and Mr. Edwards to acquaint them therewith.

Ordered, That the lieutenant of the Tower of London, or his deputy, do take back the said lord Lovat, and bring him again to the bar of this House in Westminster-hall, on Monday next, at 11 o'clock in the forenoon.

THE FIFTH DAY.

Monday, March 16, 1746.

About 11 o'clock in the forenoon the Lords and others came from the Chamber of Parliament, in the same order as on Monday last, into Westminster-hall; where the Commons, and their Managers, were in the seats prepared for them respectively, as before: and the Lords took their places in the court, and the Lord High Steward in his chair.

L. H. S. The House is resumed. Is it your lordships' pleasure that the judges have leave to be covered?—Lords. Ay, ay.

Then the serjeant at arms made proclamation for silence, and afterwards the following proclamation:

Serj. at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner Simon lord Lovat to the bar, pursuant to the order of the House of Lords to you directed.

The deputy governor of the Tower brought the prisoner to the bar, in the like form as before: and then he kneeled down.

L. H. S. Your lordship may rise.

The Lord High Steward asked leave to go down to the table: And went accordingly.

L. H. S. Gentlemen of the House of Commons, you may proceed in your evidence.

Sir W. Yonge. My lords, we beg leave to call Robert Fraser again.

Robert Fraser called into Court.

Sir W. Yonge. My lords, he has been already sworn; [and shewing the witness a

* The letter was torn where these blanks are.

letter] look upon that letter; and acquaint their lordships of whose hand-writing it is.

R. Fraser. It is mine; it was wrote by me.

Sir W. Yonge. By whose order did you write it?

R. Fraser. By my lord Lovat's order.

Sir W. Yonge. Was it dictated by my lord Lovat?—R. Fraser. Every word of it.

Sir W. Yonge. Is it signed?

R. Fraser. It is not signed.

Sir W. Yonge. Did you send that letter to any body?

R. Fraser. Yes; it was sent from Gortuleg to the master of Lovat, at Inverness.

Sir W. Yonge. By whose order did you send that letter?

R. Fraser. By my lord Lovat's order.

Then the Letter, N° XI. was delivered in, and read by the clerk at the table, as follows.

N° XI.

"My dearest child; Gortulegg came home last night, with Inveralachy's brother, and the two Sandy's, Fairfield's son, and mine: and I am glad to know, that you are in perfect health; which, you may be sure, I wish the continuance of. I am sure, for all Sandy's reluctance to come to this country, he will be better pleased with it than any where else; for he has his comrade, Gortuleg's son, to travell up and down with him; and I shall not desire him stay ane hour in the house but when he pleases.

"My cousin Mr. William Fraser tells me, that the Prince sent notice to sir Alexander Bennerman, by sir John M'Donell, that he would go some of these days, and view my country of the Aird, and fish salmon upon my river of Beaully: I do not much covet that great honour at this time, as my house is quite out of order, and that I am not at home myself, nor you: however, if the Prince takes the fancy to go, you must offer to go along with him, and offer him a glass of wine, and any cold meat you can get there. I shall send Sandy Doan over immediately, if you think that the Prince is to go: so I have ordered the glyd post to be here precisely this night.

"Mr. William Fraser says, that sir Alex. Bennerman will not give his answer to sir John M'Donell, till he return, about the Prince's going to Beaufort; and that cannot be before Saturday morning. So I beg, my dearest child, you may consider seriously of this, not to let us be affronted; for after sir Alexander, and other gentlemen, were entertain'd at your house, if the Prince should go, and meet with no reception, it will be ane affront, and a stain upon you and me while we breath: So, my dearest child, don't neglect this; for it is truly of greater consequence to our honour than you can imagine, tho' in itself it's but a maggot: But, I fancy, since Cumberland is coming so near, that those fancies will be out of his head. However, I beg you may not neglect to acquaint me (if it was by ane express) when you

are rightly informed, that the Prince is going there. I have been extremely bad these four days past with a fever and a cough; but, I thank God, I am better since yesterday afternoon. I shall be glad to see you here, if you think it proper, for as short or as long a time as you please. All in this family offer you their compliments: And I ever am, more than I can express, My dearest child, Your most affect'd and dutifull father."

" March 20th, 1746."

" P. S. The Prince's reason for going to my house is, to see a salmon kill'd with the rod, which he never saw before; and if proposes that fancy, he must not be disappointed. I long to hear from you, by the gly'd post, some time this night. I beg, my dear child, you may send me any news you have from the east, and from the north, and from the south."

Lord *Halifax*. My lords, I should be sorry to ask any questions that might interrupt the Managers of the House of Commons in their proceedings. I should likewise be sorry, that any questions should be asked by me that should, in any degree, preclude the noble lord at the bar from any defence he should think proper to make: but, my lords, as the answer, in consequence of my question, will thoroughly establish, or else greatly diminish the credit which your lordships may give to this evidence; therefore I think it my duty to ask, whether, after the writing of this letter, my lord Lovat did himself read the letter, and approve of it? And I look upon it, this would be a necessary question to ask, in regard to all the other letters which have been, or shall be, produced.

R. *Fraser*. I never did write a letter from my lord Lovat, but I first made a scrawl, or a draught of it; and whenever it was transcribed upon clean paper, it was always read to my lord Lovat.

L. H. S. Repeat what you said just now aloud.

R. *Fraser*. I first made a scrawl or draught of all the letters that I wrote for his lordship, and afterwards transcribed them upon gilt paper, and then read them every word to his lordship. Sometimes my lord read them himself, and sometimes I read them to him.

L. H. S. Upon your oath, when you read any letter to my lord Lovat, after it had been written over fair, did you read it truly as it was written, word for word?

R. *Fraser*. Yes, word for word.

Sir William Yonge produced another letter to the witness, and asked,

Sir W. *Yonge*. Look upon that letter, and tell my lords of whose hand-writing it is.

R. *Fraser*. It was written by my own hand.

Sir W. *Yonge*. My lords, we have done with this witness for the present.

L. H. S. My lord Lovat, would you now ask this witness any farther questions?

Lord *Lovat*. No; I hope to convince these gentlemen, that no footman should give cre-

dit to his evidence. [Then the witness withdrew.]

Att. *Gen*. My lords, we beg that Mr. John Murray of Broughton, may be called in again.

Mr. *Murray* called into Court.

Att. *Gen*. My lords, he has been already sworn. We pray, my lords, that this witness may be shewn the letter, N^o III, that was read to your lordships before, and that was proved to have been written by my lord Lovat to Mr. *Murray*.

The Letter, No. III. was shewn to the witness.

Att. *Gen*. Do you remember ever to have seen that letter before?

J. *Murray*. I am sorry to say, that I received this letter at Inverness, in the end of February, or beginning of March, by the hands of Mr. *Fraser* of Gortuleg.

Att. *Gen*. Mr. *Murray* says, He is sorry to have received it; but I desire to ask him, if he did in fact receive it?

J. *Murray*. I did receive it, at Inverness.

Att. *Gen*. My lords, we pray, that the letter written by the Pretender's son to my lord Lovat, may be shewn to Mr. *Murray*. The use which we shall make of it, we shall explain to your lordships by-and-bye.

The Letter, No. VI. was accordingly shewn to Mr. *Murray*.

Att. *Gen*. Of whose hand-writing is the name at the bottom of that letter?

J. *Murray*. The whole letter is written by the Pretender's son himself.

Att. *Gen*. The whole letter?

J. *Murray*. Yes.

Att. *Gen*. Both the body and the subscription?—J. *Murray*. Yes.

Att. *Gen*. Is it directed to any body?

J. *Murray*. For the lord Lovat.

Att. *Gen*. Is that direction also the same hand-writing?

J. *Murray*. The same hand.

Att. *Gen*. Do you know if that letter was ever sent?

J. *Murray*. This letter was delivered, together with the other letters, to Hugh *Fraser*, at Glasgow.

Att. *Gen*. By whom was it delivered to him?

J. *Murray*. By me, to the best of my remembrance.

Att. *Gen*. Was it, or was it not, sent and delivered by the direction of the young Pretender?—J. *Murray*. It was by his direction.

Att. *Gen*. What was it delivered to Hugh *Fraser* for?

J. *Murray*. It was delivered to him, to forward to my lord Lovat.

L. H. S. Have you ever seen the Pretender's eldest son write?

J. *Murray*. Very often.

L. H. S. Upon that knowledge you have of his hand-writing, do you, upon your oath, believe that letter to be of his hand-writing?

J. Murray. Yes; I was present in the room when he wrote it.

Then the Witness was shewn another Letter by sir William Yonge, No. VII.

Sir W. Yonge. Who was that letter wrote by?

J. Murray. This letter was wrote by Cameron of Lochiel.

Sir W. Yonge. By whose order was it wrote?

J. Murray. It was wrote by the direction of the young Pretender himself.

Sir W. Yonge. Was that letter signed? and by whom?

J. Murray. The letter was signed by Cameron of Lochiel, Mac Pherson of Clunie, and by myself.

Sir W. Yonge. To whom was that letter directed? Or, is there any direction or address to it?

J. Murray. No; there is none.

Sir W. Yonge. To whom was it intended to be sent?

J. Murray. To my lord Lovat.

Sir W. Yonge. Was it, or was it not, delivered to any body to be sent to my lord?

J. Murray. Yes; it was delivered to Hugh Fraser.

Sir W. Yonge. At the same time with the letter from the Pretender's son?

J. Murray. Yes; at the same time, and in the same packet.

Sir J. Strange. What is the reason why it was not addressed?

J. Murray. The reason why it was not addressed was, that Hugh Fraser asked, If there was a patent granted by the Pretender to create my lord Lovat a duke? To which Lochiel answered, That if there was any such patent, it was in the hands of his father John Cameron, who was then at Dunblain; and therefore that packet was not addressed, because it was not then known, whether there was such a patent, or no: and it was left without any direction, till Hugh Fraser should enquire, whether there was any patent of duke, or not.

Sir J. Strange. Are you acquainted with Cameron of Lochiel's hand-writing, or not?

J. Murray. Perfectly well.

Sir J. Strange. Were you present when that letter was written, or no?

J. Murray. There was none present but Cameron of Lochiel, Mac Pherson of Clunie, and I.

Sir J. Strange. Did you see them sign that letter?—*J. Murray.* Yes; I did.

Att. Gen. My lords, I mentioned to your lordships, that I would explain the use intended to be made of these two letters. Your lordships have observed, that among the several species of treason charged by the Articles upon the prisoner at the bar, one of them is, his corresponding with the Pretender's son, and likewise with persons employed by him. My lords, in order to shew a correspondence between the prisoner and the Pretender's son, and the persons named in that letter, we have

VOL. XVIII.

shewn in evidence, that the prisoner at the bar had an interview with Cameron of Lochiel, Mac Pherson of Clunie, and Mr. Murray; which is one kind of correspondence: and, my lords, it is material to shew, that those persons, with whom the noble lord at the bar thus corresponded, were persons employed by the Pretender's son, it being, by an act of the 17th of his present majesty, made expressly high-treason to correspond with any persons employed by the Pretender's son. My lords, the first letter now mentioned is a letter wrote by the Pretender's son to my lord Lovat; in which, your lordships will find, he refers to another letter, which is the second letter produced to your lordships, as a letter written by his order; and containing his sense. Your lordships have heard from Mr. Murray, that the first letter was written by the Pretender's son, and that the second was written by his order; and that proves expressly, that the persons by whom they were written, were persons employed by the Pretender; and consequently, any persons corresponding with them were guilty of high-treason within the meaning of the act: we therefore pray, that the letters may be read. We do not offer them as letters received by my lord Lovat, but as letters written by persons employed by the Pretender's son. The first is proved to be written by the Pretender's son himself, and the second by his direction.

Then the Letter, dated the 2nd of January, 1746, signed Charles P. R. was delivered in, and read by the Clerk at the table; as was also the other Letter of the same date, from Cameron of Lochiel, Mac Pherson of Clunie, and Mr. Murray: which said Letters are as follow:

N^o. VI.

"*Glasgow, Jan. ye 2d, 1746.*

"I have just now read a letter written to you, by Lochiel, Cluny, and Murray; and you may depend on its containing my true sentiments, as much as if it was all writ with my own hand. I shall only add to it, that you cannot do me either more pleasure, or more service, than by coming to join me out of hand; and then you need doubt as little as I do of our being perfectly satisfied with one another.

"For the lord Lovat. CHARLES, P. R."

N^o. VII.

"My dear lord;—You need not be surprised, from the situation we have been in for some time past, that we have faln out of the way of writing; notwithstanding of which, our particular love and affection for your lordship, and family, as well as our sincere attachment to our king and countrey, seems to render itt absolutely necessary to give your lordship the trouble of this letter.

"We are no strangers to the great pain and trouble your lordship had taken to persuade Mac Leod and sir Alexander to act that part, which was so consistent with their honour and interest, and, if we may venture to say so, the

very being of their families; for your lordship well knows, that upon the falling or standing of the severall Highland familys now engaged in this affair, theirs equally depends: For, did we fail in our attempt, and the conqueror prove either so weak or wicked, as to endeavour the extirpation of our familys (which perhaps wou'd not prove so easy as they imagine,) these two gentlemen wou'd probably be taken (upon some false pretext) into the general corps of disaffected, with a view to make a clean stage of the whole: or allowing, that, from the scandalous activity of one, and shamefull indolence of the other, they were spared; yet their distant and small influence, in proportion to the body of the clans, wou'd necessarily render them insignificant to any party, that might, from unforeseen causes, afterwards appear.

"Your lordship's firm and steady behaviour, in spite of all the underhand dealings, as well as open threats, of the lord Loudon, and your neighbour the President (who has rendered himself a scandall to all Scotsmen, and a nuisance to all society,) together with the early, noble and generous appearance of the master of Lovat in the cause of his king and countrey, has not only gain'd your lordship the admiration of this island, but has settled the affection and friendship of the Prince for your family upon a more firm and solide foundation, than we dare venture to say, it was ever on with any of the royall family of Steuart, notwithstanding your lordship's many heavy sufferings in that cause; and this my lord we don't assure you from ourselves alone, but by his royall highness speciall and repeated orders.

"Now, my lord, allow us to congratulate you upon your happy escape from Inverness. Had it been any other, we could not possibly have given credite to it, from the circumstances of the story; but knowing with what address lord Lovat has so often extricate himself from difficulties unsurmountable by the rest of mankind, we cou'd not allow ourselves to form the least doubt of the truth of it, and are now only in pain to think of the fatigue you must have undergone, and the danger your health must have run, in so sudden a change of your usuall way of living.

"The glorious retreat his royall highness made from within fourscore miles of London, upon intelligence of the French being landed in Scotland, having an enemy within 20 miles in front, and Mr. Wade within three days march of Lancaster in his rear, plainly shows what a great and enterprising mind is able to perform. The unactivity of the enemy in not harrassing the royall army, when so much in their power, with the feeble and weak attack they made upon our rear near to Penrith, where they were most severely handled, makes it evident how easy a game we wou'd have, did Scotsmen act with that unanimity and vigour, that made their ancestors so famous over all Europe. From the present situation of the Prince's army on this syde of Forth, who are all in the highest spirits, the numbers in the

north already in arms, the victory lord Louis Gordon has obtain'd over M^r Leod and his adherents, the landing of a body of French troops, with a fine train of artillery, the kings of France and Spain declaring the Prince their ally, and taking him under their speciall protection, the French ambassador having taken on his public character; and, in fine, an absolute promise from the court of France of a descent of 15,000 men in England, as by letters received eight-and-forty hours agoe from his royall highness the duke of Albany and York, and from cardinal Tencin, makes itt plain, that it now depends on us alone to restore the royall family to the throne of their ancestors, the rights and liberties of the subject, and Scotland to that honour and independency your lordship has so long and ardently wish'd for; which last article we are absolutely sure of, as Scotland, in the worst of events, must be ours.

"And now, my lord, the only proper means that appears to us, in common with all the Prince's well-wishers, to bring this to the wished-for issue, is your lordship's openly appearing in arms, and joining the royall standard; in which case, we are certain, that there is not a man beyond the Forth, however timorous or cautious (except some few who have already destined themselves to perdition,) but will appear with the greatest alacrity and cheerfulness. But, not to take up too much of your lordship's time, what his royall highness above all things wishes and desires is, to have your lordship with him to take upon you the command of the army; for tho' the Prince knows, that your lordship's age makes it impossible for you to undergo the drudgery part of a generall, yett he is sensible that your advice and council will be of greater value, than the addition of several thousand men. Tho' your lordship has your own equipage, yett we are apt to believe the Prince's coach and six (of which he himself makes no use) will be as convenient a voyture for your lordship; and the French ambassador, with lord Pitsligo, who has been in itt all along, won't prove disagreeable company.

"In short, it is impossible for us to give the hundred part of the reasons, that makes us so sensible of the absolute necessity of having your lordship about the Prince's person, which you will be fully satisfy'd of at meeting.

"This moment Hugh Fraser is come here, and has given the Prince a detail of your lordship's situation, and that of the country, with the proposall your lordship sent to the army at Perth; of which he approves exceedingly, and will to-morrow send orders, by express, to lord John Drummond to meett him att Ban-nockburn, Saturday first, there to concert in what shape it shall be putt in execution, and to move 4 or 6 piece of cannon towards Blair-Castle without delay: but of this your lordship is most earnestly entreated not to mention one word to any body, leaste the making it public should procure the escape of some folks, who may otherwise be catch'd napping;

and your lordship is begg'd to cutt off all intelligence from that quarter.

"We shall now only beg, that your lordship give no ear to any of the storys spread in the north, as the gazettes have not contained one word of truth in relation to us since we left Edin^r; and do us the justice to believe, that we are, with most sincere regard, attachment, and esteem, wishing you many happy and prosperous new years, my dear lord, your lordship's most obedient, most faithfull, and most sincerely affectionate humble serva . . .
"Glasgow, Jan. 2, 1746."

The signature of this letter was torn off.

Att. Gen. My lords, we have done with Mr. Murray.

L. H. S. My lord Lovat, would you ask any questions of Mr. Murray?

Lord Lovat. My lords, I did ask your lordships before, if I might have liberty to cross-examine the witnesses brought against me; and your lordship told me, I might have an opportunity of doing it, when I came to make my defence.

L. H. S. Your lordship misunderstood me: I did not say, that you would have an opportunity of cross-examining any of the witnesses produced against you, when you came to make your defence; but that you were at liberty, when the witnesses were produced, to ask them such questions as you should think proper; and that when you came to your defence, you might make such observations upon their evidence as you should think fit: but if your lordship has a mind to call any of those witnesses in your defence, which have been produced against you, I do not doubt but the Managers of the House of Commons will take care that they shall attend.

Sir John Strange. My lords, if the noble lord at the bar will give notice over night of any of our witnesses, that he thinks necessary to call in his defence, we will take care that they shall be in the way.

L. H. S. My lord Lovat, would you now ask any question of Mr. Murray?

Lord Lovat. My lords, I shall say nothing till I come to make my defence, and then I shall hope to have an opportunity to say what is just against these witnesses.

Sir W. Yonge. My lords, we now beg leave to call Robert Fraser again.

Robert Fraser called into Court again.

Sir W. Yonge [shewing the witness a letter, No. XXI.] asked, Look upon that letter, and tell my lords of whose hand-writing it is?

R. Fraser. It is mine.

Sir W. Yonge. By whose order did you write it?

R. Fraser. By my lord Lovat's.

Sir W. Yonge. Did he dictate it to you?

R. Fraser. Every word.

Sir W. Yonge. Who is the letter signed by?

R. Fraser. By my lord Lovat.

Sir W. Yonge. Did you see him sign it?

R. Fraser. Yes.

Sir W. Yonge. To whom did he order it to be sent?

R. Fraser. To the duke of Cumberland.

L. H. S. Was that letter read over by my lord Lovat, or was it read over by you to him, before it was sent?

R. Fraser. It was read over both by my lord Lovat, and by me to him.

Then a Letter, N^o XXI, signed Lovat, without any date, was delivered in, and read by the Clerk at the table, (being the Letter to the Duke of Cumberland already printed in p. 714.)

Sir W. Yonge. My lords, we have done with this witness.

L. H. S. My lord Lovat, would your lordship ask him any questions?

Lord Lovat. No.

Then the witness, by the direction of the Lord High Steward, withdrew.

L. H. S. Gentlemen of the House of Commons, have you any other witnesses to produce?

Sir W. Yonge. No, my lords, we have no more witnesses to produce.

Sir John Strange. My lords; The Commons have now gone through all the evidence they propose to lay before your lordships in support of their Impeachment; and as that has unavoidably run this cause into a great length of examination, they think it may not be improper to have the whole that relates to the impeached lord collected together, and presented to your lordships' view, in as concise a manner as the great variety of circumstances that have attended this case, will admit of.

This province is assigned to me.

And we choose to enter upon it now, at the close of our evidence, as the most fair and candid way of proceeding, with regard to the impeached lord; for—should the Commons reserve the summing up, and observing upon their evidence, to make a part of the reply (as they might do,) the noble lord at the bar (his defence being then closed) might perhaps be under some disadvantage; whereas, in this way of proceeding, if any mistake shall be committed in stating of the evidence, or any observations made upon it that the case will not bear, an opportunity is hereby given to the party accused, to set it right.

My lords, the Articles that have been read to your lordships, contain four distinct charges of high treason.

The first is, "The compassing and imagining the death of the king."

The second is, "The levying war against the king in his realm."

The third is, "Corresponding with the Pretender to his majesty's crown."

And the fourth is, "Corresponding with the Pretender's son, and others employed by him, knowing them to be so employed."

The two first of these are declared to be treason, by the express words of the statute of 25th Edward 3.

The third is made treason, by the 13th and 14th William 3, cap. 3, the words of which extend to the corresponding with the Pretender, by letters, messages, or otherwise.

The fourth species of treason is against the statute of 17th George 2, cap. 39, which makes it treason to correspond with the Pretender's son, or others employed by him, knowing them to be so employed.

As I have no imagination that any doubt can arise, whether, when the matters of fact are proved to your lordships' satisfaction, the case will not come within the provisions of these laws, I shall forbear entering into any argument upon them; and shall only say, That, although the Articles have charged the first sort of treason, in the precise words of the statute of 25 E. 3, which are, "compassing and imagining the death of the king," yet the law does not require evidence of actually accomplishing so horrid a crime; for that sacred life is so guarded, that the bare going about, or contriving so flagitious a scheme, is sufficient to constitute this great offence, provided those purposes are manifested by overt acts.

And that, although levying of war is a distinct branch of high-treason, yet it is also an overt act of the former species, "That of compassing and imagining the death of the king."

My lords, in stating this evidence to your lordships, I can no way do it so intelligibly, as by following the example of the learned manager who opened the nature of the case, and divided it into three distinct periods of time.

The first period contains the behaviour of the impeached lord, before the landing of the Pretender's son in Scotland, in the month of July 1745.

The second period includes the facts proved to have been committed by the noble lord at the bar, from the time of the Pretender's son's landing, to the battle of Culloden.

And the third period relates to what happened afterwards, to the time of my lord Lovat's being sent up, and committed to the Tower.

As to the first period of time, your lordships are pleased to observe, that our evidence goes so far back as the year 1719.

And, my lords, we chose to take it up there, because, in the noble lord's Answer, he values himself much upon, "Having given, in the year 1715, the strongest proofs of his zeal for, and attachment to his late majesty, and the succession of the crown in his illustrious family, against such as had undertaken the destruction of both: and now laments his misfortune, to have his fidelity questioned, at the end of his days, when near worn out with age and infirmities; and to be charged with intending the subversion of a government he had, in the strength and vigour of his age, exerted his utmost power and address to support."

My lords, I have faithfully rehearsed the words of this Answer, which I think made it necessary for the Commons to shew, that the noble lord's engaging in the late rebellion, was not the effect of dotage, or through the constraint, or by the imposition of others; but proceeded from a long and deep-rooted principle of disaffection to the Protestant Succession, and of attachment to the cause of the Pretender.

To begin then, at the year 1719:

Mr. Chevis, a near neighbour of the impeached lord, has sworn, That the noble lord told him, that, in the year 1719, when an invasion was attempted by Spain upon Scotland, and lord Seaforth was raising his men in favour of the Pretender, he (lord Lovat) wrote a letter to lord Seaforth, to acquaint him, that lord Lovat would join him with his clan: That this letter was delivered to lord Seaforth, after it had been first shewn to one Chisholm of Knockford. This Chisholm, it appears, informed the late duke of Athol of the contents of the letter; and his grace sent up notice of it to the government. This came to my lord Lovat's ears, who was greatly alarmed at it; but your lordships find he had soon the dexterity to get up his letter, upon terms he had an opportunity of making with lady Seaforth: after which he shewed it in confidence to a trusty friend of his, who declared it to be a treasonable letter; and as such, it was thrown into the fire.

My lords, I cannot help observing to your lordships, that it appears from this transaction, that the noble lord was then contriving to commit treason, and yet screen himself from punishment; for he declared, he had not signed the letter; and therefore, if it had been forthcoming, it could not be fixed upon him.

In the year 1737, your lordships find him sending a message, by Roy Stuart, to the Pretender at Rome, to assure him of his fidelity, and to hasten his patent that had been promised him for a dukedom.

It has likewise appeared in evidence, that he afterwards sent another message of the same nature by Drummond.

In the year 1739, he appears to have proposed an invasion to Drummond of Bochaladie, in favour of the Pretender, his lawful sovereign (as he called him); and in whose cause he then declared he was determined to live and die.—An expression which your lordships cannot but have observed occurs also in his letters.

And the same proposal Mr. Chevis has proved was afterwards made by my lord Lovat to Lochiel and Cluny M'Pherson.

My lords, I pass over the poetical performance between Roy Stuart and the noble lord, and go on to the year 1740. About this time it was he declared to Mr. Chevis, that he had signed and sealed an association of the Highland chiefs, in favour of the Pretender; and which lord Lovat declared was sent over to cardinal Fleury.

My lords, this material part of our evidence is so far confirmed, that Mr. Murray (the Pre-

tender's son's secretary) has proved his hearing of it at Paris; and that it was also mentioned to him, at a private audience he had of the Pretender's eldest son, in France.

He has likewise proved what passed between M. Amelot and him, upon the foot of such an association; and the assurances given by that court, of encouragement and support.

But, above all, your lordships have heard it confirmed by a passage, in a letter of the noble lord's to his son, that was read at the table; wherein he tells him, "That, above seven years ago, he was one of those that entered into a formal association, to venture their lives and fortunes to restore the Pretender (by him called king) and his offspring; which engagement (he says) was signed with their hands and seals, and sent to France to cardinal de Fleury, then first minister at that court; and was by him shewn to the king his master, who promised them his assistance, and succours, to restore their king."

"Since which (says he) I have made it my business to promote the king's interest, and to gain and engage faithful subjects to serve him."

And, in his letter to the Pretender's son, he appeals to all who have come into that country, who (he says) will do him the justice to declare, "That he has always been the most zealous and most active partizan they had in the north of Scotland; and in that, he owns, he did but his duty." This he repeats, in his letter to Lochiel; and boasts himself to be "the person who kept life and spirits in the Pretender's affairs, more than any man in the north."

In the year 1742, your lordships find him declaring he had got a commission to be lieutenant-general of the Highlands, and a patent of duke from the Pretender; and which he said he had merited by his services to that family.

This declaration is proved by Mr. Chevis. The talk of it, and seeing a copy in a desk, supposed to be signed by the Pretender, is proved by Robert Fraser. And Hugh Fraser says, my lord Lovat shewed it him.

Mr. Murray told your lordships, he found my lord Lovat expected the original patent had been brought over; but Mr. Murray not being certain, that such a patent had ever passed, he sent his letters to lord Lovat, without an address, but enclosed in a packet, with other papers: and this, he has told your lordships to-day, was done for fear of committing a mistake, either by directing them to his grace, or only to lord Lovat.

This affair of the commission and patent is also confirmed by a passage in the letter to his son, that I appealed to before; wherein he tells him, "That, in proof of the sense his own king had of his loyalty and zeal, he had sent him such a commission and patent, besides a number of letters under his own hand; the original of which patent he tells his son, was in Drummond's hands; but he, lord Lovat,

had an authentic copy of it, signed and countersigned by his king."

"These favours (he adds) had more than ever attached him to that interest; and he should be a monster of ingratitude if they had not." And, in the postscript, he charges his son to inquire for the patent; adding, that "he asked nothing of his royal highness (as he calls the Pretender's son) but to give his countenance, and own publicly what his father had done for him."

Your lordships have likewise heard it proved, that, during all this time, the whole turn of his conversation was in favour of the Pretender.

He declared he had made an alliance, by the marriage of his daughter, which added to his strength, and would enable him to humble his neighbours.

The healths drank at his table have been mentioned by the witnesses, particularly that execrable one proposed by himself, of Confusion to the White Horse, and all their generation.

The next thing your lordships heard of, were his encomiums on the Pretender, whose countenance he said proclaimed him, to all beholders, the rightful king.

There are likewise in proof, his exultations on the taking of Ostend, as laying open all the coast of Flanders, and exposing us to an invasion in the compass of one night, from the French, who, he declared, would carry all before them. And this we rely upon as a circumstance of great malignity, when it is considered what numbers of our troops were then abroad, in the cause of liberty and Europe, and what a situation our power at home was in at that time.

Your lordships have likewise heard his declarations about the Reformation and the Revolution, and of the noble lord's scheme to get rid of both; which was to bring in the Pretender.

And as to religion, his declaration to Mr. Chevis was, That he believed there was no true religion in the world but one; and that was the Church of Rome.

A very extraordinary declaration this, to be made by one, who, by having had an independent company in the king's service, and upon other accounts, must have seemed (at least) to have been of a different opinion.

Thus circumstanced, my lords, and in this temper of mind, was lord Lovat at the breaking out of the rebellion, in the summer of 1745:

Which is the second period of our evidence.

And this part of our evidence, your lordships will be pleased to remember, began with the early notice it appeared my lord Lovat had of the Pretender's son being landed in Scotland.

Upon the news of this, my lords, he prepares immediately to support him.

His son, a youth of about 19 years old, either newly come home, or sent for from the university on purpose, is appointed to head the clan.

The design of sending him to travel is laid aside.

A proposal made by those who were willing to have kept the son out of rebellion, is (upon consideration) rejected by lord Lovat, who, at the same time, declared, that his first intention was to have headed the clan himself; but that now his son should go, since others had disappointed him, who he expected would have joined forces with him.

And in consequence of this, orders are proved to have been given by my lord Lovat for all military preparations.

My lords, this proposal for the son's travelling is proved by Hugh Fraser, to have been made to, and rejected by the noble lord; who also, in his letter to Murray, makes use of these words: "I have sent (says he) my eldest son, the hopes of my family, and the darling of my life, a youth about 19 years old, who was just going abroad for his studies and education; I have sent him (says he,) instead of this, to venture the last drop of his blood in the glorious prince's service."

Hugh Fraser has also proved his being charged with a verbal message to the Pretender's son to the same effect; and his being sent back by Murray, with a letter to lord Lovat.

He has also proved, that, when he delivered the letter, and told my lord Lovat the true state of the Pretender's affairs, which, he said, were not very inviting, after so many regular forces were come from Flanders, which the rebels would not be able to encounter, my lord's declaration upon that occasion was, that "he had gone too far to go back;" and, for fear this news should dishearten his son, he ordered Fraser not to say a word of it to him.

Before or about this time likewise, it was, that he received the Pretender's Manifesto.*

* The following Declarations and Manifesto are extracted from "A full Collection of all the Proclamations and Orders, published by the Authority of Charles, Prince of Wales, Regent of Scotland, England, France and Ireland, and dominions thereunto belonging. Since his arrival in Edinburgh, the 17th day of September, till the 15th of October, 1745. Printed in the year 1745."

"HIS MAJESTY'S MOST GRACIOUS DECLARATION.

"JAMES R.

"James the 8th, by the grace of God, king of Scotland, England, France, and Ireland, defender of the faith, &c. To all our loving subjects of what degree or quality soever: greeting;

"Having always borne the most constant affection to our ancient kingdom of Scotland, from whence we derive our royal origin, and where our progenitors have swayed the sceptre with glory through a longer succession of kings, than any monarchy upon earth can at this day boast of. We cannot but behold with the deepest concern the miseries they suffer under a foreign usurpation, and the intolerable

He orders his son to read it aloud to the company.

And when Mr. Chevis (who never went near him afterwards) was offering some objection to it, my lord Lovat told him, that he talked trea-

burthens daily added to their yoke, which become yet more sensible to us, when we consider the constant zeal and affection, the generality of our subjects of that our ancient kingdom, have expressed for us on all occasions, and particularly when we had the satisfaction of being ourselves amongst them.

"We see a nation always famous for valour, and highly esteemed by the greatest of foreign potentates, reduced to the condition of a province, under the specious pretence of an union with a more powerful neighbour; in consequence of this pretended union, grievous and unprecedented taxes have been laid on, and levied with severity, in spite of all the representations that could be made to the contrary, and these have not failed to produce that poverty and decay of trade, which were easily foreseen to be the necessary consequences of such oppressive measures.

"To prevent the just resentment which could not but arise from such usage, our faithful Highlanders, a people always trained up and inured to arms, have been deprived of them: forts and citadels have been built and garrisoned, where no foreign invasion could be apprehended, and a military government has been effectually introduced, as into a conquered country. It is easy to foresee what must be the consequences of such violent and unprecedented proceedings, if a timely remedy be not put to them; neither is it less manifest, that such a remedy can never be obtained, but by our restoration to the throne of our ancestors, into whose royal hearts such destructive maxims could never find admittance.

"We think it needless to call to mind how solicitous we have ever been, and how often we have ventured our royal person, to compass this great end, which the Divine Providence seems now to have furnished us with the means of doing effectually, by enabling our good subjects in England to shake off the yoke under which they have likewise felt their share of the common calamities. Our former experience leaves us no room to doubt of the cheerful and hearty concurrence of our Scots subjects on this occasion, towards the perfecting the great and glorious work: but that none may be deterred by the memory of past miscarriages from returning to their duty, and being restored to the happiness they formerly enjoyed; we, in this public manner, think fit to make known our gracious intentions towards all our people.

"We do therefore, by this our royal Declaration, absolutely and effectually pardon and remit all treasons, and other crimes hitherto committed against our royal father, or ourselves: from the benefit of which pardon we except none, but such as shall, after the publication hereof, wilfully and maliciously oppose

son; or it was treason in him to object to the reading the Manifesto.

Soon after this, your lordships may recollect, it has appeared, that great preparations were made for supporting the cause of the Pretender.

us, or those who shall appear, or endeavour to appear in arms for our service.

"We further declare, That we will, with all convenient speed, call a free parliament; that, by the advice and assistance of such an assembly, we may be enabled to repair the breaches caused by so long an usurpation, to redress all grievances, and to free our people from the unsupportable burthen of the malt-tax, and all other hardships and impositions, which have been the consequences of the pretended Union, that so the nation may be restored to that honour, liberty, and independency, which it formerly enjoyed.

"We likewise promise, upon our royal word, to protect, secure, and maintain all our Protestant subjects in the free exercise of their religion, and in the full enjoyment of all their rights, privileges, and immunities, and in the secure possession of all churches, universities, colleges, and schools, conform to the laws of the land.

"All this we shall be ready to confirm in our first parliament; in which we promise to pass any act or acts that shall be judged necessary to secure each private person in the full possession of his liberty and property, to advance trade, to relieve the poor, and establish the general welfare and tranquillity of the nation: in all such matters, we are fully resolved to act always by the advice of our parliaments, and to value none of our titles, so much, as that of common father of our people; which we shall ever shew ourselves to be, by our constant endeavours to promote the quiet and happiness of all our subjects. And we shall be particularly solicitous to settle, encourage, and maintain the fishery, and linen manufactory of the nation, which we are sensible may be of such advantage to it, and which we hope, are works reserved for us to accomplish.

"As for these, who shall appear more signally zealous for the recovery of our just rights, and the prosperity of their country, we shall take effectual care to reward them according to their respective degrees and merits. And we particularly promise, as aforesaid, our full, free, and general pardon to all officers, soldiers and sailors, now engaged in the service of the Usurper, whether of the sea or land, provided, that, upon the publication hereof, and before they engage in any fight or battle against our forces, they quit the said unjust and unwarrantable service, and return to their duty: in which case, we shall pay them all the arrears that shall be at that time due to them from the Usurper: we shall grant to the officers the same commissions they shall then bear, if not higher; and to all soldiers and sailors a gratification of a whole year's pay, for their forwardness in promoting our service.

Arms, colours, tents, powder, and ball, are prepared, and laid in by lord Lovat's order.

His arms and crest are painted, supervised, and approved by himself.

So eager is he, that his son is upbraided for

"We further promise and declare, That the vassals of such as shall, without regard to our present Declaration, obstinately persist in their rebellion, and thereby forfeit all pretensions to our royal clemency, shall be delivered from all servitude they were formerly bound to, and shall have grants and charters of their lands to be held immediately of the crown, provided, they, upon the publication of this our Declaration, declare openly for us, and join heartily in the cause of their country.

"And having declared our gracious intentions to our loving subjects, we do hereby require and command them to be assisting to us in the recovery of our rights, and of their own liberties: and that all our subjects, from the age of 16 to 60, do, upon the setting up of our royal standard, immediately repair to it, or join themselves to such as shall first appear for us in their respective shires; and also to seize the horses and arms of all suspected persons, and all ammunition, forage, and whatever else may be necessary for the use of our forces.

"We also strictly command all receivers, collectors, or other persons, who may be seized of any sum or sums of money levied in the name, or for the use of the Usurper, to retain such sum or sums of money in their own hands, till they can pay them to some person of distinction appearing publicly for us, and demanding the same for our use and service, whose receipt or receipts shall be a sufficient discharge, for all such collectors, receivers, or other persons, their heirs, &c.

"Lastly, We do hereby require all sheriffs of shires, stewards of stewartries, and their respective deputies, magistrates of royal boroughs, and bailies of regalities, and all others to whom it may belong, to publish this our Declaration, at the market-crosses of their respective towns and boroughs, and there, to proclaim us under the penalty of being proceeded against, according to law, for their neglect of so necessary and important a duty.

"Given at our Court at Rome, the 23d day of December 1743, in the 43rd year of our reign. J. R."

"THE PRINCE'S MANIFESTO.

"CHARLES P. R.

"By virtue and authority of the above commission of regency, granted unto us by the king our royal father; we are now come to execute his majesty's will and pleasure, by setting up his royal standard, and asserting his undoubted right to the throne of his ancestors.

"We do therefore, in his majesty's name, and pursuant to the tenor of his several Declarations, hereby grant a free, full, and general pardon for all treasons, rebellions, and offences

his backwardness, and the retainers of the family are spoke to, to hasten him.

He thunders out his anathemas against a gentleman, who, he thinks, had disappointed him, which if he had not done, he says, in his letter to Lochiel, "he had so managed that part of the north, that above 6,000 men had marched south to the Prince's assistance; which he (lord Lovat) thought would much

whatsoever, committed at any time before the publication hereof, against our royal grandfather, his present majesty, and ourselves. To the benefit of this pardon, we shall deem justly entitled all such of his majesty's subjects, as shall testify their willingness to accept of it, either by joining our forces with all convenient diligence, by setting up his royal standard in other places, by repairing for our service to any place where it shall be so set up; or, at least, by openly renouncing all pretended allegiance to the Usurper, and all obedience to his orders; or to those of any person or persons commissioned, or employed by him, or acting avowedly for him.

"As for those who shall appear more signally zealous for the recovery of his majesty's just rights, and the prosperity of their country, we shall take effectual care to have them rewarded according to their respective degrees and merits: and we particularly promise, as aforesaid, a full, free, and general pardon to all officers, soldiers, and sailors, now engaged in the service of the Usurper; provided, that upon the publication hereof, and before they engage in any fight or battle against his majesty's forces, they quit the said unjust and unwarrantable service, and return to their duty, since they cannot but be sensible, that no engagements, entered into with a foreign usurper, can dispense with the allegiance they owe to their natural sovereign. And as a further encouragement to them to comply with their duty, and our commands, we promise to every such officer the same, or a higher post in our service than that which at present he enjoys, with full payment of whatever arrears may be due to him at the time of his declaring for us; and to every soldier, trooper, and dragoon, who shall join us, as well as to every seaman and mariner of the fleet, who shall declare for, and serve us, all their arrears, and a whole year's pay, to be given to each of them as a gratuity, as soon as ever the kingdoms shall be in a state of tranquillity.

"We do hereby further promise and declare, in his majesty's name, and by virtue of the above said commission, That as soon as ever that happy state is obtained, he will, by and with the advice of a free parliament, wherein no corruption, nor undue influence whatsoever shall be used to bias the votes of the electors, or elected; settle, confirm, and secure all the rights, ecclesiastical and civil, of each of his respective kingdoms; his majesty being fully resolved to maintain the Church of England, as by law established, and likewise the Pro-

encourage his (the Pretender's son's) own loyal party, and fright the English to his obedience."

At this time likewise it was, that he wrote those letters to the Pretender's son, and his secretary, which were so audibly and distinctly read to your lordships, that they stand in no need of a repetition to make their impression.

In the next place, your lordships find him

testant churches of Scotland and Ireland, conformable to the laws of each respective kingdom; together with a toleration to all Protestant dissenters; he being utterly averse to all persecution and oppression whatsoever, particularly on account of conscience and religion. And we ourselves being perfectly convinced of the reasonableness and equity of the same principles; do, in consequence hereof, further promise and declare, That all his majesty's subjects, shall be by him and us maintained in the full enjoyment and possession of all their rights, privileges, and immunities, and especially of all churches, universities, colleges and schools, conformable to the laws of the land, which shall ever be the unalterable rule of his majesty's government, and our own actions.

"And, that this our undertaking may be accompanied with as little present inconvenience as possible to the king's subjects; we do hereby authorize and require all civil officers and magistrates now in place and office, to continue, till further orders, to execute their respective employments in our name, and by our authority, as far as may be requisite for the maintenance of common justice, order and quiet: willing and requiring them, at the same time, to give strict obedience to such orders and directions, as may, from time to time, be issued out by us, or those who shall be vested with any share of our authority and power.

"We also command and require all officers of the revenue, customs, and excise, all tax-gatherers, of what denomination soever; and all others who may have any part of the public money in their hands, to deliver it immediately to some principal commander authorised by us, and take his receipt for the same, which shall be to them a sufficient discharge; and, in case of refusal, we authorise and charge all such our commanders, to exact the same for our use, and to be accountable for it to us, or our officers for that purpose appointed.

"And having thus sincerely, and in the presence of Almighty God, declared the true sentiments and intentions of the king our royal father, as well as our own, in this expedition, we do hereby require and command all his loving subjects to be assisting to us in the recovery of his just rights, and of their own liberties: and that all such, from the age of 16 to 60, do forthwith repair to his majesty's royal standard, or join themselves to such as shall first appear in their respective shires for his service: and also, to seize the horses and arms of all suspected persons, and all ammunition,

magnifying the skirmish at Preston Pans into a victory not to be paralleled in history; which, I may venture to say, was certainly calculated by my lord for the encouragement of his people.

When the late earl of Cromertie's men marched south, and passed by Castle Downey, your lordships observe him repining that they

forage, and whatever else may be necessary for the use of our forces.

"Lastly, We do hereby require all mayors, sheriffs, and other magistrates, of what denomination soever, their respective deputies, and all others to whom it may belong, to publish this our Declaration at the market crosses of their respective cities, towns and boroughs, and there to proclaim his majesty under the penalty of being proceeded against according to law, for the neglect of so necessary and important a duty: for as we have hereby graciously and sincerely offered a free and general pardon for all that is past; so we, at the same time, seriously warn all his majesty's subjects, that we shall leave to the rigor of the law all those who shall from henceforth oppose us, or wilfully and deliberately do or concur in any act or acts civil or military, to the let or detriment of us, our cause or title, or to the destruction, prejudice, or annoyance of those, who shall, according to their duty and our intentions thus publicly signified, declare and act for us.

"Given at Paris, the 16th May, 1745.

"C. P. R."

"PRINCE'S DECLARATION AND MANIFESTO.

"CHARLES, P. R.

"Charles, prince of Wales, &c. Regent of the kingdoms of England, Scotland, France and Ireland, and the dominions thereunto belonging: unto all his majesty's subjects, of what degree soever, greeting.

"As soon as we, conducted by the providence of God, arrived in Scotland, and were joined by a handful of our royal father's faithful subjects, our first care was, to make public his most gracious Declaration; and, in consequence of the large powers by him vested in us, in quality of Regent, we also emitted our own Manifesto, explaining and enlarging the promises formerly made, according as we came to be better acquainted with the inclinations of the people of Scotland. Now that it has pleased God, so far to smile on our undertaking, as to make us master of the ancient kingdom of Scotland, we judge it proper, in this public manner, to make manifest what ought to fill the hearts of all his majesty's subjects, of what nation or province soever, with comfort and satisfaction.

"We therefore hereby, in his majesty's name, declare, That his sole intention is to re-instate all his subjects in the full enjoyment of their religion, laws, and liberties; and that our present attempt is not undertaken, in order to enslave a free people, but to redress and remove the encroachments made upon them;

VOL. XVIII.

should be first ready, and what a shame it was they should pass by his nose.

He entertains the late earl of Cromertie, and his officers, then in arms for the Pretender, and declaring, in my lord's hearing, they were going to assist the Pretender's son.

And this (as it came out upon a noble duke's

not to impose upon any a religion which they dislike, but to secure them all the enjoyment of those, which are respectively at present established among them, either in England, Scotland or Ireland; and if it shall be deemed proper, that any further security be given to the established church or clergy, we hereby promise, in his name, that he shall pass any law, that his parliament shall judge necessary for that purpose.

"In consequence of the rectitude of our royal father's intentions, we must further declare his sentiments with regard to the national debt: that it has been contracted under an unlawful government, nobody can disown, no more than that it is now a most heavy load upon the nation; yet, in regard that it is for the greatest part due to those very subjects whom he promises to protect, cherish and defend, he is resolved to take the advice of his parliament concerning it, in which he thinks he acts the part of a just prince, who makes the good of his people the sole rule of his actions.

"Furthermore, we here in his name declare, That the same rule laid down for the funds, shall be followed with respect to every law or act of parliament since the Revolution; and in so far as, in a free and legal parliament, they shall be approved, he will confirm them. With respect to the pretended Union of the two nations, the king cannot possibly ratify it, since he has had repeated remonstrances against it from each kingdom; and, since it is incontestable, that the principal point then in view, was the exclusion of the royal family from their undoubted right to the crown, for which purpose the grossest corruptions were openly used to bring it about: but whatever may be hereafter devised for the joint benefit of both nations, the king will most readily comply with the request of his parliaments to establish.

"And now that we have, in his majesty's name, given you the most ample security for your religion, properties and laws, that the power of a British sovereign can grant: We hereby for ourselves, as heir apparent to the crown, ratify and confirm the same in our own name, before Almighty God, upon the faith of a Christian, and the honour of a prince.

"Let me now expostulate this weighty matter with you, my father's subjects, and let me not omit this first public opportunity of awakening your understandings, and of dispelling that cloud, which the assiduous pens of ill designing men have all along, but chiefly now, been endeavouring to cast on the truth. Do not the pulpits and congregations of the clergy, as well as your weekly papers, ring with the dreadful threats of popery, slavery, tyranny, and arbi-

S E

question) was in a friendly, hospitable manner, and not as a person quartered on by compulsion.

All this while his men are gathering together.

There are two rendezvouses of the clan, and 700 Frasers drawn up within half a mile of his house.

trary power, which are now ready to be imposed upon you, by the formidable powers of France and Spain? Is not my royal father represented as a blood-thirsty tyrant, breathing out nothing but destruction to all those who will not immediately embrace an odious religion? or, have I myself been better used? But listen only to the naked truth.

"I, with my own money, hired a small vessel, ill provided with money, arms or friends; I arrived in Scotland, attended by seven persons; I publish the king my father's Declarations, and proclaim his title, with pardon in one hand, and in the other liberty of conscience; and the most solemn promises to grant whatever a free parliament shall propose for the happiness of a people. I have, I confess, the greatest reason to adore the goodness of Almighty God, who has, in so remarkable a manner, protected me and my small army through the many dangers to which we were first exposed, and who has led me in the way to victory, and to the capital of this ancient kingdom, amidst the acclamations of the king my father's subjects: why then is so much pains taken to spirit up the minds of the people against this my undertaking?

"The reason is obvious, it is, lest the real sense of the nation's present sufferings should blot out the remembrance of past misfortunes, and of the outcries formerly raised against the royal family. Whatever miscarriages might have given occasion to them, they have been more than atoned for since; and the nation has now an opportunity of being secured against the like for the future.

"That my family has suffered exile during these fifty-seven years every body knows. Has the nation, during that period of time, been the more happy and flourishing for it? Have you found reason to love and cherish your governors, as the fathers of the people of Great Britain and Ireland? Has a family, upon whom a faction unlawfully bestowed the diadem of a rightful prince, retained a due sense of so great a trust and favour? Have you found more humanity and condescension in those who were not born to a crown, than in my royal fore-fathers? Have their ears been open to the cries of the people? Have they, or do they consider only the interest of these nations? Have you reaped any other benefit from them, than an immense load of debts? If I am answered in the affirmative, why has their government been so often railed at in all your public assemblies? Why has the nation been so long crying out in vain for redress against the abuse of parliaments, upon account of their long duration, the multitude of place-men, which occasions their venality, the intro-

He offers (as it has been proved) commissions to several persons;

Declares his son was to be their colonel:

Threats and promises are made use of by him; and the fiery cross is carried about:

The distinguishing mark of the rebels, the

duction of penal laws, and in general, against the miserable situation of the kingdom at home and abroad? All these, and many more inconveniences must now be removed, unless the people of Great Britain be already so far corrupted, that they will not accept of freedom when offered to them; seeing the king, on his restoration, will refuse nothing that a free parliament can ask, for the security of the religion, laws and liberty of his people.

"The fears of the nation from the powers of France and Spain, appear still more vain and groundless; my expedition was undertaken unsupported by either: but indeed, when I see a foreign force brought by my enemies against me, and when I hear of Dutch, Danes, Hessians, and Swiss, the elector of Hanover's allies, being called over to protect his government against the king's subjects, is it not high time for the king my father, to accept also of the assistance of those who are able, and who have engaged to support him? But will the world, or any one man of sense in it, infer from thence, that he inclines to be a tributary prince, rather than an independent monarch? Who has the better chance to be independent on foreign powers? He, who with the aid of his own subjects, can wrest the government out of the hands of an intruder: or he, who cannot without assistance from abroad, support his government, though established by all the civil power, and secured by a strong military force, against the undisciplined part of those he has ruled over so many years? Let him, if he pleases, try the experiment, let him send off his foreign hirelings, and put the whole upon the issue of a battle; I will trust only to the king my father's subjects, who were or shall be engaged in mine and their country's cause: but, notwithstanding all the opposition he can make, I still trust in the justice of my cause, the valour of my troops, and the assistance of the Almighty, to bring my enterprise to a glorious issue.

"It is now time to conclude, and I shall do it with this reflection. Civil wars are ever attended with rancour and ill will, which party-rage never fails to produce in the minds of those, whom different interests, principles or views set in opposition to one another; I therefore earnestly require it of my friends, to give as little loose as possible to such passions; this will prove the most effectual means to prevent the same in the enemies of our royal cause. And this my Declaration will vindicate to all posterity the nobleness of my undertaking, and the generosity of my intentions.

"Given at our palace of Holy-rood-house, the 10th day of October, 1745. C. P. R."

"By his Highness's command. J. MURRAY."

white cockade, is worn by the officers in his presence :

He drinks to their success ; and, in his letter to the Pretender's son, " begs of God to preserve him, and give him success and glory in all his enterprizes : "

He advises those he is sending forth not to let the Pretender's son hazard his person, by going into engagements :

He prophesies victory and success to him.

Let us all be thankful, that his prophecies were not fulfilled !

All this while your lordships find him balancing between hopes and fears :

He gives orders, and contradicts them, either as our own forces arrive, or there comes assistance to the rebels from France ;

Insomuch that his son is at last forced, with tears in his eyes, to beg, " He may no longer be made a fool or a tool of ; " but may then have such orders as the father will stand by.

And then it was he directed the clan to march ; and said, " Those were the orders he would stand to. "

And, to prove they marched by his direction, I appeal to his letter to the Pretender's son ; wherein he says, " I have sent with my son all the principal gentlemen, and heads of families of my clan, with 800 of my common people. " And the words of his letter to Mr. Murray are, " I have sent my son. " He also tells his son, in the letter that has been read, that " he will put all irons in the fire to send him men : I will be working at them (says he) all I can. "

His friends and dependents, however, were in doubt what to make of him, and whether it would be safe for them to exert themselves, or not, suspecting (and not without cause,) that he was keeping open a backdoor for himself ; and therefore it was they also thought it necessary to call upon him to dissemble no longer, but to take off the mask ; which he performed before them, by pulling off his hat, and laying it at his feet, telling them " There it is then. "

And, in the letter addressed to him from the Pretender's son, your lordships must have observed a jealousy he had of him ; for he is there pressed to come and join him in person ; " and then (says the letter-writer) you need doubt as little as I do of our being perfectly satisfied with one another. "

In the course of our evidence, my lords, it has appeared, that he was taken prisoner by lord Loudon, as fomenting the rebellion ; and his escaping afterwards has been proved.

He corresponds with his son and Lochiel, when in arms for, and employed by, the Pretender, knowing they were so employed ; which is one of the overt acts of treason laid in the impeachment.

And what is the game he is all the while playing against his son ? From first to last it is an endeavour to avoid being fixed himself, and to throw it all upon his son ; that son, whom he had, in a manner, forced into the rebellion.

This appears by Robert Fraser's evidence relating to a draught of a letter to the lord Presi-

dent, charging the young man with obstinacy, and forcing out the clan against the father's inclination, or power to controul him : Which when the master had discovered, by accidentally going into the secretary's room, and insisting to see the draught, which the father had ordered he should not, he declares (in great resentment of such usage from his father,) " That he would go himself to the President, and put the saddle upon the right horse. Good God ! (says the master) how can he use me so ! "

And the disposition of the son is further proved by the circumstance of pulling the white cockade out of his hat, in the father's presence, and throwing it into the fire.

And this likewise was confirmed by the evidence of Hugh Fraser, who has told your lordships, that, both from the public and private discourse and behaviour of the master, he is satisfied he was better disposed, than to have gone, of his own accord, into the rebellion.

To this I may add what fell from Chevis on his cross-examination ; who, when he was asked by the noble lord about a plot to hang the old one, and save the son, declared to your lordships he never heard of any other than directly the reverse.

A behaviour this from a father to a son, which I the less wonder at in the noble lord, when I consider he was at the same time forgetting that natural allegiance, which he owed to the father of his people.

There is one circumstance more upon this head, which is, that, when he began to find his majesty's forces were likely to be an overmatch for the rebels, he privately sent out Hugh Fraser to find what terms he could get from lord Loudon and the President ; and what might probably be the consequence to himself, if his clan continued in arms.

And this, my lords, brings me to the glorious action at Culloden ;

A battle which, the noble lord declared, was rashly entered upon ;

Contrary to his opinion ; which was, that the rebels should have retired to the mountains, where, he thought, the duke's horse could not follow them, and where they might easily have subsisted themselves till they had received a reinforcement of troops and money.

Upon this occasion, he pointed out the distress such a conduct must have brought upon the king's troops, and upon that great commander, who, under the wise precautions of his majesty, and by the good providence of Almighty God, has proved to be the deliverer of his country.

Surely, my lords, there is no need for me to dwell any longer on that period of time, which includes the rebellion.

The third and last period is what happened afterwards :

And this, my lords, consists of a great number of particulars, which have been proved at your lordships' bar.

The first thing your lordships have heard of

is, his personal conference with the Pretender's son on the night of the battle of Culloden.

The excuses made by the noble lord to that person, for not coming himself to join him, on account of his age and infirmities, have appeared in evidence, and are to the same effect with those which have been read out of his letters.

They are proved to have been, to outward appearance, satisfactory to the person, to whom these excuses were made; and your lordships find the parting between them was with mutual embraces.

The next thing your lordships have heard of, in the course of our evidence, is the flight of the noble lord, in order to avoid being taken by the king's troops,

To this end, he retires into a part of the country, where, he imagined, it would be impossible for them to find him out, or harass him.

In such a place it is he had that meeting with the rebel chiefs; on which occasion his behaviour is very remarkable.

For it has appeared, that, at that consultation, he continued to be what, at other times, he boasted to have been, the life and spirit of the party.

Who so forward to reassemble their scattered forces as he?

It was he that declared they had no need to be afraid; for he did not doubt but eight or ten thousand Highlanders might yet be raised to defend themselves, either to get terms from the duke, or fight the elector of Hanover's troops; which was the expression he made use of.

In consequence of this, it was then agreed to raise men; and a paper is drawn up for that purpose. The noble lord indeed avoided signing it himself, by desiring Lochiel to vouch for his son the master's proportion: But it is very observable, that when his cunning suggested to him the declaration, that he was a neutral person, it presently forsook him, or else he had not accompanied it with another declaration, that denoted his repining at his not having joined the Pretender's son on his first landing.

This agreement to raise men is immediately followed by a distribution of French money for that purpose; which money, to the amount of 35,000 livers, had been just received to support the rebels.

The money indeed, that was intended to raise the Frasers with, was not paid into the noble lord's own hands; but (the master being absent) it was delivered to a servant that attended upon the noble lord, and part of it was by himself, soon after, sent to his son; which brings it home to my lord Lovat as his own act: It shews him privy to the design for which it was advanced (which was treasonable); and his own hand is in the transaction.

As this money has appeared to have been sent over to support the rebellion, and those who joined in it, the noble lord thought he had a right to a share of it; and therefore sends to

Murray for some of it, which he demanded, and received, for twenty days pay of a guard to attend his own person, and defend him against the king's troops, who were in search of rebels at that time.

And when, soon after, his son came to desire he might be permitted to surrender himself to the duke, he calls him a person of a mean spirit, and advises him against it; that son who would have been contented with a thin regiment, so the father had been safe.

When taken, his guilt immediately suggested to him, and he declares openly, that he expected to lose his head: he comforted himself, however, that his estate was so settled, that it would be preserved to his family.

Your lordships have likewise heard the circumstances that attended the search of his strong box: when papers were found in it, he declares in a jocular way, that they would find no treason in them: he continues in this strain whilst many private and immaterial papers were reading; but, when the letter from his son (which has been read in evidence) appeared, and he is asked, whether that came within his description, or was designed to be found there, he changes his note, is surprised at its being found there, and agrees it was not in a proper place.

After all this, I need only barely mention the offers he made to merit his life by discoveries, and appeal to the letter written by him to the duke of Cumberland, just now read at the table.—Those must have proceeded from a consciousness, that he had forfeited his life before.

How the noble lord will be able to reconcile all his softening insinuations in his letter to the duke with what he before said to Lochiel, wherein he declares, "He is resolved to live and die in his king and royal prince's service; and that no death the government can invent can lessen his zeal, or fright him from his duty"—This I must leave to his lordship; for, I own, it is past my skill.

My lords, I am very ready to acknowledge, that, in the course of our evidence, one of the witnesses has said, that, by what he could observe, the noble lord did not seem to be averse to his present majesty; but his resentment, he said, was against the ministry, that had taken away his company.

But how far that is agreeable to his actions, healths, and declarations that he was ready to join Kouli Kan, if he had come over, your lordships will consider.

And, as to his objection to Mr. Murray's evidence, as remaining an attainted person, I will only say (that it may appear in this Trial when it comes abroad into the world), that although sir Thomas Armstrong suffered upon the notion, that a compulsory taking within the year was not strictly a surrender; yet, in the second year of his present majesty's reign, in the case of one Roger Johnson, who had been outlawed for treason, and was taken within the year allowed by the statute, the

then Attorney General, like a true friend to the liberty of the subject, disdained to insist upon Armstrong's Case; and the Court of King's-bench held it was immaterial, whether he came before them on a voluntary surrender, or a compulsory caption, so long as it appeared the man was there, and amenable to justice within the time: and in consequence of this, the man had his trial, and was acquitted.

To apply this to our witness, I need only observe, That it has appeared in evidence, that his time was not out till the 12th of July 1746, and he was committed prisoner by the lord justice clerk fourteen days before, and has ever since remained in custody, amenable to the law. The precedent, therefore, I have cited, is directly in the point, and founded in the justice and equity of the case; for a man, who has a fixed time given him to come in, ought not to be prejudiced by being taken up before.

Some questions, my lords, have been asked our witnesses upon their cross-examinations, and some objections thrown out about expectations of mercy, which I do not see it is necessary to take notice of at this time: if they are relied upon by the noble lord, in his Defence, the Reply will be the most proper time to answer them; and to that I shall leave it.

All that now remains for me to do, in discharge of the commands I have been honoured with by the Commons, would be to take particular notice of the letters that have been read, and the strength they communicate to the evidence of the witnesses.

But, as I have attempted something of this nature as I went along, and they are also fresh in your lordship's memory, it does not seem necessary to be making a separate head of them.

In gratitude therefore to your lordships, who have thus honoured me with your attention, I forbear to descant any farther upon these letters; and if, in this, I shall be thought by those who sent me hither, to have been remiss in my duty to them (to whom I own myself accountable), I shall humbly implore their forgiveness for any omissions I may have been guilty of in this service.

This only I will say, upon the letters, that whatever bodily infirmities the noble lord may labour under, yet whoever reads or hears those letters, and considers the strength and energy of the expressions, dictated by himself, must agree with him in what he intimated to sir Everard Fawkener, that the faculties of his mind were yet intire.

I have now done, my lords, with stating the evidence that has been given in proof of the high-treason charged in the impeachment; and I should abuse your lordships' patience, if (after this) I should attempt to apply it particularly to the several statutes I took notice of in the outset.

Sorely, my lords, I may venture to say, that these facts (if not answered by the noble lord) must, in your lordships judgment, amount to a

full proof of all the high treason with which he is charged; and will abundantly justify me in alluding to that expression contained in the noble lord's own letter to his son, wherein he boasts "to have done more against this government than would hang fifty lords, and forfeit fifty estates."

Thus, my lords, have the Commons maintained their impeachment, and supported it (as they think) with a weight of evidence suitable to the dignity of their interposition.

They think they have sufficiently shewn your lordships, that this unfortunate lord was not fit to be trusted to bring his plan about again, *et versare dolos*, as he offered to do. On the contrary, they think it appears, that they have properly singled him out, and brought him to this bar, on their own prosecution, here to receive your lordships judgment for the other part of the alternative pointed out by himself.

L. H. S. Gentlemen of the House of Commons, have you any thing farther to offer in support of your Impeachment?

Sir W. Yonge. No, my lords.

L. H. S. My lord Lovat, the gentlemen of the House of Commons have closed what they have to offer by way of evidence, and in support of the charge against you; and now is the time for you to make your Defence, by making such observations as you shall think fit, upon the evidence which has been given against you, and upon what they have offered, by way of argument, to enforce it. Your lordship may likewise open your own evidence, which you have to offer, and call your witnesses, and pursue your own method, as you shall think fit; provided it be agreeable to law, and the course of proceeding in such cases.

Lord Lovat. My lords, I have already told your lordships several times since I came here, that I was very weak and feeble, and really afflicted with a distemper that made me almost incapable to appear here, if it had not been to shew my obedience and respect to your lordships; and I now humbly beg, that since you are so good as to indulge me to say something for myself, that you will give me four or five days, at least, to recover my health a little, and to prepare my evidence. And, my lords, I have another thing humbly to propose to your lordships: there is an evidence, a very material evidence for me, who is a member of the House of Commons: I would humbly beg that your lordships would be pleased to take such methods as you shall think proper, to make him appear at the bar, and give his evidence, which is but two or three words, whatever day your lordships please.

L. H. S. My lord Lovat, as to what you have mentioned, first, in asking for four or five days, to make your defence, and prepare your evidence, that is an interruption of a trial I have not known; but it is in the judgment of the Lords what time they will be pleased to give you. As to what your lordship hath said, in

regard to a member of the House of Commons being a material evidence for you, you must be advised by your counsel (who are to advise you as to matters of law, and the proper methods of application) in what manner you are to make application for that purpose.

Lord Lovat. My lord, I will take your lordship's advice, and will do so; but it will be impossible for me to appear before you, except I am better in health.

L. H. S. Gentlemen of the House of Commons, have you any thing to offer, in relation to what my lord Lovat has now said?

Sir W. Yonge. My lords, nothing, but to submit it to your lordships, when you will be pleased to proceed. My lords, the time that the prisoner at the bar has desired is very extraordinary, and will be very inconvenient: but, my lords, a reasonable time the Commons will have no objection to.

Lord Lovat. My lords, I am at your lordships' disposal: I am a prisoner here, and submit entirely to your lordships' determination, be it what it will.

The Lord President moved to adjourn to the Chamber of Parliament; and the Lord High Steward going back to his chair, the House was adjourned accordingly. And then the Lords, and others, returned in the same order as before.

And the House being resumed in the Chamber of Parliament,

Ordered, That a Message be sent to the House of Commons, by Mr. Sawyer and Mr. Mountague to acquaint them, That the lord Lovat having requested, that Normand MacLeod, esquire, a member of their House, might be examined as a witness at [his Trial, the Lords do desire that they will give leave to the said Normand MacLeod to be so examined at the said Trial: and that their lordships will proceed further thereupon, in Westminster-hall, on Wednesday next, at eleven of the clock in the forenoon.

Ordered, That the lieutenant of the Tower of London or his deputy, do take back the said lord Lovat, and bring him again to the bar of this House in Westminster-hall, on Wednesday next, at eleven of the clock in the forenoon.

THE SIXTH DAY.

Wednesday, March 18, 1746-7.

About eleven of the clock in the forenoon, the Lords, and others, came from the chamber of parliament, in the same order as on the first day, into Westminster-hall: where the Commons and their Managers were in the seats prepared for them respectively, as before. And the Lords took their places in the Court; and the Lord High Steward in his chair.

L. H. S. The House is resumed. Is it your lordships' pleasure that the judges have leave to be covered?

Lords. Ay, ay.

Then the Serjeant at Arms made proclamation for silence; and afterwards the following proclamation:

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner, Simon lord Lovat, to the bar, pursuant to the Order of the House of Lords, to you directed.

The deputy governor of the Tower brought the prisoner to the bar, in the like form as before. And then he kneeled down.

L. H. S. Your lordship may rise.

The Lord High Steward asked leave to go down to the table; and went accordingly.

L. H. S. My lord Lovat, your lordship may now proceed to make your Defence.

The Prisoner then acquainted their lordships with his great age and infirmities, which rendered him, as he alleged, incapable of speaking what he had to offer; and that therefore he had put into writing what he had conceived, and was advised to say on this occasion; and which he desired their lordships would be pleased to permit their clerk to read at the bar: and their lordships permitting it, the same was read by the Clerk, as follows; viz.

My lords; In my unhappy situation, it is with the highest pleasure and gratitude, that I return my acknowledgments to your lordships, for the indulgence you have shewn me, during the course of my long Trial: and had I, my lords, met with any degree of justice from those who have appeared as witnesses against me, it would have been unnecessary for me to have troubled your lordships with any thing in my own defence; but as there can be no security against the oaths of persons who are swayed by malice, or interested by the hopes of life, and fears of punishment, it becomes necessary for me to trouble your lordships with a few observations: First, as arising from the particular circumstances of my case; and, Secondly, upon the nature of the evidence that has been produced against me, and the degree of credibility which such sort of evidence deserves. With respect to the first, my lords, upon being served with a copy of the Articles of Impeachment, I immediately applied to your lordships for an order to bring up those witnesses, whom I thought necessary for my defence: and, considering the complicated nature of the treasons charged upon me, and the great period of time they were intended to comprehend, it cannot surprise your lordships, that my list contained sixty, or thereabouts. But, to my very great misfortune, uncommon methods have been used against me, to prevent their attendance: the ordinary judges have been divested of their offices, and obliged to appoint others, who were recommended by the king's officers to officiate for them: Nay, the ordinary seats of justice have been, in my particular case, forsaken, and new courts erected, to which numbers have been forced under the severest menaces, to attend as witnesses against me; whilst all whom these new

judges and rulers, upon their inquisition, found might be serviceable to me in my defence, have been overawed and intimidated; so that they durst not attend my Trial. These, my lords, are facts as notorious in themselves, as unprecedented in these kingdoms; and facts which I can instantly prove, to your lordships' satisfaction, partly by affidavits now in my hands, and partly by witnesses of undoubted credit, who have been brought five hundred miles from the Highlands of Scotland, with a view to be examined against me; and who, it is probable, have been laid aside, lest what I now take the liberty to affirm to your lordships, should, upon their examinations, have been made to appear.

My lords, by these and such-like methods, have my witnesses been terrified from appearing; at least, so very few have had the resolution to venture, that they scarcely deserve to be named, and cannot be material for my defence, without the assistance of the others. I am therefore under the hard necessity to forget yet a little longer the inconveniences of a close and tedious imprisonment, and to stifle that desire of liberty which is so natural to me, for some longer time, till, by your lordships effectual interposition, I can command the attendance of my witnesses; and, of consequence, justify my innocence: for, if your lordships consider, that my very words and actions have been made the subject of a critical examination, from the year 1719, my case must appear extremely hard, and necessarily require a very circumstantial proof, by examination of those persons with whom I have had any intercourse, from that period till now: but, if your lordships should instantly oblige me to proceed upon my Defence, unprepared as I am, I must submit. Locked up a prisoner in the Tower, I cannot make your lordships' Order effectual against the several persons in the list I gave in to this honourable House; and to proceed to trial, whilst I am under these circumstances, has the appearance of so much hardship, that I flatter myself it will move your lordships effectually to interpose, and order some proper method, by which my witnesses can be forced to attend; and not suffer a peer of the realm to be destroyed, because he cannot work impossibilities, or oblige me, like the Israelites of old, to make brick without straw. I must therefore humbly move, and insist with your lordships, not to introduce a precedent in my case, which may be attended with the worst of consequences to any lord who shall hereafter be brought to your lordships' bar. And, indeed, my lords, I say this not altogether out of a regard to myself: I am now fourscore* years of age, have suffered many changes, and, thank my God, have no unbecoming fear for any thing I can yet suffer: I know, by the quick advances and frailties of old age, that, in the course of nature, I am hastening to my end;

* In his Letter to the duke of Cumberland, he called himself past seventy. See p. 714.

and, by the favour of the Almighty, I have been long preparing for that great and solemn change: but this, my lords, may produce a precedent that shall prove fatal to many of younger years. And, surely, your lordships must be convinced I have the greater reason to insist on this demand, upon considering what I propose to lay before your lordships, in the second place, namely, a few observations upon the nature of the evidence, and the credit that those witnesses deserve who have sworn against me.

In general, your lordships have undoubtedly perceived the high improbability that runs through the whole of Chevis's oath: He, my lords, takes upon him to swear to conversations as far back as the year 1719; and mentions as if I was then engaged in plots against his late majesty, at the very time many of your lordships know, and that it is notorious, I was highly in his favour. It might, my lords, carry the air of vanity for me to mention to your lordships the many particular services I was thought to have done his majesty in the year 1715: but allow me, my lords, to say, they were services of such a nature, as made his majesty think me entitled to very distinguishing marks of his favour, as will appear by several letters, which, by his majesty's orders, I had the honour to receive from the late lord Stanhope, my great and very worthy friend: so that; my lords, Chevis's accounts are even more than improbable; besides, that the minute and particular manner in which he swears to circumstances that have happened so long ago, must render his testimony too suspicious to be believed. And allow me to observe a very remarkable circumstance, That he has carefully avoided to name any one man who was present at any one of those conversations, and could possibly have been brought to confront him, lest the same providence which detected the elder, in the case of Susanna, might have detected Chevis. A farther circumstance your lordships will also allow me to observe, That it is not to be supposed, that I, or any man of common sense, should have talked so often, and so freely, upon a subject of that delicate nature, to a person, who, if your lordships can possibly believe himself, was always so openly and zealously affected to the present establishment. But can your lordships yet conceive any good opinion of a person who voluntarily offers himself as an evidence to little trifling conversations, which the only opportunity he had of hearing was his eating at my table, when he must have starved at his own, and perished for cold, unless my money had furnished him with clothes? In evidence of this, I was, till very lately, possessed of many of his accepted notes, for greater sums than I am afraid he is yet able to pay, I having prevailed with a friend to let me have money upon them, to supply my present wants; and I should be sorry if he shall suffer by his friendship to me.

The next three evidences who have appeared at your lordships' bar against me, are these in-

famous fellows, who call themselves secretaries; the one, and on this occasion I name Murray, the most abandoned of mankind, who, forgetting his allegiance to his king and country, has, according to his own confession, endeavoured to destroy both like another Cataline, to patch up a broken fortune upon the ruin and distress of his native country; to-day stealing into France to enter into engagements upon, your lordships may believe, the most sacred oaths of fidelity; soon after, like a sanguinary monster, putting his hand and seal to a bloody proclamation, full of rewards for the apprehending the sacred person of his majesty; and, lest the cup of his iniquity had not been filled, to sum up all in one, impudently appears at your lordships' bar, to betray those very secrets, which he confessed he had drawn from the person he called his lord, his prince, and master, under the strongest confidence. Your lordships will perceive, I have yet forbore to mention the other circumstances of his having received since the battle of Culloden, 35,000 louis-d'ors, which he yet expects to live and riot on; but my lords, who can consider the price of blood and treachery, and not bestow that sort of pity, which Murray, the greatest criminal, the true disciple of his master Iscariot, calls for? One thing more, my lords, I cannot omit; and that is, to take some notice of the indecent and scandalous liberty the wretch has attempted to take, by aspersing a number of very noble, worthy, and honourable persons, of whose innocence your lordships were so fully persuaded, as to stop him in his career, lest, like one of Samson's foxes, he should destroy some of the worthiest members of the commonwealth. But if, after all that I have said, your lordships can pay the most distant regard to this secretary's evidence, it is hard to determine how many of his majesty's other faithful subjects may escape the licentious liberty of his impeachment; for let him once think, that upon the multiplicity of his accusations, his worthless life depends, and there is no reason to apprehend any of the most faithful subjects can boast of a long security. I will not, my lords, trouble your lordships much upon the objections, to which my counsel have spoke against the competence of this witness; but, if a desire of life to so wicked a person, who must be afraid to die, can be any inducement to swear falsely, it is apprehended impossible any of your lordships can give the least degree of credit to the oath of the villain secretary Murray.

My lords, the next secretary I choose to trouble your lordships with, is Robert Fraser, a person who never had the good fortune to be worth a shilling, and whose veracity and truth never exceeded his riches. He, my lords, has taken upon him to swear to letters wrote by himself, and many of them not pretended to have been signed by me: Others, my lords, have neither date or direction; and no sort of proof has been attempted to be brought by the managers, where, or in whose custody,

they were said to have been found. How weak an evidence, therefore, this is to fix so heavy a charge as high treason upon a peer of this realm, is humbly submitted. But, my lords, this witness has also, to go through the whole drudgery of swearing, framed a very improbable and awkward tale to your lordships, of his having found, in a writing-desk in my house, a copy of a pretended patent, creating me duke of Fraser, which, by-the-by, the managers have not offered to produce; and I must leave it with your lordships, whether it is at all likely, that, if I had been possessed of such a patent, I should have left it so carelessly loose; or that, if I had, this witness should have been the only person in my numerous family to have seen it; for I am not now speaking of the testimony of the other witness Hugh Fraser. My lords, is it, or can your lordships think it possible I could have had the copy, and not have had the original? The one was quite as easily sent as the other; and your lordships all know that it is a mighty unusual thing to send copies of patents, where dignities are intended to be conferred. As to the other part of Robert Fraser's testimony, that relates to his writing for arms, powder, and ball, I am persuaded it cannot make the least impression upon your lordships: First, because he has not deposed to express quantities; and, secondly, that it might have been so easy for the Managers to have brought a positive proof, had the fact been true, by the persons from whom these things were said to have been bought; or, at least, by those who carried them to my house, though indeed I can make no manner of doubt, that had this gentleman, Robert Fraser, thought it material, he would have gone a little farther, and sworn to that, as he is one of those honest gentlemen, whose mouth seldom opens, but for their tongues to lie.

My lords, I must next trouble your lordships with Hugh Fraser, and again repeat a general observation, that a person, himself in the rebellion, and who did, upon his oath, declare at your lordships' bar, that he would give no evidence, except in expectation of life, cannot be reckoned an unsuspected witness; for, according to the value which he shall set upon his own life, must his evidence be less or more hurtful to me; since, my lords, life is the purchase, and his giving evidence the only price. He says, that I shewed him a copy of the patent; and yet, long after this pretended time of shewing, he, my lords, was the very person to whom Murray declared, he knew nothing of such a patent. He was also the person who received those treasonable letters that have been read against me; and it is not pretended, that after this interview with Murray at Glasgow, I ever saw him, or had any intercourse with him, till I was brought to your lordships' bar; nor is it laid to my charge, that I ever received any of those letters or commissions, which Fraser is said to have brought from Glasgow. And here, my lords, I must repeat the same observation against Fraser of Dun-

balloch, who was himself in the rebellion; and therefore in like manner swearing away my life to preserve his own.

Many other particulars, my lords, I purposely omit, reserving my observations, till I shall have your lordships' order to bring up my witnesses; and then, my lords, I shall be able to falsify those particulars, and indeed, the whole substance of this heavy charge against me.

I must, my lords, beg your lordships' pardon for taking up so much of your time. I labour under so many disadvantages from old age, and the decay of the faculties of the mind, that it is no wonder I should make a bad defence for myself, unassisted either by counsel or solicitor; and that so many great and eminent persons, skilled in the laws, and masters of Ciceronian eloquence, have appeared to manage the prosecution against me. But I hope, in your lordships hands my old life is safe; and that your lordships, whose noble blood is like so many fountains, from whence issues streams of humanity, justice, and honour, will not, nay, cannot, find me guilty upon the evidence of such witnesses as have defiled your bar, and have no other method left to expiate their own crimes, but by laying them upon me: For your lordships must allow me to observe, that all the witnesses, except sir Everard Fawkener, have both their lives and estates depending upon their giving such evidence as may convict me: And even as to sir Everard, he has judgment enough to know, that, should I be acquitted, he would find it difficult to defend an action at my instance, for reparation of uncommon wrongs, and acts of violence, done by his order upon my estate, in cutting very valuable woods, and appointing receivers of my rents; and consequently he has too great an interest in my conviction, to be considered or received by your lordships as an unexceptionable witness.

My lords, to me, who am no lawyer, it appears extremely strange and unreasonable, that *accii criminis* should be admitted witnesses before they are pardoned; but if it is true, that the law of England differs in this respect from the law and usage of all other nations, I should be glad to know, how that difference has been introduced.—I take it, my lords, for granted, that it is not by the force of any statute; for, I am sure, the great learning and ingenuity of the managers have omitted to mention none that concerns the case of treason; and, if it is by the common law, my objection is entire, and can only be determined by your lordships, as in this case my jury.

In some sort of felonies, my lords, I remember to have often heard of statutes which authorise a proof of that nature; but, in treason, I never heard of one: And, indeed, the necessity does by no means appear to me to be the same; 1st, because the one is not so common as the other; and 2dly, because there can be no room to plead a penury of witnesses in treason, which is laid to my charge: whereas there may in felonies. Another strong consi-

deration will naturally occur to your lordships, that the revenge or malice of power cannot operate in felonies; but may in treason.

If, my lords, I should be told, it has been established by custom, I must beg leave to say, that, as it seems contrary to justice and reason to trust to the evidence, which an accomplice unpardoned is to give, it is incapable of being hallowed by custom; since I am assured, that it is an established rule, that, unless a custom is reasonable, and according to justice, it is void.

But allow me, my lords, to ask, what reason can be given, why these confessed rebels have not been honoured with a pardon previous to my trial? If it is that the government believe, in that case, they would not swear the truth, can the wit of man invent a stronger argument why your lordships, in equal diffidence, should not believe them when they have no pardon; for, if they are such abandoned villains (and, in truth, my lords, I believe them such) as to perjure themselves after a pardon, when they can neither gain nor lose by the evidence they are to give, surely your lordships ought not to trust them, when their lives depend upon giving such evidence as may convict me, who have yet the honour to be a brother peer.

One thing more, my lords, and I have done; and that is, should this sort of proof be once established, I may venture to say, that *delatores* would become greater nuisances here than ever they were at Rome; and that all our noble and ancient families, will be, by degrees, cut off, upon pretence of Jacobite or republican plots; since the history, my lords, of all ages shews, that power can make plots; and fatal experience proves, that in every age are villains ready, like my three secretaries, to prove what power shall hereafter dictate or expect.

Thus far I thought it my duty, in vindication of myself, to trouble your lordships, and, without further trespassing upon your patience, freely submit my life, my fortune, my honours, and, what is dearest of all, my posterity, to your lordships.

L. H. S. My lord Lovat, do you think fit to call any witnesses?

Lord Lovat. No, my lords.

*Sol. Gen.** My lords; Though the noble lord perseveres in denying the charge, yet, as he has called no witnesses, but rests his defence altogether upon complaints, observations, and objections to the force and credibility of the evidence against him, if I was to follow my own inclination and judgment, I should think it unnecessary to say any thing upon a matter already sufficiently understood.

But I am told by the opinion of those, whose opinion is to me a law, that I shall not do my duty, nor perform the part assigned me, unless I close this solemn trial, by calling back your lordships' memory and attention to the princi-

* See vol. 11, p. 238.

pal grounds upon which we have proceeded;* especially as they have now been objected to as insufficient, and complained of as setting an example, which may be dangerous to innocence hereafter.

The gentlemen who manage this prosecution have, in the course of it, meant to do justice to their trust in such a manner, that the noble lord at the bar should feel the weight of truth, but not of his accusers: and it is not to aggravate guilt, or to press down the load heavier upon him, that I am at this time commanded to speak; but to satisfy your lordships now, and the world hereafter, from the nature of the evidence by which this accusation has been supported, why no part is attempted to be answered.

He has put your lordships in mind, that the law requires you, as his judges, to be his counsel; which is certainly true: and I am persuaded, compassion, inseparable from noble minds, has been ingenious to suggest to your thoughts, doubts and objections, in favour of one standing in that place, who certainly labours under some infirmities, and is allowed to defend himself by no other tongue than his own.

If scruples have arisen in the minds of any of your lordships, they will gain strength from that consideration; and the honest prejudice you must feel from his want of assistance, may be of more advantage to him, than the ablest assistance he could have had.

It is proper, therefore, it may even be necessary, to endeavour to set the whole in such a view, as may tend to obviate every possibility of doubt.

There are but two things for your lordships' consideration upon this occasion:

First, Whether the evidence given is a convincing and legal proof of the charge, if it be believed? and next, whether there be any reason to induce your lordships not to believe it?

The only thing, in the course of this proceeding, which has not yet been done to satisfy your lordships with regard to both these points, is, to apply the particular evidence that has been given to the principal overt acts laid in the Articles of Impeachment.

As this is the only thing which has not yet been done, it is the only thing which I shall attempt to do.

There are three kinds or species of treason, of which the noble lord at the bar stands accused by the Articles:

Compassing and imagining the death of the king:

Levying war against his majesty within the realm;

And Corresponding, contrary to a late act of parliament.

The two first are treasons, declared to be so

* As to the right to reply, though no witnesses were called in defence, see in this Collection the Trial of Horne Tooke for a Libel, A. D. 1777.

by the statute of the 25th of Edward the third.

Compassing or imagining the death of the king is an inward thought, or operation of the mind; and therefore, as God alone can judge of thoughts, because he alone can know them, so, for this kind of treason, no man can be convicted, unless he does some open act, which proves the secret intention of his mind. It is not necessary, that the open act should have an immediate tendency to take away the natural life of the king; but any design to subvert his government, or to raise war against him, which may, in consequence, draw on his death, has been long settled to be an overt act of this species of treason.

In high treason, for greater security, the law requires a formal, as well as convincing proof; and therefore no man can be found guilty of high treason, which is not proved by the testimony of two witnesses. One, let his credit be never so good, let him be supported by never so many circumstances, is not sufficient.

But it is not necessary, that two witnesses should give proof of the same overt acts: if they give evidence in proof of distinct overt acts, it is enough, provided they are overt acts of the same species of treason.

Having mentioned what legal proof is required (for this was the law before the 7th of king William, and is therefore applicable to the present occasion,) I will state the overt acts of each species of treason, whereof the noble lord stands impeached; and apply the evidence to them.

Of compassing and imagining the death of the king, the principal overt acts laid in the Articles are three:

1st. That he conspired, with several of the king's subjects, to induce a foreign power (the French) to invade this kingdom.

2d. That he corresponded with the Pretender, in order to dethrone the king, and, with that view, solicited, and accepted, a commission from him to be lieutenant-general of the Highlands; and also solicited and obtained from him a patent creating him duke, as a reward of his engaging in that design.

3d. That he conspired to raise war and rebellion against his majesty within this realm.

That conspiring with a foreign power to invade the kingdom is an overt act of compassing the death of the king, cannot now be doubted.

As to the proof:

Robert Chevis proves, That, in June 1739, he heard lord Lovat propose to William Drummond of Bochastle the project of an invasion;

That, in 1740, he heard him say, there was an association; and drank success to it.

Robert Fraser proves a letter of the 14th of January, 1746, from the noble lord to his son, to have been dictated by him, afterwards read over to him, approved of, and sent; in which are these words:

"I was one of those that entered into a formal

association to venture our lives and fortunes to restore the king, and his offspring; and we signed our mutual engagements for this purpose with our hands and seals, and sent it to France to the cardinal de Fleury, then first minister of France, by the hands of Mr. William Drummond of Bochaldis. The cardinal was so pleased with it, that he shewed our engagements and subscriptions to the king his master, and begged of his majesty to support us; and the king desired the cardinal to assure us of his protection and assistance, and succours to restore our king."

Here are two witnesses who give evidence of that; which is direct proof against the noble lord of this overt act: but this direct proof is strengthened by general evidence.

John Murray of Broughton proves, that such an association and memorial was sent to the court of France; and that William Drummond of Bochaldis was the person who carried it; he names all who signed it; he was himself carried by this Drummond of Bochaldis to monsieur Amelot, and introduced as coming from those, who signed, and sent the association and memorial: he was received by monsieur Amelot upon that foot: he had an answer from the French king to carry to those from whom he came.

This general evidence is again corroborated by that, which is positive proof against the noble lord.

In his postscript to the letter I mentioned before, he says, If his patent of duke was refused, he would keep to the oath that he gave to the gentlemen who first engaged in the project with him, that he would never draw his sword till that was done. He mentions three of the persons by name who first engaged with him; so that the general evidence is supported by this postscript, as to some of those who signed the association, and particularly as to lord Lovat himself.

The authenticity of this letter and postscript don't rest upon the positive testimony of Robert Fraser only; but is supported by the letter from my lord's son, to which this is an answer, proved to be the hand-writing of the son, and to have been found in my lord's custody.

There are other circumstances which give credit to the proof of his having entered into the association, which was sent to France by William Drummond of Bochaldis.

In his letter to Lochiel, he enquires after Mr. William Drummond, as the man whom he loved, and who loved him best.

Robert Fraser says, lord Lovat told him, that his patent was in the hands of one Drummond in France.

And, in his letter of the 14th of January to his son, he says, The patent was sent by William Drummond, as a reward of his having joined in the association.

The second overt act of this species of treason, which I mentioned, was,

That he corresponded with the Pretender, in

order to dethrone the king, and, with that view, solicited and accepted a commission from him to be lieutenant-general of the Highlands; and also solicited and obtained from him a patent creating him duke, as a reward of his engaging in that design.

Though corresponding with the Pretender he made treason by act of parliament, yet corresponding, in order to disturb the king's government, is an overt act of compassing the death of the king; and so it is laid in the Articles.

As to the proof of this overt act:

Robert Chevis heard him, in 1736, send a message by Roy Stewart to the Pretender, with assurances of his fidelity, and that he would live and die in his cause; and charged Roy Stewart to expedite the sending over his commission of lieutenant-general, and patent of duke.

This is corroborated by Charles Stewart, who met Roy Stewart in 1736 at Boulogne, and was told by him, that he was going to Rome; and hoped for a place under the Pretender, through letters of recommendation which he carried from lord Lovat.

Robert Chevis was told by lord Lovat in 1742, That he had got a commission of lieutenant-general, and obtained a patent.

Robert Fraser saw at Gortuleg, among lord Lovat's papers, a commission from the Pretender, appointing him lieutenant-general.

He saw the copy of a patent creating him duke.

He was told by lord Lovat, after his escape from lord London, that his patent of duke was in the hands of one Drummond in France.

Hugh Fraser was told by lord Lovat, that his patent of duke was in Lochiel's hands; and, in November 1745, my lord shewed him a copy of the patent.

In his letter to John Murray of Broughton, he refers to his cousin the bearer (who was this Hugh Fraser) about a suit he had to make.

John Murray of Broughton says, Gortuleg explained this to relate to his patent.

In his letter to his son, speaking of the Pretender, he says,

"When he was acquainted with the association, he gave Mr. Drummond a commission to me of general of the Highlanders, which I have."

"Last of all, the king was so good as to give such a singular mark of his favour to me and my family, that he created me duke of Fraser, and sent me that patent by William Drummond; of which I have a copy."

The original, he says, was left with old Lochiel.

In the postscript to this letter, he says,

"Tell your captain lieutenant (Hugh Fraser) I beg of him to remember what I spoke to him about my patent.—Put all irons in the fire.—I ask nothing of his royal highness, but to give his countenance, and own publicly what his father has done for me; which if he refuse, I must keep to the oath, &c. never to draw my sword till it was done."

This is corroborated by general evidence given by Broughton, and Hugh Fraser: they talked at Glasgow about it: the packet was not directed till Hugh Fraser should learn from old Lochiel, whether he had such a patent.

Of this overt act there is direct positive evidence, by the testimony of three witnesses, Hugh Fraser, Robert Chevis, and Robert Fraser, supported by two more, Charles Stewart, and John Murray of Broughton; and all the circumstances, which confirm the authenticity of the letters.

The third overt act, which I mentioned, of this species of treason, was,

That he conspired to raise war and rebellion against his majesty, within this realm.

In his letter to the Pretender's son, he says, "None of your servants but will do me the justice to declare, that I am, and always have been, the most zealous and active partizan your royal highness has in the north of Scotland."

In his letter to John Murray: "For many years past I was the life and spirit of the king's affairs in these countries," &c.

"I made it my only business to encourage and keep up the hearts of the king's friends."

In his letter to his son, he says, "Since that association, I made it my business, wherever I was, to promote the king's interest, and to gain and encourage faithful subjects to serve him: so that I have done more against this government than would hang fifty lords, and forfeit fifty estates."

In the postscript, "It can be easily proved against him (your father,) that he has done more against the government than any one of his rank in Britain."

Hugh Fraser proves, That he said he thought of heading the Frasers himself, as he believed four or five thousand men would have risen; but that was disappointed.

He sent a message to the young Pretender, by the witness, that he had intended to have gone at the head of four or five thousand men, to support his interest.

When the witness gave him the true state on both sides, he said he had gone too far to go back.

In his letter to Lochiel, he says, He had so managed the north, that 6,000 men would have marched south to join the Pretender, had not the design been frustrated.

Robert Fraser proves, That he made excuses to Lochiel, Keppoch, and others, for not having joined them publicly: That he made excuses, after the battle, to the young Pretender; and they both embraced.

This is strengthened by general evidence given by John Murray of Broughton, that, when the young Pretender landed, a message was sent to lord Lovat by doctor Cameron, and Gortuleg came from him.

And also by general evidence given by Robert Fraser, that, soon after the Pretender landed, one Cameron came to lord Lovat, and Gortuleg went to the young Pretender.

This is strengthened too by most of his let-

ters; which imply a previous concert, and assurances given: they are full of apologies for his not acting up to that, which, he seems conscious, was expected from him.

His wavering and irresolution speak a mind divided between former engagements and present fear.

At first, when he thought four or five thousand men would be raised, he intended to have headed them himself: when that scheme was disappointed, he neither would join the rebels himself, nor send his men. Upon the news of the battle of Preston-Pans, he resolved his son should go.

When an account came of the landing of the Dutch forces in England, he resolves his son should stay, so as to give occasion to that expression of his, That one day undid what another did.

At last, when lord John Drummond landed in Scotland, with a body of French forces, and assurances of powerful succours from France, he returns to the design of sending his son.

This conduct, and fluctuation of counsels, shew he equally dreaded either breaking former engagements, when the attempt wore a face of success; or keeping them, when it looked desperate; and gives credit and strength to all the direct and positive evidence, that the case was so.

Thus this overt act is proved by the testimony of two witnesses, Robert and Hugh Fraser, and supported by all the circumstances which confirm the authenticity of the letters.

The second species of treason, whereof the noble lord stands accused by the Articles, is, Levying war against the king within the realm.

My lords, levying war, properly speaking, and in the nature of the thing, is itself an open act, and may be laid as an open act, of compassing the death of the king: It is impossible to consider a man as levying war, without having done some act. In treason there are no accessaries; all who assist are principals. Though a man should not himself appear in arms, nor commit any hostilities with his own hands, yet if he voluntarily aids, in any manner, those who are in arms, and commit hostilities, he is guilty of levying war.

But though levying war be really an act itself, to be proved by the hostilities committed, or assistance given; yet, as the letter of the statute of Edward 3, requires the four kinds of treason first mentioned in that act to be made out by open deed, overt acts are always laid of this species of treason, though generally, they are only descriptions of the manner of levying war.

In the present case, the Articles have pointed out particularly the manner in which the noble lord is charged with having levied war. And of this species of treason there are three overt acts laid:

First, That he encouraged, by messages and letters, the Pretender's son, and his adherents, then in arms, waging war against his majesty, within this realm.

Hugh Fraser proves, That he carried a message from lord Lovat to the young Pretender; the purport of which your lordships have heard.

Robert Fraser proves his letters to the Pretender, Lochiel and John Murray of Broughton.

His evidence as to the letter I last mentioned, is supported by its appearing to be written in answer to a letter of the 31st of October, from Broughton; and Hugh Fraser swears, he brought such a letter from John Murray of Broughton to lord Lovat, was privy to the contents, and gives an account of them: and John Murray of Broughton proves, that he received this letter from Gortuleg.

All these letters are established by the postscript to his letter to his son of the 14th of January, 1746; in which he says,

"I send you enclosed the four letters which you should have carried with you from Castle-Downey: you may tell the prince when you deliver the letter to him."

The authenticity of this is supported by his son's letter, to which this is an answer.

So that to this overt act, there are two positive witnesses, Hugh and Robert Fraser; besides all the circumstances which give them credit.

The second overt act of this kind of treason laid in the Articles, is,

That he sent his son, at the head of an armed force, to join the young Pretender, and his adherents, and assist them in the war they were then carrying on against his majesty, within the realm.

Robert Fraser proves, That lord Lovat sent letters early to two heads of different tribes of the name, to prepare their men, in order to join the master of Lovat:

That he ordered colours and bell-tents to be got ready:

That his men were twice rendezvoused just by his house, with his privacy:

That he ordered the witness to give them gunpowder, and delivered him the key of the place where it was, for that purpose:

That he furnished them with bonnets, shoes, and shot.

His letters to the young Pretender, Lochiel, Broughton, and the son himself, shew that he sent his son, and the men he led.

Hugh Fraser says, after his return from the President, lord Lovat gave his opinion, that his son should march with all dispatch:

That this was his final opinion, and should not be countermanded.

Robert Chevis proves, that my lord offered him a captain's commission.

Hugh Fraser of Dumballoch says, lord Lovat asked him what number of men he could raise; and said the master was to head and raise them. Declared he would send his son and clan—wished himself younger, that he might go and command the men himself—blamed his son's slowness in raising the men—promised gratuities to the wives and children of those who went south to the Pretender, and

engaged to support their families in their absence.

W. Walker was present at part of a dispute between lord Lovat and his son, who threw his cockade into the fire.

He heard lord Lovat say to Fraser of Byerfield, "What would you have me do? I am forcing my son out, the life of me."

Peter Fraser of Balladrum proves, that when the men were rendezvoused, the officers used to go to lord Lovat, and he bid them go to his son, their colonel.

There are more; but I have already named six witnesses to this overt act, whose evidence is confirmed by a variety of circumstances.

The third and only other overt act of this kind of treason, which I shall mention, is, that he conspired with many persons in arms, how to renew the rebellion, when it was almost suppressed, and to raise forces to keep it alive.

John Murray of Broughton proves, that lord Lovat met at Mortlign, in the island of Morar, fifteen of the chiefs of the rebels:

That he said 3,000 men would be sufficient; and mentioned 400 Frasers, as the quota of his son; and desired Lochiel to answer for his son.

John Farquhar proves, that he embraced Lochiel's officers; and said, he did not doubt their getting 7 or 8,000 real honest men, to fight the elector of Hanover's troops.

Charles Stewart proves, that 3 or 400 Frasers were proposed as his son's quota; and that he desired Lochiel to answer for his son.

All agree French money was distributed for the purpose of raising men; and that 70 or 80 Louis-d'ors were given to a man belonging to lord Lovat, for the Frasers.

John Murray of Broughton says, That four or five days after, my lord talked of sending the servant who had received the money, to his son with it.

So that, to this overt act, there are three concurring witnesses.

The third head of treason laid in the Articles, which is, knowingly corresponding with the eldest son of the Pretender, and persons employed by him, contrary to the late act of parliament, I pass over, because the evidence to support that part of the charge is also evidence upon the two other kinds of treason; and, as such, it has already been taken notice of.

All this particular proof is strongly corroborated, if it wanted any support, by a general evidence of guilt.

Lieutenant Dalrymple proves, that lord Lovat, after he was taken, being asked, how he came to be engaged, said it was in revenge for the loss of his company.

David Campbell asking how he came to be engaged in a thing of this kind, at his years, lord Lovat said, he had been disobliged by taking away his company.

Sir Everard Fawkener has told your lordships, that he did not take pains to deny his guilt: that he put the part he had acted upon resentment to the ministry, for having taken

away his company : That he said, for the sake of revenge, he would have joined Kouli Kan, had he come.

His escaping after he was first apprehended, the condition and place in which he was taken, shew, that he thought his only safety lay in flight.

After he was taken, his declarations to those who took him ; his conversations with sir Everard Fawkenor, well knowing who he was, shew an absolute conviction, that the part he had acted was too notorious to be dissembled.

My lords, this being the nature and strength of the evidence, upon which the case now in judgment depends : from the precedent which may be made upon this occasion, I little thought to have heard of danger to innocence hereafter.

If this were a doubtful matter, if it were a measuring cast, the Commons had rather the guilty should escape, than run a risk of the innocent being condemned. When they accuse, they desire the person accused may be convicted upon clear, satisfactory, and unanswerable proof, or not at all.

The noble lord at the bar has complained of many hardships : few are the trials in which such a complaint would be so little founded.

He had full time to prepare for his defence : at his own request he has been indulged with adjournments during the trial : he has had all the advantages of assistance which could be given, or connived at.

I wish the inflexible rule of law, as it still stands in prosecutions of this kind, could have allowed him to make his full defence by others.

The appearance of a hardship would have been removed ; but, as this case is circumstanced, the removing that appearance would have helped the prosecution much more than the prisoner.

I speak it feelingly, I had rather reply to the ablest advocate, than do what my duty now requires of me. It is painful to the last degree, to observe upon any thing which has dropped from himself ; but some notice must be taken.

He has laboured to prove, that no credit ought to be given to the witnesses against him, because many of them are accomplices, and speak from the danger of their situation.

I will allow, that the hopes of life, or the fear of death, may have induced some of them to give evidence upon this occasion, but not a false evidence.

The same hope or fear is a security against that : when the Commons accuse, and your lordships sit as judges, what expectation can they have but from their ingenuity and veracity ? Should they be caught prevaricating, should they be detected in a false accusation, desperate were their condition indeed.

But the noble lord is misinformed, when he says an accomplice ought not to be believed at all, till he is pardoned : if so, he could not be examined. The utmost force of the objection is no more than a circumstance, to weigh in the scale against his credit ; but then it must be balanced with the matter of the evidence, the

manner in which it is given, the proof by which it is supported, and that by which it is contradicted.

The matter here is probable and consistent : nothing of consequence rests upon a single testimony : they who support each other, first told their stories separately ; have never since had an opportunity of conferring ; and therefore could not agree in a fiction.—One perhaps first examined in London, another at Inverness, neither knowing what the other had, could, or would say, kept in separate custodies ever since, it is impossible they should unite in the same falsehood.

The manner too in which they gave their evidence, carried with it a degree of conviction : to instances in one, the behaviour of Hugh Fraser demonstrated what he told your lordships : he said, if he had no hopes of mercy he would not have spoke at all ; for if he submitted to be examined, he must speak religiously the truth.

The visible agonies, and anguish of mind, under which he laboured ; the ingenuity with which he answered the precise question put to him, without ever going a syllable beyond it ; could not but force belief to all he said : and shewed he gave the answer because it was true, but wished not to have given it upon this occasion.

When he first discovered what he knew, he has told your lordships, that he thought himself in the article of death ; and from what he then said he never has varied since.

The proof by which their testimony is supported, I have already laid together in one view : to contradict them nothing is offered.

The noble lord says, the witnesses who could clear him are not here : though, in the course of the trial, we heard of his having witnesses, and what they would prove ; he has not had time enough to bring them ;—he complains of their having been prevented : as he has not witnesses enough, he won't call any.

These are pretexts ; but he let fall the true reason why he has no witnesses.—There is no making brick without straw ; there is no calling witnesses without facts ; there is no making a defence without innocence ; there is no answering evidence which is true.

He has not so much as suggested what these witnesses could prove, if they were here.

I will do him the justice to believe, that, if he could with truth, he would not now throw the whole upon the stiff-necked, headstrong disobedience of his son—That unhappy boy is already attainted, and now actually in custody. Though he might have been made the scape-goat, if he were out of reach, yet, in his present situation, I am sure the noble lord would not defend his own life by leading this unfortunate youth : much less would he attempt such a kind of defence, contrary to truth ; for so it must be, if either the prisoner himself, or our evidence, is believed.

Would he call witnesses to prove the letters which have been read to be forged ? Consider how they are authenticated. To some his sig-

nature still remains—He don't controvert its being like his hand—The bodies are wrote by Robert Fraser. A letter, unquestionably signed and sent by the noble lord to his royal highness the duke, was produced: the body is wrote by the same Robert Fraser. The signature to this, and the signature which remains to the others, appear manifestly of the same hand.

One of the most material letters is an answer to a letter wrote by his son—that too must be a forgery; yet it was found in his own custody. But the intrinsic evidence of authenticity is still stronger.

If the letters are forged, how come they to give the same account of the association, and mention the same persons concerned, as your lordships have heard from the general evidence?

If the general evidence is a fiction, how could the same story get into these letters?

If Robert Fraser invented the letters, how came Hugh Fraser, and others, to give the same account of the patent and commission which is to be found in them? If the patent and commission never were seen or heard of, how could they be put into forged letters? But remarks are unnecessary, where the case is so plain. I have said thus much, to shew, that the noble lord's alleging he wants assistance, or has not his witnesses, may be of more service to him, than any assistance, or witnesses, he could have; and to shew, that the Commons have not taken upon themselves this prosecution, to lay the noble lord at the bar under any disadvantages, in his defence. From the witnesses who have been examined, the case must appear to your lordships such as no advantages could have enabled him to get the better of. There are many circumstances which induced them to single out this prosecution; many circumstances of a public, many of a peculiar nature. I am almost tempted to mention some of them; but, in part, they have occurred to your lordships in the course of the examination; and I refrain, lest I should drop any thing that might tend to inflame. Every thing of that sort has, by every body, been carefully avoided upon this occasion. That Ciceronian eloquence, as he calls it, from principles of justice and humanity, has not been used against him. Every gentleman, who has spoke in this trial, has made it a rule to himself, to urge nothing against the prisoner but plain facts, and positive evidence, without aggravation. They have addressed themselves to your judgment, and not to your passions. I dare say your lordships have observed, that, though the evidence given consists of a variety of facts, some more directly affecting the noble lord, others less, and some, perhaps, not affecting him at all, neither in the summing up the evidence, nor in what I have now troubled your lordships with, has any thing been mentioned as direct evidence against him, which is not so. Circumstances which only tend to corroborate, have been mentioned in that light; and evidence which no way affects him, has not been repeated, or observed upon at all.

My lords, the whole is now before your lordships: it is your province to make the conclusion which ought to be drawn from the premises.

Lord Talbot. My lords, the abilities of the learned manager who just now spoke, never appeared with greater splendour than at this very hour, when his candour and humanity has been joined to those great abilities which have already made him so conspicuous, that I hope one day to see him add lustre to the dignity of the first civil employment in this nation. My lords, I observe one thing in the defence of the noble lord at the bar; which, for the sake of the Managers for the representatives of Great Britain, and out of the regard that I have for their constituents who deputed them, I think myself obliged to take notice of.

My lords, the noble lord at the bar, in his defence, complains, I believe, very unjustly, of the hardships he has suffered, in being deprived of his witnesses; and, at the same time, mentions, that there are witnesses of indisputable credit, who were brought up in order to be witnesses against him, but who have not been examined by the Managers, for fear they should, on their cross-examination, support those facts.

My lords, I therefore now desire, for the honour of the gentlemen who are Managers of this prosecution, that the noble lord at the bar may be asked, Whether he is now willing to have those witnesses produced, and to have them asked any questions concerning that matter?

Attorney General. My lords, what has been taken notice of by the noble lord, and what is desired by him, is extremely irregular, after the Managers have closed and summed up their evidence; and the noble prisoner had liberty and time given him, in the most indulgent manner, to make his defence in such way as he should be advised. He was pleased to make a speech to your lordships, containing a great variety of facts, but declined producing any witnesses; and though called upon for that purpose, thought proper to acquaint your lordships, that he should offer none to support those facts which he had alleged: your lordships have, upon that declaration, been pleased to proceed to hear the Managers' reply.

My learned friend on my left hand hath executed that part with great justice to the commands of the Commons, and all that tenderness to the noble prisoner, which was consistent with his duty. Your lordships have heard and felt the weight of it.

The proceedings are closed, and wait only for your lordships' opinion. The Managers therefore are surprized to find the noble lord now calling upon the prisoner, to examine witnesses which he did not think proper himself to examine, after the fullest opportunity of considering it. And it appears by his own speech, he has had correspondence with his witnesses since they came up. The Managers therefore

must insist, that your lordships will proceed to give your opinion upon the whole of the evidence, which is now fully before you.

My lords, I cannot but take notice of the method which the prisoner at the bar has taken, of reflecting upon this prosecution, in his speech. He has complained in a heavy manner, and endeavoured to induce your lordships to believe, that those who have had the conduct of this prosecution, have been using undue methods, either to get witnesses to support the charge, or to prevent him from having any witnesses in his defence. If the prisoner at the bar could have made out any thing of this kind, your lordships would certainly have heard it here, in evidence; for his not doing it could not be out of deference to the Commons, or to your lordships, or to his majesty.

He has represented as if a new method was taken, of erecting uncommon courts of justice, to compel some witnesses to give evidence on one side, and deter others from doing it on the other. My lords, it is indecent to lay reflections of this kind before your lordships, in this manner. Is the noble lord at the bar now to say, I could have evidence, if I had an opportunity of producing it; and if your lordships will give me time, I will prove all that I have said? My lords, what has he been doing ever since the Articles were exhibited? Who are the persons he could now examine? Many of his witnesses, he has said himself, are come up; has he made any use of them? Have they been examined at your lordships' bar? On the contrary, did not the prisoner say, he would produce no witnesses? Yet, says he, I will reflect upon the proceedings; and say, that I could have witnesses, if I had leave and time to produce them.*

My lords, a prisoner who is tried for his life, may think he has a right to say any thing, how false, how unjust soever: but it is incumbent on your lordships to prevent the effect of such reflections, to do justice to all parties, to the government, the Commons of Great Britain, and the Managers. The prisoner seems to have hopes, that your lordships may be prevailed upon, by this means, to believe, that there is some truth in what he says. Your lordships' indulgence now, of further time, on this pretence, would give some colour to that suggestion; and it will be imagined, that it was believed by your lordships. I call upon the prisoner himself, to declare, whether your lordships did not indulge him with an opportunity of calling any witnesses, even those brought up on the part of the Managers, on his giving them notice for that purpose? If your lordships should now, upon what has been said by the noble lord, which I do not doubt but he said from the great regard he has to justice,

and from his compassion for a person appearing in the circumstances of the prisoner: I say, my lords, if upon such a suggestion your lordships should now call again upon the prisoner to produce his witnesses, it will be giving credit to that false and injurious insinuation: and I hope your lordships will not give colour to imagine it was believed by you, by giving leave to the prisoner now to call witnesses for that purpose.

Lord High Steward. Have you done with your evidence on both sides?

Lord Lovat. My lords, I am an unfit person to say any thing after that great man that has spoken last; but, since I am now upon my trial for my life and fortune, I must tell your lordships what is really fact, though, perhaps, it may not be pleasing to that great man, that there is not one syllable of what he has said true. My lords, it is certain, that I got your lordships' order for bringing up sixty witnesses to this place; and it is certain that I sent a gentleman, who was once allowed to be my solicitor; and, though I was robbed of my whole money, and did not get a farthing out of my estate since I was taken prisoner, yet I had interest enough to get 500*l.* from Mr. Ross, which was given to this man, to bring up my witnesses. My lords, he came there to Inverness, and found all the witnesses that I had named to him were very ready to come up; but I was extremely surprised to find, that there was a new court, besides the Court of the House of Peers, a little depute of the sheriffs, that took upon him to leave the common place of justice in the Tolbooth at Inverness, and to go to a private place in the suburbs, and there to erect such courts as he thought fit; and there he examined what witnesses he pleased; and those which he thought friends to me were some of them put into prison, others overawed and terrified, and others chased out of their houses, their houses burnt, and their cattle taken away, and most of the rest obliged to go to the Highlands, and threatened to be undone, if they came to be evidence for me. My lords, after my friend, that was sent to bring up my witnesses, used all his endeavours, and offered to bear their expences, and to keep them, he could not get them to come up, because there was an influence used by the general officers in his majesty's service, and persons sent up and down the whole country, to threaten part of the witnesses, and to bribe others of them: So that, my lords, though I am no lawyer, nor orator, as the learned gentleman on my left hand is, yet I heard from a very great man, that this was a precedent which never happened in Scotland, and, he believed, not in England; and he said to me, that it was most certain the Lords would take notice of it, because the affront had been done to themselves. My lords, after I was arraigned before your lordships, and that the House of Commons had brought up Articles against me, that your lordships would not allow any little court of inquisition to go after-

* According to lord Kenyon, in the Case of *Fox v. Horne Tooke*, A. D. 1792, Lord Lovat introduced the names of persons not concerned in his Trial, and it was said it was indecent to do so, and he was stopped accordingly.

wards, and to judge my cause, as it were, before your lordships. Therefore, my lords, it is simply impossible for me to make my defence, while I am not allowed the witnesses that your lordships ordered for me. That what I say myself is true, there are two affidavits here of it, if your lordships please to let them be read by the clerk.

L. H. S. My lord Lovat, by our law, affidavits cannot be read as evidence upon a trial: You must call witnesses to prove the facts. But I would ask your lordship the name of that agent, whom you sent down into Scotland to bring up the witnesses, and who gave you this information?

Lord Lovat. His name is Hugh Fraser.

L. H. S. My lord Lovat, I must put your lordship in mind, that you made three applications to the House of Lords, by petition, to put off your trial: The first was on the 19th of February, and the others on the 2d and 3d of March. One of those petitions was supported by an affidavit made by one Hugh Fraser: Was that the same Hugh Fraser, whom you sent, as your agent, into Scotland?

Lord Lovat. Yes, my lord, it was.

L. H. S. Then, my lord, there is another affidavit annexed to your petition to put off the trial, on the 3d of March, which is the affidavit of George Ross. Now, in neither of these petitions, though one of them is supported by the affidavit of Hugh Fraser, whom you admit to be the person you sent into Scotland to summon your witnesses, is there any allegation of any undue practices, or any restraint upon your witnesses. How comes it to pass, when this Hugh Fraser came back from Scotland, and made an affidavit to support the petition to put off your trial, that this complaint was not made then?

Lord Lovat. My lords, in the first place, it could not be done before, because they went upon these methods but just before Hugh Fraser came up. I have a minister of the gospel, a very honest and worthy man, whom they designed to make an evidence against me: and, I believe, he will tell the truth upon the subject of the hardships done to my people, to keep them from coming up here to be evidences; I mean my tenants.

Mr. Noel. My lords; I did not intend to have troubled your lordships at all, not finding the noble lord at the bar had, in his defence, made it necessary for me to take any part in the reply; since what he has said (if it had been more material than the nature of it appears to be), he hath said unsupported by any evidence at all; and the noble lord very well knows, that, in every court of justice, a prisoner is not expected to make his defence by what he thinks fit to say himself; but he must support it by evidence, or it can have no weight in answer to the evidence produced to support the charge against him; and, my lords, it was for that reason that I did not trouble your lordships in that part of the case, which hath been so amply

VOL. XVIII.

minutely, and accurately gone through by my learned friend, who has spoken to it. But, since the noble lord has irregularly mentioned several matters since the reply was closed, I shall take the liberty to make some observations upon what he has insisted upon.

My lords, the noble lord at the bar has made it matter of complaint to your lordships, as if particular methods of practice had been used, to prevent his witnesses coming up to appear in his behalf. Your lordships will give me leave to say, that such allegations ought to be considered as the highest injustice, when his lordship has not called one single witness to the truth of them, or to his own defence. My lords, this affectation of saying things, without supporting them by any proof, after hearing the reply of the Commons, and the summing up of the whole proceeding, is a method which was never known to be endured in any proceeding by way of legal trial. My lords, it is extremely easy for any noble peer upon this occasion, when he stands to be tried for his life, and has no defence to make, nor no witnesses to produce; it is easy, I say, my lords, to throw in matters by way of calumny; but your lordships will not endure it, unless it is made at a proper time, and supported by proper evidence.

My lords, I am the more surprised at this from the noble lord at the bar, because, whatever he may think of it, this I will say, that I know of no instance in any case where a prisoner has been more fairly dealt with, or used with more candour and humanity on the part of those, whose business it is to make out the charge against him, nor on the part of those, by whom he is to be tried: And it is the more extraordinary, because, if I am not mistaken, till this very day, he has declared to your lordships, that he had numbers of witnesses ready to produce, who would falsify every fact which has been alleged against him.

My lords, I will take notice, now I am up, of another objection made by the noble lord to some of the witnesses that have been produced against him. My lords, it is a known objection; it has been often made, and as constantly over ruled.

The noble lord says, some of the witnesses are persons interested; that they are criminal, as accomplices in this rebellion; and therefore ought not to be believed. Your lordships will give me leave to suggest, whether the laying down that as a rule would not be of very ill consequence, and, in effect, secure the most wicked offenders from all possibility of punishment and justice. My lords, it is from a principle of right reason, and absolutely necessary to the preservation of government, that those who are concerned with them, should have liberty to do justice to the public by their testimony. It is so in all cases of robbery, murder, and other felonies, and much more in cases of treason, where the whole is in danger. My lords, if this was not so, the very end of government would fail in every particular, if

3 G

those who are concerned, and best able to discover the truth, are not allowed to give testimony, for the sake of preserving the nation. But, my lords, in the present case, I don't recollect any material fact against the noble lord at the bar. but what has been proved by every witness *visâ voce*, and by every letter that has been read, wherein not only his corresponding and treasonable engagements have been made appear, but he has expressed himself, almost in every letter, as manifesting the glory he took, and zeal he shewed, in that wicked service, which he is proved to be engaged in to the last.

My lords, we have nothing now to do, but to expect your lordships' opinions upon the evidence and facts that have been laid before you; and in contradiction to which, there is not one single evidence produced by the noble lord.

Here the Prisoner offered to speak.

L. H. S. My lord Lovat, my lords will be ready to hear every thing that you can offer, which is material for your defence; but I must acquaint you, that the Commons, by the constant rules of proceeding in cases of this kind, are entitled to the last word.

Lord Lovat. My lords, I am far from blaming the honourable Managers for the Commons, though they prosecute me with great warmth, and especially the man at their head, who was, some time ago, my friend and acquaintance. But, my lords, whatever they were pleased to object against me, as I was forced to speak for myself, I was obliged to answer; and my lords, since I asked the favor of this House to force up my evidence in the manner they thought fit, your lordship saying, That no affidavit was good upon the subject, my lords, I have two very good witnesses, one a very reverend minister of the gospel, that will prove the most extreme hardships that ever were imposed in this country, to hinder my witnesses from coming up to me: so that, if your lordships do not, in your great justice and goodness, think it proper to order, in the manner your lordships please, to have my witnesses come up, I must submit to your lordships. You may do what you please.

L. H. S. My lord Lovat, I particularly asked your lordship, Whether you would call any witnesses to prove what you alledged in your defence: To which you answered, that you would not.

Lord Lovat. My lords, I would call witnesses upon no other account than this that I have mentioned. I have witnesses to prove the falsity of what has been said by the witnesses against me; but, since I do not get time to do that, I give it up.

L. H. S. Your lordship does not attend to what I said, which was, that I asked you two or three times, Whether you would call any witnesses to prove any part of your defence: To which you said, No. If you had any witnesses, why did you not call them at that time?

Lord Lovat. This minister was brought up as one of the counter-evidence. I told your lordship, that I would call no witnesses that day.

L. H. S. Is that minister here?

Lord Lovat. He is here.

L. H. S. Gentlemen of the House of Commons, it is certainly an irregular method, in which the noble lord at the bar would proceed, to call witnesses after the reply; but I desire to know of you, Whether you oppose my lord Lovat's calling witnesses now?

Att. Gen. My lords, it is a difficulty upon us, who are appointed Managers, to carry on this prosecution, and would do it with all the candour and indulgence possible, to insist, that the noble lord, who is trying for his life, should not now be admitted to produce witnesses; but it is, perhaps, as difficult to know, how to dispense with that which is the known course and method of proceedings, merely because the prisoner, in an irregular and improper manner, thinks fit to desire it. The Managers do not oppose their being produced, from an imagination that they would say any thing material for the noble lord at the bar, but, if your lordships are to break through all methods and rules of proceedings, your lordships will consider the consequence. The noble lord at the bar told your lordships, that he did not intend to call any witness; and, upon that foot, the Managers replied. He has now told you, that he would do it. But what is it that he would examine them to? Is it to make out any part of his defence to the treason charged on him? That is not pretended; but to prove the hardships he complains of, in being hindered from having his witnesses; and the noble lord at the bar wants your lordships' order now for their coming. The tendency of this, if it means any thing besides complaint, is to put off the cause after it is heard; and, unless I had a greater authority than I have at present, I cannot take upon myself, and I do not find that the rest of the gentlemen, who are Managers, can take upon them, to depart from the known established course of proceeding, and to introduce a precedent, that may be of bad consequence. And, my lords, I can hardly think, that the noble lord at the bar would insist upon doing it, but because he thought, that the Managers must insist, that he ought not. There is nothing that has occurred now, that did not, must not, have occurred to him before; and when the prisoner thought fit to declare to your lordships, after having full time allowed him for the maturest consideration, and counsel appointed for his assistance, that he would not call any witnesses, you cannot but think such determination of his was upon the advice that his counsel gave him; and your lordships will hardly think, that the noble lord can, at present, thus unadvisedly determine to call any witnesses, which before, upon the foot of the advice he must be presumed to have taken, he determined not to do, from any expectation that they would be able to do him any

real service, but from views of another kind. The Managers therefore doubt not that your lordships will proceed in this case, as you would in any other, to consider the evidence, and give such judgment on the whole, as your lordships shall think most right and just.

Lord Lovat. My lords, I have often told your lordships of the infirmities that I labour under: I have often mentioned them to you; and the want of memory is the thing I regret most. I have been a cripple these four years, and therefore not very capable to go to head men in the rebellion; yet I am much surprised to hear that honourable person, that is at the head of the law, and very deservedly placed there, that he should lose his memory in an hour's time. My lords, the reason is plain to your lordships, why I did not adduce witnesses this morning: The reason was, because I begged of your lordships time to bring my witnesses up from Scotland, that they might be produced to prove my innocence; and the only reason that I now desire to call these two witnesses, if your lordships please, is, that they may prove before that great man such examples of extreme hardships, as he will never find out in all his law books.

L. H. S. My lord Lovat, you mentioned but one witness at first; and now you mention two: Who is the other?

Lord Lovat. The two are, Donald Fraser and Alexander Fraser.

L. H. S. Gentlemen of the House of Commons, do you oppose my lord Lovat's being admitted, though it is irregular, to call these two witnesses?

Att. Gen. My lords, I think we cannot, consistently with our duty to the Commons, give up this point, which would be attended with many dangerous consequences, the whole of which your lordships may not now be able to foresee, if a man, when he has closed his defence, and says, That he will examine no witnesses, and the managers have replied, should afterwards be admitted, on such a pretence as this, to examine witnesses.

Earl of Cholmondeley. My lords, I am satisfied that the manner, in which the noble lord at the bar desires now to call his witnesses, is totally different from any proceeding that I ever saw; but, as the accused lord, in his defence, has alleged several hardships that he has undergone, in having his witnesses prevented from attending his trial, and as that contains the highest reflection upon the government, and those who are employed under it, I would therefore desire to know of the noble lord at the bar, whether, upon the speech that he offered at the bar, as it contains objections to the credit and weight of the evidence, and complaints of undue practices; whether, upon those complaints, the noble lord at the bar desires the opinion of the Lords, whether they will give him further time, in order to produce his witnesses?

Lord Lovat. My lords, I was fully determined never to examine any witnesses, when I

found I was under such disadvantages; and I humbly beg your lordships' protection and kindness to give me time.

Solicitor General. My lords; The matter now agitated is of the utmost consequence not only to the present, but to all future proceedings of this kind; and I doubt, whether it is yet thoroughly understood, in its full extent.

The witnesses the noble lord now proposes to call, are not to his defence, or in support of his innocence.

If they were, how irregular soever it may be to offer them now, in my opinion, and, I dare say, the other managers are of the same, I should be for consenting to their being called. We should never contend, though in strictness we might, that any evidence of this kind came too late to be heard.

But the design of calling them, as now opened, is to shew, that, from some obstruction given to the bringing up his witnesses, his trial ought to be put off to an indefinite time; and that he may have new orders to summon and compel witnesses to come from Scotland. This we oppose, because the application intended to be supported by it cannot now be made.

The speech made by my lord consisted of two parts: First, a desire to put off his trial indefinitely; and, if your lordships should not think fit to comply with this desire, then he rested his defence upon observations, and objections to the force and credibility of that evidence which had been offered to prove his accusation.

In this he was very proper; for though a person accused calls no witnesses, yet, if the charge against him is not clearly made out by legal and credible evidence, he ought to be acquitted. Being asked, whether he had any witnesses to call, he declared he had none.

Had he desired to take your lordships' opinion, whether the trial should not stay till he could send to Scotland for witnesses, we should have opposed it. Your lordships calling to the managers to proceed, was a determination, that you would not deliberate about staying the trial.

I own freely to your lordships, the reason why I did not take particular notice of the noble lord's complaint, was, because I understood it to be meant as an artifice to palliate his not going into any evidence: And I did not think it necessary, I did not care, to endeavour to wipe off from his apology any varnish of this kind with which he thought fit to colour it. One thing, had I thought of it, I would have taken notice of: He was pleased to say, that several witnesses, brought up in support of the prosecution, were not called by the managers, because they would have proved the hardships he complains of. I can assure your lordships, and every other gentleman of the committee will join in what I say, no one witness was left unexamined for that reason. It is true, more persons were brought up to be

witnesses than we called ; but the reason of not calling them was, either because we thought what they had to say not material enough ; or else, because they were liable to an objection the noble lord had made ; which, whether well or ill founded, we did not care to give your lordships the trouble of disputing.

In consequence of what fell from your lordships, we told the noble lord, in the course of the trial, that any witness examined by us should attend to be examined by him, if he desired it, and would give notice: We should have done the same with regard to any person brought up as a witness, though not examined.

As to this whole matter of complaint, the managers are intire strangers to it ; Nothing of that kind has been done with their privacy or knowledge.

And this brings me to the point, whether witnesses shall now be heard at this time, to prove any such ground for putting off the trial *sine die*.

We oppose it, because, true or false, the trial cannot now be put off ; and it would be a most dangerous precedent, to go into an *ex parte* examination of such collateral matters. Hearing the evidence supposes your lordships can do something in consequence of it: If you cannot, it would be irregular and improper to go into it.

Before your lordships appoint the time of trial you take into consideration the nature of the charge, and the place where the facts arise, in order to allow a reasonable time for preparation, and bringing witnesses.

Your lordships did so in the present case ; and, after weighing all circumstances, you appointed the 23d of February.

If, through any accident, the time fixed is too short, your lordships are always open to applications, which must be supported by evidence, to shew the delay is not affected ; that all due diligence has been used ; and that the witnesses are material, and expected to come within a certain time.

Upon the application of the noble lord, your lordships deferred this trial to the 5th of March.

Upon another application by him, you deferred it to the 9th of March, the day named in his petition.

If he had any ground sufficient for deferring the trial longer, he should have applied to your lordships before it began ; but, upon the ground now mentioned, it could not have been deferred, even in that way, because it is plain, this matter, whatever there be in it, was within his knowledge, at the time of the other applications. Hugh Fraser, his agent, who went down, as his lordship says, to bring up his witnesses, made an affidavit, annexed to a petition presented by his lordship on the 2d of March, for putting off the trial ; and was called in, and examined at your lordships' bar.

There was likewise an affidavit annexed to his lordship's petition, presented on the 3d of March ; and not a syllable of this complaint ever suggested ; which shews, that they

thought no stress could be laid upon it ; and that it was not to be supported. In the course of the trial hitherto your lordships have heard nothing of it ; on the contrary, you have heard of his witnesses, and what they were to prove.

There is no precedent of putting off a trial indefinitely, after the evidence for the prosecution is closed ; I dare say there never will be such a precedent. At soonest this trial could not come on again before the next session of parliament.

We oppose the attempting to prove a matter upon which your lordships cannot now do any thing ; but I desire it may be understood, that we do not oppose, though it be at an improper time, the calling any witnesses upon the merits of his defence, either to disprove the evidence against him, or to assert his own innocence.

Then the duke of Newcastle moved to adjourn to the Chamber of Parliament : and the Lord High Steward going back to his chair, the House was adjourned accordingly : and then the Lords returned in the same order as before.

After some time, the Lords, and others, returned into Westminster-hall, in the same order as usual ; and the Peers having taken their places, and the Lord High Steward being seated in his chair, the House was resumed.

Then Proclamation was made for silence, as usual.

L. H. S. Lieutenant of the Tower of London, take the prisoner from the bar ; but you are not to take him away to the Tower yet.

Lord Lovat. If your lordships would send me to the Highlands, I would not go to the Tower any more.

The prisoner was taken from the bar accordingly.

L. H. S. Your lordships have heard and considered the evidence in this cause, and every thing that has been alleged by the Managers for the House of Commons, and by the prisoner. The solemn and established method of your proceedings requires, that I should ask your lordships' opinion severally upon the question, Whether the noble lord the prisoner is Guilty of the High-Treason whereof he stands impeached, or Not Guilty ; and that those opinions should be given in the absence of the prisoner. My lords, this has always been your rule ; and after that is done, the prisoner is to be brought to the bar again, and to be acquainted by me with the result of those opinions. Is it your lordships' pleasure to proceed now to give your opinions upon the question of Guilty, or Not Guilty ?*

* *Mcm.* It appears by the Lords' Journal of March 18, 1747, that before judgment was pronounced in the present Case, "the lord archbishop of York, for himself and the rest of the Bishops, delivered a Protestation ; which they desire may be entered :

Lords. Ay, ay.

Proclamation was then made for silence, as before.

Then the Lord High Steward stood up uncovered; and, beginning with the youngest peer, said,

L. H. S. Henry Arthur lord Herbert of Cheshbury, what says your lordship? Is Simon lord Lovat Guilty of the High Treason whereof he stands impeached, or Not Guilty?

Whereupon Henry Arthur lord Herbert of Cheshbury, standing up in his place uncovered, and laying his right hand upon his breast, answered,

Lord Herbert. Guilty, upon my honour.

In like manner, the several lords after-mentioned, being all that were present, being respectively asked the same question, answered as followeth:

Lords.—Sandys, Edgecumbe, Ilchester and Stavordale, Montfort, Talbot, Raymond, Monson, Ducie, Cadogan, Romney, Onslow, Bathurst, Masham, Trevor, Middleton, Mauseell, Hay, Somerville, Hervey, Cornwallis, Berkeley of Stratton, Ward, Byron, Leigh, Strange, Maynard, St. John of Bletsoe, North and Guilford, Willoughby of Parham, Wentworth of Nettedsted, Willoughby de Broke, Dudley, Delawar;—Guilty, upon my honour.

Viscounts.—Leinster, Torrington, Harcourt, Falmouth, St. John, Lonsdale, Hutton, Townshend, Fauconberg, Say and Sele;—Guilty, upon my honour.

Earls.—Buckinghamshire, Brooke, Clinton, Leicester, Portsmouth, Bath, Orford, Effingham, Ashburnham, Fitzwalter, Waldegrave, Ker, Graham, Poinfret, Macclesfield, Harborough, Stanhope, Cowper, Halifax, Granville, Tankerville, Strafford, Ferrers, Oxford and Mortimer, Portmore, Findlater and Seafield, Moray, Cholmondeley, Godolphin, Powlett, Jersey, Coventry, Rochfort, Warrington, Holderness, Gainsborough, Abingdon, Berkeley, Lichfield, Shaftesbury, Burlington, Doncaster, Carlisle, Cardigan, Chesterfield, Winchelsea and Nottingham, Stamford, Peterborough and Monmouth, Westmorland, Warwick and Holland, Lincoln, Pembroke and Montgomery;—Guilty, upon my honour.

Marquises.—Rockingham, Lothian, Tweeddale;—Guilty, upon my honour.

Dukes.—Chandos, Manchester, Portland,

“And the same was read as follows:

“The Lords spiritual of the House of Peers do desire leave of this House to be absent from the judgment now to be given in the Case of the lord Lovat by protestation, saving to themselves and their successors all such rights in judicature, as they have by law, and of right out to have.”

“Then he asked leave that they might withdraw; which being agreed to, they immediately withdrew accordingly.”

Newcastle, Kingston, Ancaster and Kesteven, (lord great chamberlain,) Argyll, Montagu, Rutland, Leeds, Bolton, St. Albans, Beaufort, Richmond;—Guilty, upon my honour.

Grafton, lord chamberlain of his majesty's household. Guilty, upon my honour.

Devonshire, lord steward of his majesty's household. Guilty, upon my honour.

Dorset, lord president of the council. Guilty, upon my honour.

Then the Lord High Steward laying his right hand upon his breast, said,

Lord High Steward. My lords, I am of opinion, that Simon lord Lovat is Guilty of the high-treason whereof he stands impeached, upon my honour.

L. H. S. My lords, there are 117 of your lordships present; and you have unanimously found, that Simon lord Lovat is Guilty of the high-treason whereof he stands impeached.

Is it your lordships' pleasure, that he should be brought to the bar, and acquainted therewith?

Lords. Ay, ay.

Proclamation was made for silence; and another Proclamation for the lieutenant of the Tower to bring the prisoner to the bar; which was done in the same order as before: and then Proclamation was again made for silence, as usual.

L. H. S. Simon lord Lovat, the Lords have considered the Charge of High Treason, which has been brought against you by the House of Commons: they have considered the evidence, and all that has been offered to maintain the Charge: they have also considered every thing that has been alleged in your lordship's Defence: and, upon the whole matter, their lordships have unanimously found, that you are Guilty of the High Treason whereof you stand impeached.

Lord President. My lords, I move your lordships to adjourn to the chamber of parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the chamber of parliament?

Lords. Ay, ay.

The House was accordingly adjourned to the chamber of parliament; and the Lords and others returned in the same order as before.

And the House being resumed in the chamber of parliament,

Ordered, That this House will proceed further, in order to the giving of Judgment against Simon lord Lovat, to-morrow, at eleven of the clock in the forenoon, in Westminster-hall.—And

A Message was sent to the House of Commons, by the former messengers, to acquaint them therewith.

Ordered, That the lieutenant of the Tower of London, or his deputy, do take back Simon lord Lovat, and bring him again to the bar of the House in Westminster-hall, to-morrow, at eleven of the clock in the forenoon.

THE SEVENTH DAY.

Thursday, March 19, 1746-7.

About eleven of the clock in the forenoon the Lords and others came from the chamber of parliament, in the same order as on the First Day, into Westminster-hall; where the Commons, and their Managers, were in the seats prepared for them respectively, as before: and the Lords took their places in the Court, and the Lord High Steward in his chair.

Lord High Steward. The House is resumed. Is it your lordships' pleasure, that the judges have leave to be covered?

Lords. Ay, ay.

Then the Serjeant at Arms made Proclamation for silence as usual, and afterwards the following Proclamation:

Serjeant at Arms. Oyes, Oyes, Oyes! Lieutenant of the Tower of London, bring forth your prisoner Simon lord Lovat to the bar, pursuant to the order of the House of Lords to you directed.

The Deputy Governor of the Tower brought the Prisoner to the bar, in the like form as before; and then he kneeled down.

L. H. S. Your lordship may rise.

The Serjeant at Arms, by direction of the Lord High Steward, made another proclamation for silence.

L. H. S. Simon lord Lovat, when your lordship was last at this bar, I acquainted you, that your peers had found you Guilty of the high-treason whereof you stand impeached, by means whereof you are convicted of that high treason: and I am now to ask your lordship, what you have to say, why Judgment of Death should not pass upon you, according to law?

Lord Lovat. My lords, I am very sorry I gave your lordships so much trouble in my trial; and I give you a million of thanks for your being so good, in your patience and attendance, whilst it lasted. I thought myself very much loaded by one Murray, who, your lordships know, was the bitterest evidence there was against me. I have since suffered by another Mr. Murray, who, I must say with pleasure, is an honour to his country, and whose eloquence and learning is much beyond what is to be expressed by an ignorant man like me. I heard him with pleasure, though it was against me. I have the honour to be his relation, though perhaps he neither knows it, nor values it. I wish, that his being born in the north may not hinder him from the preferment that his merit and learning deserves. Till that gentleman spoke, your lordships were inclined to grant my earnest request, and allow me further time to bring up witnesses to prove my innocence; but, it seems, that has been overruled. All now that I have to say, is a little in vindication of my own character. I was pointed out by the honourable Managers as a most inveterate enemy of the royal family now

upon the throne, and the most zealously attached to a family that is not like to come upon the throne. My lords, I humbly beg, that your lordships will take notice, that my attachment to the family of Hanover is proved without contest, after the great services I have done. I was honoured by the king's favour and countenance, that made me so naturally and gratefully attached to his person and family; and as I was for twelve years in Germany, almost every day in conversation with his majesty and his family, I thought it necessary to know the history of his family; and I read it very particularly; both the public and private history of it: and I must say, that since your lordships, and this nation in general, thought fit to have a king from Germany, you could not have chose one from a more illustrious House; so great, that several emperors of Germany have been elected from out of that family; and they always behaved with great distinction, both in the wars, and in their own country. I will only give one instance of that, which I had from my dear master the late king's own mouth (of glorious memory). I heard him say this to the emperor's envoy, after the siege of Belgrade, when the envoy told him, That there were 40,000 Janissaries killed upon the spot: "Why, says he to the envoy, I shall be very glad of it; but I know the nature of those animals: if 40,000 of them are killed at night, in the very place of those that are killed 40,000 will rise up the next morning. I have had experience of the war with the Turks: I was with 6,000 of my own men, at the siege of Buda: and, I believe, they will do me the justice to say, that both I and my men behaved as we ought to have done." This shews, my lords, that I always had a true notion of the greatness and illustration of the family of Hanover. I gave signal proofs of it in the year 1715; and I beg your lordships will indulge me to repeat a little of what passed at that time, because there are several lords here that were not then born. My lords, when I came into England, in the year 1714, my design was, that, with the assistance of my friends, the late duke of Argyll, and the present duke, I should endeavour to get my remission, to go down into my own country, to endeavour to recover my fortune, and to serve the government faithfully, in what I was able. In this situation I was, when my lord Marshal set up the Pretender's standard at Aberdeen. It did much alarm the court. I was sent for, and particularly spoken to by the earl of Sunderland, and my lord Townshend, who were always my friends. My lords, this present duke of Argyll was so generous, that he would follow his brother to Scotland, and expose his life as a volunteer; and he suffered by it; for at the battle of Sheriff-Muir, he had a ball went through his side and arm, and had almost lost his life, if it had not been by the extraordinary skill and diligence of one Mr. Mac Gill, a surgeon, who attended him. When he went down, he told me, Dear Lovat,

you must do your best for us now ; and I desire you may meet me in Badenoch, with all the men you can get together ; and I will gather all the men I can in Argyllshire, and meet you there. I went down on horseback, and he went down post. Before I came to my own country, I found that the rebels were got together in vast numbers ; and as Inverness was the great capital, of all those parts, my lord Marshal resolved to send 2,000 men to reinforce the garrison of Inverness, that it might not be surprised. The Mac Intoshes and the Mac Donalds were gathered together, in order to go to Inverness. When I found it was impossible for the earl of Ilay to come with his men from Argyllshire, I resolved to distinguish myself, even though by a desperate stroke. I had gathered together 200 men at Stratharrick ; with these I marched to Inverness, and invested it. Sir John Mac Kenzie, the then governor, had 1,000 men in the town ; so I found there was nothing for it but boldness. I sent a message, which, indeed, looked like a French gasconade, that I would blow him, and his garrison, and the castle, and the strong steeple, into the air, if they did not surrender to me before 10 o'clock the next day ; though I had not two pounds of powder. At the same time, I sent a party of men, in which was a pretty gentleman of skill, one captain Ross, the laird's brother. Whether sir John Mac Kenzie heard this over-night, I can't tell ; but he enquired, if I was fully resolved to attack the town. He told him positively, that I was. Says he, If Simon be there, he is a desperate fellow ; I believe I must leave the town to him : and accordingly, he ran off that night, with all his men. This I did, my lords, before any of the loyal clans to this government were raised. After this they were pleased to declare me general of the king's forces there. When I got together near 2,000 men, of which 1,000 were my own, I resolved to attack lord Seaforth, who was coming with 2,500 men, to join sir John Mac Kenzie, at Inverness, or to fight any of the rebels that should meet him : he called them so. He stood his ground till I came within half a mile of him. I drew up the little army I had in pretty good order, being an officer for many years before : and I can say to your lordships, that, I believe, I am the oldest officer in commission in Great Britain ; for fifty years ago I was captain of grenadiers in king William's army. They were the Sutherland men, lord Ray's men, and some of the Grants and Monros : But when I came to march up the hill to attack lord Seaforth, I had none followed me but the Monros. When they found I was come within sight of them, they made a precipitate retreat to a bridge that was near them, over a river : and afterwards, by lord President's advice, who was then in the army, lord Seaforth came, and submitted to me, as general of king George's forces, promising immediately to lay down his arms ; which he did. This submission was brought up and shewn to the minis-

try. I then went, and reduced the duke of Gordon, who gave me the most ample submission I ever read, to the king ; and assurances of fidelity to him and to the government. That submission I likewise shewed ; and, if they are not consumed in my house that was burnt, they are still extant. My lords, then I pursued the rebels from place to place, and chased them from hill to hill. On this expedition I lost my only brother, who was a very brave young fellow ; and I never left off pursuing the rebels till the rebellion was suppressed and extinguished : so that I may fairly say, that I assisted to keep the crown upon the late king's head, as much, if not more, than any one man of my own rank in Britain. I had then several invitations to come to court : and had three letters of thanks from the king's person, by the hands of the great earl Stanhope, who was secretary of state then ; in which he says, that he was so sensible of my extraordinary and signal services, that he would, all his life, give me such marks of his favour, as would oblige all the country to be zealous and faithful to me. Upon this I came to court ; and I was not disappointed. I believe there are lords in this House, I am sure there are a great many yet alive, that know I was a particular favourite of the late king's ; I believe more than any one of my own rank in Scotland. I remember my lord Townshend told me one day, who was my particular friend, that I was certainly a great favourite of the king ; and if all the ministry should join together to hurt me, that it was not in their power to do it ; and that he would do me all the service he could ; and said, the king would not refuse any thing he should ask for me : and the king, to my own certain knowledge, reproached the Scotch ministry, that I was not provided for. But that unhappy nation has been always divided amongst themselves, between the family of the Argylls, and that of the Montrosses ; so that they, knowing me to be a relation and partizan of the family of Argyll, they never would do any thing for me. At last, the king said, he must do it himself ; and sent for the Hanoverian minister, and told him, That he must immediately fix upon a way to give me a pension : at last, it was ordered by the king's particular instruction, that I should have a letter, or patent for myself, for 300*l.* a year ; which I enjoyed till now, for any thing I know. Then all the English ministers, every one of them, were my friends ; and they proposed that I should go into the army. Lord Cadogan, who, in the year 1716, went with an army into Scotland, sent for me ; and desired me to bring up 500 men to Badenoch, to escort him to Inverness : which I did. They gave out, that the Highlanders were to attack him in the woods : but when they heard, that I was with him, with the best part of my clan, they did not think it proper to attack him. After lord Cadogan came to Inverness he sent for sir Robert Monro, who was killed at the battle of Falkirk : he called me into his closet with him, and told me, We are now fully convinced, lord

Lovat, that it was you, and a few of the king's friends that were joined to you, that subdued and suppressed the rebellion, and extinguished it; and that all that was wrote in the Gazette about lord Sutherland, was all romance. Now, I am so sensible of those services that you have done the government, that, if you will join yourself to the duke of Marlborough, to the earl of Sunderland, and to me, that are thought the favourites of the king, we will, in the first place, immediately make you a major-general: you shall have a regiment of foot, or dragoons, and 3,000*l.* a year pension, during your life. My lords, if I had accepted of that offer, I had now had the best estate in Scotland; and would have been fair for being one of the field-m Marshals of England, being the oldest officer: But, my lords, the condition was too severe; and I had rather never have any being than be ungrateful. The late duke of Argyll, I mean this duke of Argyll's father, who was one of the greatest men that has been in our country for many ages; he was a father to me, and protected me as his own child; he got me two remissions from king William; and, as he was carrying another remission in, to be signed by queen Anne (king William to my misfortune, having died that year), he found the door shut; that is, he found that three men had turned out all king William's friends, of whom he was one, and the duke of Queensberry, and several others; and that she brought in two families, the duke of Hamilton, and the marquis of Athol, whom she made a duke: and to please him, with whom my family unfortunately had a quarrel about an estate; to please him, I say, she put 2,000*l.* upon my head, which was 1,000*l.* more than ever was usual. So I told the duke of Argyll, that I had nothing for it, but to go to Hamver, and there to live and die with fidelity to the duke of Hanover. He told me, that he was well assured, that the duke of Hanover would be glad to receive me; but, as he was then declared the Protestant heir, and that succession depended much upon the good will of queen Anne, he must, upon her desire, be obliged to send me back to England; and that he did not know a safe way for me but to go to France, because we were at war with them then. And that was the first thing, my lords, that obliged me to go to France, which was the foundation of my misfortunes. Now, my lords, after what I have told you, I must humbly submit it to your lordships, whether you do not think it is improbable, that I should be an enemy to king George, and his family: I, that received more marks of favour from the late king George, than any subject in the north; I, that got my estate settled in his time, both by the House of Commons and Peers; I, that expected never to be out of favour with the government, being very zealous to promote any thing that was for the good of it. My lords, I commanded a Highland company for fifteen years, as their colonel: and the country can testify, that there was no depredation, theft, or robbery, committed there during that time:

I took twenty-five Highland robbers in the Highlands in one night, and brought them all prisoners to the Tolbooth of Inverness. I continued to act in the manner that general Wade from time to time ordered me. I own I did not expect, that he, who reviewed my company every year, and called it the best company that he ever saw in his life—I must make the lords laugh upon that occasion: He told me, that Mr. Pulteney, now earl of Bath, said, in the House of Commons, that he knew old Lovat very well; that he would never have a company but in his pocket: and now I can tell him, that he did not speak truth. General Handasid was present, and his brother, who is a very pretty gentleman, when he declared, that he never did see such a fine company in any country that he was ever in: and he appealed to the two Handasides, and the other officers that were there, whether it was not true; and they all agreed in it. So that, my lords, after this, I very little expected, that, without ever blaming me, or imputing any crime to me, my commission should be broke; and not only so, but that I should be ordered to keep 400 men from it in the country, to be put into another company, to make up a regiment that general Wade procured for his favourite colonel Durore. My lords, I was certainly much out of humour to see myself so used; but I never imputed it to the king, nor to his prime minister sir Robert Walpole, afterwards earl of Orford. And this is all the grounds of my being out of temper, or that they can lay hold of, to say I was against the government. So, after what I have told your lordships, and the manner that I have been used, I hope your lordships will not think I was capable of any malicious design against the government. And, indeed, it was a loss to the government more than to me, that my company was broke, because, if I had commanded the Highland company, as I did for 15 years, the country had been peaceable, and there had been no rebellion.

Lord High Steward. My lord Lovat, I must put your lordship in mind of the question I asked you, Whether you have any thing to offer in arrest of judgment?

Lord Lovat. Whatever way I may be overruled, I will say to my dying hour, that I have met with the greatest hardships ever practised in Britain; and I still insist, that I shall get the benefit that all subjects have a right to, of adducing witnesses, that may be for the safety of their lives and interests.

L. H. S. Your lordship has heard the opinion of the Lords already.

Lord President. I move your lordships to adjourn to the chamber of parliament.

L. H. S. Is it your lordships' pleasure to adjourn to the chamber of parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the chamber of parliament.

Then the Lords, and others, returned to the chamber of parliament, in the same order they

came down: And the House being there resumed,

The proceeding entered in the Journal of the 19th of March, 1715, in relation to the giving of judgment against George earl of Wintoun, was read: Which being done,

Their lordships were informed, That the Commons, with their Speaker, and the mace, were at the door: Whereupon they were called in: And Mr. Speaker, at the bar, said,

My lords; The knights, citizens, and burgesses, in parliament assembled, did, at this bar, in the name of themselves, and of all the Commons of Great Britain, impeach Simon lord Lovat of High-Treason, and exhibited Articles against him, and have made good the same: I do therefore, in the name of the knights, citizens, and burgesses, in parliament assembled, and of all the Commons of Great Britain, demand judgment of your lordships against Simon lord Lovat for the said high-treason.

And they being withdrawn,

Ordered, That, when judgment shall be pronounced against the said lord Lovat, it be the same as was pronounced against the late earl of Wintoun.

Then the House was again adjourned into Westminster-hall: And the Peers, and others, went down in the same order as before; and the Peers being in their places, and the Lord High Steward in his chair, and the Commons and their managers in the seats prepared for them respectively; the House was resumed: And the Serjeant at Arms made proclamation for silence, as usual.

Lord High Steward. My lord Lovat, as some time has intervened since I last asked you the question, Whether you had any thing to offer in arrest of judgment, I am now to ask you again, whether you have any thing to say, why judgment of death should not pass upon you, according to law?

Lord Lovat. No: I have said all that I had to say; and beg your lordships' pardon for the rude, long discourse I made to your lordships. I had great need of my cousin Murray's eloquence for half an hour, and then it would have been more agreeable.

Proclamation was made for silence, as usual.

Lord High Steward. Simon lord Lovat; You have been impeached by the Commons of Great Britain, in parliament assembled, of high-treason, charged upon you by particular Articles, containing different species, and various overt acts, of that treason.

To these Articles your lordship thought fit to put in an Answer, amounting to a general plea of Not Guilty to the whole; and, after a long and impartial trial upon the clearest and most convincing evidence, against which you offered no defence by witnesses, your peers have unanimously found you Guilty.

VOL. XVIII.

What remains is the disagreeable, but unavoidable, part of proceeding to that judgment, which is the necessary consequence of such atrocious crimes. Happy had it been for your lordship, if before you engaged in them, you had suffered the terrors of that consequence to have their due weight, when the sacred ties of your allegiance, and your oaths, were not strong enough to restrain you.

In this proceeding, the zeal and dutiful affection of the Commons to his majesty, and their country, and the justice of the House of Peers, have alone forth in their full lustre. The Commons found your lordship to be one of the principal conspirators, who contrived and carried on the late detestable rebellion, to destroy our religion and liberties, and to subvert that legal settlement of the crown in his majesty, and his royal family, under which alone we can live free and happy.

They rightly judged, that this, which is the common cause of all the people of Great Britain, ought to be prosecuted by the united voice of the people: That it became them to investigate and lay open, in full parliament, the source of those calamities, which we have lately suffered, and the deep-laid and long-meditated conspiracy, in which your lordship had so considerable and so flagitious a part. They rightly judged, that no judicature was equal to such an important proceeding, but this high-court, on whose penetration and justice they relied, and before whom, in this great assembly, public and indubitable satisfaction might be given.

Before your conviction, I have spoken to your lordship upon a presumption of your innocence; but now I am bound, by the unanimous decision of my lords your peers, to take the evidence against you to be true, and to address myself to you as a guilty person.

Your lordship has, in your Answer, endeavoured to avail yourself of former services to his late majesty, and the Protestant Succession, which you have this day enlarged upon at the bar. How unfortunate have you been in referring back to such cancelled merit, since thereby you have furnished an opportunity to the Commons, to shew, for how long a track of time you have conceived and nursed up this treason in your heart! Whatever your pretences were, so infected was your mind, and so forward your zeal, in the cause of that Pretender, whom you had then abjured, as to engage in that rash and weak attempt from Spain, in his late majesty's reign. Yet, at or very near that time, it appears, by the evidence (out of which every observation I will make shall naturally arise,) you were soliciting or accepting favours and trusts from that very government, which you had thus engaged to destroy. What use did you make of those trusts? The instance of Roy Stewart, now an attainted rebel, speaks it too plainly. Whilst you were sheriff of the shire of Inverness, the largest county in Scotland, and one of the greatest consequence, you suffered that criminal, in the

3 H

year 1736, to escape out of your public prison; harboured him afterwards in your own house; then charged him with messages, and assurances of fidelity, to the Pretender; and to procure for you a commission of lieutenant-general, and a mock title of honour, from that pretended prince.

If any thing could surpass this treachery, it is the association, which your lordship, together with six other persons, signed and sealed, and sent to Rome and Paris, by Drummond of Bochaldie, in the beginning of 1740. The substance of this was, to assure the Pretender, whom you always called your lawful king, of your readiness to appear openly in arms for his service; and to solicit an invasion from France against your native country, to support this desperate design.

It should seem, by the evidence, that the foreign enemies of Britain were less forward in this measure to disturb her, than her degenerate, unnatural sons. Whether that reluctance proceeded from a distrust of so false a set of men, or from a conviction, that the body of this great people was not to be shaken in their loyalty to a king, who possesses the throne by the most rightful title, and governs them in justice and mercy, according to their laws and constitution; in either case they were in the right. What dependence could the court of France have on a few abandoned traitors? What hopes could they entertain, that a general infatuation would, on the sudden, seize and delude a brave, a free, and a happy people, to seek their own slavery and ruin?

From this time till the year 1743, the conspiracy lingered in its progress, though great efforts appear to have been made to render it more extensive, and more formidable. Then it happened, as it always has happened, that when France saw such an enterprize, whether successful or not, might be made a convenient engine of her own politics, that court set about an invasion in earnest. Great preparations were made, and ready at Dunkirk; but the providence of God disappointed them. To be capable of proving transactions of this kind by strict evidence in the forms of law, is not common, nor, in the nature of the thing, ordinarily to be expected. But this the vigilance of the Commons has effectually done, to the conviction of all well-intentioned persons, and to the shame and confusion of those, who, though they believed, and perhaps knew it themselves, were industrious to propagate a pernicious incredulity in others.

Thus the Commons have traced and brought down the series of the conspiracy to the remarkable era of July, 1745, when the eldest son of the Pretender landed in Moidart, unsupported by any foreign troops, unattended, and almost alone.

The appearing rashness of this attempt gave rise to some apprehensions, some misgivings, in the breasts of your lordship, and your fellow-conspirators, proceeding from a concern, not for the king, or for your country, but for

your own private interest and safety. A French invasion had been long solicited; a French force was depended on, to secure you against the just vengeance of your native country; and the failure of that damped your hopes, and produced your expressions of disappointment. However, such was your zeal, that, in this rash enterprize, your lordship joined; not indeed personally (this you often excused, complaining of your infirmities), but by sending, or rather forcing out your clan; and committing every other species of the blackest treason, which the Articles of Impeachment have charged upon you.

Permit me to stop here a little, and lament the condition of part of this united kingdom; happily united in interests both civil and religious; happily united under the same gracious monarch, and the same public policy.—And yet the common people, in some of the remote northern counties, are still kept in such a state of bondage to certain of their fellow-subjects, who, contrary to all law, and every true principle of government, have erected themselves into petty tyrants over them, as to be liable to be compelled into rebellion against their lawful sovereign, under the peril of fire and sword. Astonishing it is, that such a dangerous error in government, such a remain of barbarism, should have subsisted so long in any quarter of this civilized, well-governed island. But, since such is the misfortune, let it be accounted one good fruit of this inquiry, that it has appeared in this solemn manner. The knowledge of the disease shews the way to the cure; and it calls aloud for a remedy.

This usurped power was audaciously made use of over your clan. It is true, your lordship's activity in exerting it rose and fell, in proportion to the appearances of the good or bad success of the Pretender's cause; but, after the advantage gained by the rebels at Preston-Pans, which you vainly called "A victory not to be paralleled in history," you thought it time to throw off the mask; and, with less caution, to espouse a party, which, you then hoped, might be espoused with impunity.

I forbear to enumerate the many overt acts of your treason. It would be tedious to this assembly, who have heard them so much better from the witnesses, and from the recapitulation of the managers. It would be grievous to your lordship, if your heart is, by this time, touched with any remorse for your guilt. But one thing I cannot help observing upon,—the excuse you expressly made for this traitorous conduct, even after you were taken prisoner; to which you have this day artfully endeavoured to give a different turn. Being asked, how you could act such a part against a government, from which you had received many favours? Your lordship's answer was, "That it was in revenge to the ministry, for their ill usage of you, in taking away your commission of captain of an independent company of Highlanders." An excuse almost as

false as it was profligate. False, because some of your treasonable practices were committed whilst you were possessed of that very commission. Profligate it was, in the highest degree. Is allegiance no duty? Are oaths to his majesty, and his government, no obligation upon the conscience? Is loyalty to our lawful sovereign, and the love of our country, to depend on the enjoyment of extraordinary favours and emoluments, which no man has a right to; which can, in the nature of things, be enjoyed but by a few; and are in the pleasure of all governments to confer or deny? A person actuated by, and avowing, such principles as these, must be lost to all sense of virtue, and of shame, and of every natural, as well as civil, sanction of society.

Sorry, very sorry I am, to see this last reflection so strongly verified by the proofs against your lordship. It has appeared, that you used your paternal influence over your eldest son, a youth not above the age of nineteen, to compel him to go into the rebellion; and afterwards unnaturally endeavoured to cast the crime and reproach of it upon him. If this be true, it is an impiety which makes one tremble. It is the celebrated saying of a wise writer of antiquity, and shews his perfect knowledge of human nature, "That the love of our country includes all other social affections:" For we see, when that is gone, even the tenderest of all affections, the parental, may be extinguished with it.

I have said these things, not with a view to aggravate your lordship's crimes, but, as becomes this place, and this occasion, to rouse your mind, which, there is reason to fear, may have been too much hardened, to a just and deep sense of your unhappy and dreadful situation.

Were I to attempt this from topics of religion, I should be at a loss, whether to apply to you as a Protestant or a Papist. Your open profession, your solemn oaths, and public actions, speak on one side: But, if I am to believe the evidence, your private discourse and declarations testify on the other. I will apply no suppositions on this head particularly to your lordship; but from thence I would draw an instructive lesson, which well deserves the serious attention of this whole nation, of what important consequence it is, to preserve not only the name and outward form of the Protestant religion amongst us, but the real uniform belief and practice of it. Indifference to all religion prepares men for the external profession of any; and what may not that lead to? Give me leave to affirm, before this great assembly, that even abstracted from religious considerations, the Protestant religion ought to be held in the highest reverence, as the surest barrier of our civil constitution. Ecclesiastical usurpation seldom fails to end in civil tyranny. The present happy settlement of the crown is, in truth, and not in name only, the Protestant Succession. And the inviolable preservation of that wise and fundamental law, made since the

Revolution, whereby every Papist, or person marrying a Papist, is absolutely excluded from inheriting to this crown, will, in future times, be a solid security for our posterity, not only against the groundless and presumptuous claim of an abjured Pretender, and his descendants, but also to prevent this kingdom from becoming a province to some of the great Popish powers, who have so long watched for the destruction of our liberties.

But, to return to your lordship: Suffer me to exhort you with great earnestness, and in great charity, to deliberate seriously upon your own case, and to deal impartially with your own conscience. If, according to the evidence given at this bar, you have led a life of craft, dissimulation, and perfidy, consider how that scene has closed; what desolation you have thereby endeavoured to bring upon your country; how fatally it has ended for yourself. Consider, that the sentence which I am obliged to pronounce, may soon send you to a tribunal, where no disguise or artifice can avail you.

The sentence of the law is, and this High Court doth adjudge:

'That you, Simon lord Lovat, return to the prison of the Tower, from whence you came; from thence you must be drawn to the place of execution; when you come there, you must be hanged by the neck, but not till you are dead; for you must be cut down alive; then your bowels must be taken out, and burnt before your face; then your head must be severed from your body, and your body divided into four quarters; and these must be at the king's disposal. And God Almighty be merciful to your soul!'

Lord Lovat. My lords, I hope your lordships will not take it amiss, that I should let

* "There is perhaps no instance in which the difference between our law in its solemn denunciations and in actual practice is more remarkable than in the crime of High Treason. Although the sentence uniformly pronounced by the judge, is one which it is never intended should be executed, it is still suffered to remain a part of our law. It remains a just subject of reproach to us by foreigners, and answering among ourselves no other purpose than at a very awful moment to distract the reason, and terrify the imagination of each miserable convict, by an enumeration of horrible barbarities, which with judicial and religious solemnity he is told that he is to undergo. He is to be drawn to the place of execution, and there to be hanged, but not till he is dead; he is to be cut down and his entrails taken out and burned while he is yet alive; his head is then to be cut off, and his body to be divided into four quarters, and to be at the king's disposal. Here there is no discretion reposed in the judges, they are bound to pronounce this cruel and disgusting sentence, and all discretion is transferred to the executioner. He is allowed, if he thinks fit, to defeat the in-

you know, though it be in a very barbarous language, both the affection I had for his late majesty, and the service I did for him and his family. And I must say, I have for that the testimony of one of the king's evidence, that I declared my affection to his present majesty:

tention of the law, by suffering the criminal to remain suspended till he is dead, he may, if such be his pleasure, omit the embowelling altogether, and it is to the humanity of the hangman that it is left to temper the savage severity of the law. That humanity however, has not been always exerted; 'there are few instances,' says Mr. Just. Blackstone, *Comm.* vol. 4, p. 377, 'and those accidental or by negligence, of persons being embowelled till 'previously deprived of sensation by strangling.' There are few instances, but there are some. It depends therefore not on the aggravation to be found in the guilt of the offender, but on accident or on the neglect of the man who executes the sentence, whether severe tortures shall constitute part of the punishment. Nor in truth has it always been through accident or negligence that those tortures have been endured. It should seem that in ancient times the sentence was usually executed in all its rigour: it has been so at no very remote period, no further indeed back than the rebellion of 1745: and recourse will probably again be had to these severities, if the violence and bitterness of civil dissensions and intestine wars should ever again unhappily rage in this country, and be attended with the same effect as they have produced in past times and among other nations, that of kindling every latent spark of revenge and cruelty existing in the human breast." Appendix to sir S. Romilly's *Observations on Criminal Law*, note F.

See the accounts of the execution of Babington and others, vol. 1, pp. 1158 et seq.; of general Harrison, vol. 5, p. 1237; of Mr. Townley, p. 351, of this volume; and of Catherine Hayes, who, in the year 1726, was burned alive for petit treason, as mentioned by Foster, *Crown Law*, p. 336.

In Walcot's Case, the terms of the judgment were "quod per collum suspendatur et vivens ad terram prosternatur et quod secreta membra ejus amputentur et interiora sua extra ventrem suum capiantur et in ignem ponantur et ibidem comburantur:" and the judgment was reversed for want of the words 'ipse vivente.' See vol. 9, pp. 560 et seq.

And for more respecting this matter, see in vol. 24 of the *Parliamentary Debates*, sir Samuel Romilly's Speech in the House of Commons, on February 17th, 1813.

In treating of the different sorts of punishment in Scotland, Mr. Hume, *Commentaries, Trial for Crimes*, ch. 17, vol. 2, p. 362, says:

"The first and highest is the punishment of death. Which in later times, has always been inflicted in one way, that of hanging by

And I have reason so to do; for when he was regent of these kingdoms, and his father was in Hanover, he was so good as to give me a *Noli Prosequi* for the great laird of Macintosh that was at the battle of Preston: And when I complained of the hardships the duke

the neck on a gibbet, without any aggravation of bodily suffering; farther than that in cases of cruel and atrocious murder, it has sometimes been ordered to strike off the right hand before suspension; and that in cases of treason, a female offender perishes by fire, and a man is executed with many additional circumstances of indignity and horror; which, however, his majesty may and usually does remit. [In the Case, (see it in this Collection) of Robert Watt, tried in August and September 1794, his majesty ordered all these circumstances to be remitted; and directed, that in lieu of them, the head should be severed from the body, when lifeless, and be held up in view of the people.] But formerly various ways of execution seem to have been used. For all high and atrocious crimes, and more especially for murder, and in the case of habitual thieves and depredators, the ordinary course was by beheading; and in two instances of aggravated murder, that of John Dickson of Belchester, April 30th 1591, who murdered his father, and that of Robert Weir, June 26th 1604, who murdered Kincaid of Warriston, at the instigation of his spouse, we had adopted the French way of breaking alive on the wheel. [The doom orders him to be broken alive upon a row or wheel, and to remain exposed upon it for twenty-four hours, and the row, with the body, to be afterwards set up between Leith and Edinburgh, by the place where the murder was done. There is this entry respecting it in the diary of Robert Birrell; "The 16th of Junii, Robert Weir broken on one cart wheel, with one coultter of one pleuche, in the hands of the hangman, for murdering of the guidman of Warriston, whilk he did 2d Julii 160."'] In cases of heresy and witchcraft, the inevitable doom was, to be burned quick; and sometimes the like was ordered on conviction of bestiality, or incest: or at least, the abhorred offender was appointed to be *worried* at a stake, and the body to be burned to ashes. There are a few instances also of execution by drowning; as in the case of Helen Faa, a gypsy, and ten females more of the same tribe, January 29th 1624; in the Case too of George Sinclair, August 2d 1628, for incest committed with two sisters; and of James Mitchel, March 1st 1675, for bestiality. At Edinburgh this sort of doom seems ordinarily to have been carried into effect, in the loch (as we call it) on the north of that city.

"With respect to the disposal of the dead body, this, in cases of murder, is, by statute 25th George 2d, c. 37, appointed to be, by delivery of the body to a surgeon for dissection, unless the Court shall order it to be hung in chains. Of which way of exposure I find an

of Roxburgh put every day upon me in an audience he was pleased to admit me to, in his closet at Kensington, he was so good as to say, that, if he was king, he would defend me against all my enemies, not only the duke of Roxburgh, but all my other enemies. Now, my lords, when a man has but a very few days, in appearance, to live, what he says should be relied upon, if there is not immediate evidence to the contrary. I have shewn your lordships my esteem for the illustrious house of Hanover. I have shewn my attachment for my dear master the late king, and my respect for his present majesty; and therefore all that I have further to say, is most humbly to implore your lordships' intercession, and to recommend me to his majesty for mercy.

L. H. S. Have you any thing further to offer?

Lord Lovat. Nothing, my lords, but that I make the same prayer to the honourable the members and Managers of the House of Commons; and that, I hope, as they have been stout, they will be merciful.

L. H. S. Would you offer any thing further?

Lord Lovat. Nothing but to thank your lordships for your goodness to me. God bless you all, and I bid you an everlasting farewell.—We shall not meet all in the same place again; I am sure of that.

L. H. S. Lieutenant of the Tower, take the prisoner from the bar.

Which being done, proclamation was made for silence, as usual.

Then the white staff being delivered to the Lord High Steward by the gentleman usher of the black rod upon his knee, his grace stood up uncovered; and, holding the staff in both his hands, broke it in two, and declared that there was nothing farther to be done by virtue of the present commission, and pronounced the same to be dissolved; and then leaving the chair, came down to the wool pack, and said, Is it your lordships' pleasure to adjourn to the Chamber of Parliament?—*Lords.* Ay, ay.

Then the House was adjourned to the Chamber of Parliament; and the Lords and others returned in the same order as they came down.

And the prisoner was carried back to the Tower of London.

instance as long ago as 1630, when the body of George Tillery, convicted of murder, was ordered, "to hang thereafter in an iron chain, quibled he rot away, to the terror and example of others." The like appointment was made April 4th 1637, as to John Dow Macgregor, a messenger, convicted of theft, robbery, and murder; and December 29th 1652, as to John Black a murderer; as also in several later cases of more than usual wickedness, such as, November 22d, 1751, that of Norman Ross, a servant, who murdered his mistress, and August 13th, 1755, Andrew Wilson, who poisoned his wife."

AN ACCOUNT OF THE BEHAVIOUR OF SIMON LORD LOVAT, FROM THE TIME HIS DEATH-WARRANT WAS DELIVERED, TO THE DAY OF HIS EXECUTION. BY A GENTLEMAN WHO ATTENDED HIS LORDSHIP IN HIS LAST MOMENTS.

Though I was an eye-witness of the extraordinary behaviour of this nobleman during his trial, I little thought to find that uncommon gaiety accompany him in his last moments. I was indeed too well acquainted with his lordship to imagine he would shudder much at the sight of death; but yet I expected, that it would abate somewhat of his natural vivacity, and reduce him to a more serious turn of mind: however, neither the apprehension of pain and agony, or the thoughts of his speedy dissolution, seemed to give him any uneasiness.

On Friday the 3d of April, when the warrant came down for his execution, and the gentleman told him he was sorry to be the messenger of such bad news; his lordship replied very cheerfully, God's will be done! And then taking him by the hand, drank his health, thanked him kindly for the favour (as he called it,) and assured him he was so well satisfied with his doom, that he would not change stations with any prince in Europe. His lordship then sat down with the gentleman, drank part of a bottle of wine with water,* and seemed very composed.

In the evening he smoked his pipe, mentioned some circumstances relating to his trial, and was very cheerful. About ten o'clock he called for the Warders of the Tower to undress him, and while they were taking off his shoes, told them, he should not give them that trouble much longer, for that he was to take his leave of this world the next Thursday.

The next morning, his lordship being informed of the report that was raised, of an engine to be erected to take off his head, said, "It was a fine contrivance; for, as his neck was very short, the executioner would be puzzled to find it out with his axe; and if such a machine was made, they might call it Lord Lovat's Maiden."

* "As his lordship has been often branded with the name of a drunkard in the public papers, I must do so much justice to his memory, as to assure the public, that he never drank more than two pints of wine a day during his whole confinement, and never any without water; and I have often heard his lordship say, he was never drunk in his life. It is true, a considerable quantity of brandy and rum was used every night and morning to bathe his legs, which might probably give birth to this report; for he never drank a dram himself, unless he was indisposed, and then he generally took a little burnt brandy with bittern." Note to the Original Publication. Former Edition.

He was very cheerful all this day, talked a good deal of his own affairs, and, among other things, said, "That he was concerned in all the schemes that had been formed for restoring the royal family, since he was fifteen years old; but that he never betrayed a private man or a public cause in his life: that he never shed a drop of blood with his own hand, nor ever struck a man, except one young nobleman, whom he caned publicly for his impertinence and impiety."

Sunday. This morning he rose pretty early, and behaved as usual; talked for some time about his family, and shewed us the copy of a letter he had sent to his son, which I shall here insert, because it contains his lordship's sentiments of religion and a future state; and the person who wrote it for him, assures me, it is an exact copy of the original.

A COPY OF LORD LOVAT'S LETTER TO HIS SON SIMON, NOW PRISONER IN EDINBURGH CASTLE.

"My dear Simon; Notwithstanding my great distress and affliction, you are always present with me, and I offer my prayers to heaven for you.—You see now by experience, that this world is but vanity of vanities, and that there is no trust to be put in the arm of flesh; you see that God's providence rules the world, and that no man or family but must yield to it, whether he will or not. Happy is the man, that, in all the cross accidents of this life, submits himself to the will and providence of God, with sincere humility and patience. It is the blessed Trinity, Father, Son, and Holy Spirit, that can deliver you and me from our present melancholy situation: we have provoked God by our sins, which most certainly have brought these troubles upon us: I do sincerely thank God for these troubles, because they have brought me from the way of sin that I lived many years in, to a way of repentance and humiliation, and instructed me to follow my dear Saviour the Lord Jesus Christ, as I ought to do. I therefore, my dear child, earnestly beg of you, with the sincere heart of a tender and affectionate father, to repent of all your sins and transgressions, and to throw yourself at the foot of the cross of Christ, begging for his sufferings sake, which you know were great, to give you true repentance, to forgive your sins, and be reconciled to you for the sake of his blood, that he shed upon the cross for sinners, and beg of him to preserve you from the snares of the devil, the world, and the flesh; which will be too many for you without his divine assistance; and if you have a true contrition for your sins, and are reconciled with zeal and affection to your Saviour, you will find comforts that cannot be expressed. If you put your sole confidence in Jesus Christ, he will certainly bring you out of all your troubles, and make you the happiest lord Lovat that ever was. So, my dear child, I beg of you for God's sake, for your own sake, for my

sake, and for the sake of your brothers and sisters, to throw yourself upon God's mercies, which have been ever of old; repent of your sins, and live a sincere, Christian, and righteous life, and you will certainly bring God's blessing upon yourself, your family, and kindred; and if you neglect this my paternal advice, which by the laws of God and nature I am obliged to give you, you may assure yourself of being miserable in this world, and eternally miserable in the next. I know not yet what my fate may be; but bless God, I am prepared to go to the scaffold and block to-morrow, if God in his divine will and providence hath ordered it so. So, my dear child, do not be in the least concerned for me; for I bless God I have strong reasons to hope, that when it is God's will to call me out of this world, it will be by his mercy, and the suffering of my Saviour Jesus Christ, to enjoy everlasting happiness in the other world. I wish this may be yours, and am, My dear child, Your affectionate father,* &c."

Monday. His lordship arose about seven, and, according to his usual custom, called for a glass of wine and water: upon which the Warder asked his lordship, what wine he would please to have? "Not white wine (says he,) unless you would have me go with the skitter to the block." For it seems white wine generally gave him the flux. Some time after this, the Major came to see him, and asked how he did. "Do!" (says his lordship) "why, I am about doing very well, for I am preparing myself, Sir, for a place where hardly any majors, and very few lieutenant-generals go."

A certain nobleman came to see his lordship this day, and asked him some questions concerning his religion. To whom he answered, "That he was a Roman Catholic, and would die in that faith: that he adhered to the rock upon which Christ built his church; to St. Peter, and the succession of pastors from him down to the present time; and that he rejected and renounced all sects and communities that were rejected by the Church." The declaration of his being a Jansenist was occasioned by the same nobleman's asking him, "(Of what particular sort of Catholics? Are you a Jesuit?)"† "A Jesuit! No, no, my lord," an-

* Concerning lord Lovat's conduct to this son, see in the Trial, the testimonies of Chevis, Robert Fraser, Hugh Fraser and Walker, and lord Lovat's Letter to the Lord President.

† Probably this question [if indeed this conversation passed] was suggested by notions which were current that lord Lovat, shortly after his release from the Bastille, in the year 1708, had received Popish orders, and was admitted into the order of Jesuits. In the *Memoirs of the Life of lord Lovat*, published in 1746, is related a brief history of his transactions, during his residence at St. Omers, under a religious character, the whole of which

swered "he,) I am a Jansenist." (The Jansenists are great enemies to the Jesuits.) And then owned that he was acquainted with several in France that were Jansenists, and was more intimate with them, than any other learned and religious men in that kingdom; and upon this occasion assured his lordship, that, in his sense of a Roman Catholic, he was as far from being one as his lordship, or any other lord in the House.

Having occasion this afternoon to speak of the late king George 1st, he gave his majesty a great character, and added, "He was my friend, and I dearly loved him."—But we do not think proper to insert the whole conversation.

Tuesday. This morning he rose as usual about seven, and after drinking a glass of wine and water, desired one of the warders to lay a pillow at the feet of the bed, that he might try whether he could kneel down properly, and fix his head low enough for the block; which being done, he made the essay, and told the warder, "He believed, by this short practice, he should be able to act his part in the tragedy well enough." He then asked the said warder, if he thought the executioner would be able to take off his head without hacking him? "For (says he) I have reserved ten guineas in a purse, which he shall have if he does his business well."

"My lord (said a gentleman that came to wait upon him), I am sorry you should have occasion for him at all." To this his lordship replied, "So I believe are many of those who were the cause of my coming hither, and for aught I know, all of them will by and bye. The taking off my head, I believe, will do them no service; but if it will, God bless them with it; though I cannot but think myself hardly dealt by: In the first place, I was stripped of every thing, and might have wanted even the common necessities of life, had not my cousin, Mr. William Fraser, advanced a considerable sum of money to general Williamson, and promised on certain conditions to pay for my farther subsistence. And then, to be convicted by my own servants, by the men that had been nurtured in my own bosom, and I had been so kind to, is shocking to human nature; but I believe each of them has a sting of conscience on this account, that will bear him company to the grave; though I am very far from wishing either of them any evil. It is a sad thing,

is contradicted in an Answer, which was published in the same year, with the title of *An Examination of a modern Romance, entitled, Memoirs of the Life, &c.* As to Lovat's conversion to Popery, see Somerville's *History of Queen Anne*, chapter 9, (p. 175, 4to. edition of 1708,) and Lockhart and Macpherson, as referred to by him. The *Memoirs of the Life of lord Lovat*, published in 1746, must not be confounded with the *Memoirs* professing to be his own composition, which were published many years afterwards.

Sir, for a man's own servants to take off the head of their master and chief." His lordship then asked the gentleman, how he liked the letter he had sent to his son? He answered, "I like it very well, it is a very good letter." "I think (says his lordship) it is a Christian letter."

After this the gentleman informed his lordship, that one Mr. Painter, of St. John's college, Oxon, had sent three letters, viz. one to the king, one to the earl of Chesterfield, and the other to Mr. Pelham, desiring that he might suffer in his lordship's stead: and that that to his majesty concluded in the following manner: "In one word, let Lovat live! Punish the vile traitor with his life, but let me die; let me bow down my head to the block, and receive, without fear, that friendly blow, which, I verily believe, will only separate the soul from its body and miseries together." At which his lordship expressed his surprize. "This (says he) is an extraordinary man indeed! I should be glad to know what countryman he is, and whether the thing is fact. Perhaps it may only be a finesse in politics, to cast an odium on some particular place or person. But if there be such a person, he is a miracle in the present age, and will be in the future, for he even exceeds that text of Scripture, which says, 'Greater love than this hath no man, that a man lay down his life for his friend.' However, this man offers to suffer for a stranger, nay, for one that he stigmatizes with the name of a vile traitor. In short, Sir, I am afraid the poor gentleman is weary of living in this wicked world, and, if that be the case, the obligation is altered, because a part of the benefit is intended for himself."

Wednesday. This morning, about two o'clock, his lordship prayed very devoutly for a considerable time, and called upon the Lord for mercy, which he often did before, with great fervency. After this he fell asleep, and we heard no more of him till six, about which time he called for the warder to dress him, and seemed as gay as usual. About ten o'clock he sang part of a song, at which the warder expressed his surprize, and asked his lordship, how he could be so merry, when he was to die to-morrow? To which my lord replied, that "he was as fit for an entertainment as ever he was in his life." He then sent for Mr. P——, the barber, whose father, they tell me, is a Muggletonian. While his lordship was shaving, he talked a good deal about his father's principles: and when he was shaved, "Well (says he), pray give my service to your father, and tell him I shall go to heaven before him; for I find he does not expect to go till the day of resurrection, but I hope to be there in a few hours."

After this, he talked to a gentleman who came to see him about some private affairs, and then calling for a basin of water to wash himself, "Now, gentlemen, I will shew you a wonder (says he)! You shall see a man drown himself who was sentenced to be beheaded, and

by that means change the law; and, Sir, I heartily wish it was in my power to change all things; if it was, I would make a thorough change indeed."

About this time another of his lordship's friends came to wait upon him, with whom he had some talk concerning the bill depending in parliament with relation to the Scotch affairs. His lordship seemed very uneasy about it, and wished all those gentlemen who voted for it had the skitter.

He then told them he would have his body carried to Scotland, to be interred in his own tomb in the church of Kirk-Hill;* and said, that he had once made a codicil to his will, where all the pipers from Johnie Groat's house to Edinburgh were invited to play before his corpse, for which they were to have a handsome allowance; and though that might not be thought proper now, yet he was sure some of the good old women in his country would sing a Coronach (a ceremony used at funerals, much like the Irish howl) before him. "And then," says he, "there will be old crying and clapping of hands, for I am one of the greatest chiefs in the Highlands."

About this time sir H. M. and sir L. G. came to take their leaves of my lord; he saluted them on their first coming in; but soon after told them, "If he had his broad-sword by him, he should not scruple to chop off their

heads, if he thought they were in the least concerned in bringing in or voting for the bill now depending, for destroying the ancient jurisdiction and privileges of the Highland chiefs." And then added, "For my part, I die a martyr for my country."

After eating a hearty dinner, he called one of the warders to him: "Now, Willy," says he, "give me a pipe of tobacco, and that will be the last I shall ever smoke, unless people smoke tobacco in the other world."

Soon after this, the governor of the Tower came to pay him a visit, when his lordship arose, and offered him his easy chair; which the governor refusing, and saying he was sorry his lordship should give himself the trouble to rise out of his seat on his account, he answered, "What, Sir, I hope you would not have me be unmannerly the last day of my life."

Upon the governor's coming in, his lordship deferred smoking his pipe some time longer, and talked about indifferent matters. Mr. William Fraser, his lordship's agent, and Mr. James Fraser, came to wait on him at the same time, with whom he talked a good while concerning his family affairs, and the management of his funeral.

After this he called again for his pipe, and, while he was smoking, asked one of the warders, if his message was carried to my lord Traquair, and what answer he brought? "His lordship," replied the warder, "bids you an eternal farewell, wishes you happy, and is offering up his prayers for you." "'Tis very kind of him," says my lord, "and I thank him for it. Come, Mr. Southbey," says he to the warder, "give me some water, and put a little wine upon it." And then taking up his tobacco-stopper, "My pipe is almost out," says he, "as well as my glass." He then asked about general Williamson's family, spoke very kindly of the general; and being informed, that miss Williamson was so affected that she could not take her leave of his lordship, "God bless the dear child," says he, "and make her eternally happy, for she is a kind-hearted good lass." After this, his lordship sent a message to the cook, desiring her to roast a piece of veal, that it might be ready to mince for his breakfast in the morning. He then desired the warders to sit down and smoke with him, which they did, and drank a glass of wine, and wished his lordship a good journey. "Amen," quoth my lord; and then knocking the ashes out of his pipe, "Now, gentlemen," says he, "the end of all human grandeur is like this snuff of tobacco." His lordship seemed to have a great regard for his two warders. After his pipe was out, he thanked them kindly for taking so much care of him; "And now, gentlemen," says he, "I have but one favour more to ask of you; and that is, to go upon the scaffold with me, and not leave me till you see this head cut off this body." They both promised his lordship; and afterwards one of them told him, that if ever he lived to see his son the Master of Lovat, he would let him know with what

* In the year 1736, lord Lovat erected a stately monument in the church of Kirk-Hill, within a few miles of Castle-Downey, with a pompous inscription. The brave sir Robert Munro, (who was killed at the battle of Falkirk) being on a visit to lord Lovat, they went together to view the monument. Sir Robert, upon reading the inscription, in a free manner, said, Simon, How the devil came you to have the assurance to put up such a boasting romantic inscription? To which his lordship answered, "The monument and inscription are chiefly culled for the Frasers, who must believe whatever I their chief require of them, and their posterity will think it as true as the gospel." The inscription is as followeth:

TO THE MEMORY
OF

THOMAS Lord FRASER of LOVAT,

Who chose rather to undergo the greatest hardships of fortune, than to part with the ancient honours of his house, and bore these hardships with undaunted fortitude of mind:

This Monument was erected by

SIMON Lord FRASER of LOVAT, his son,

Who likewise having undergone many and great vicissitudes of good and bad fortune, through the malice of his enemies, he, in the end, at the head of his clan, forced his way to his paternal inheritance, with his sword in his hand, and relieved his kindred and followers from oppression and slavery: and both at home and in foreign countries, by his eminent actions, in the war and the state, he has acquired great honours and reputation.

Hic tegit ossa lapis SIMONIS fortis in armis,
Restituit pressum nam genus ille suum;
Hoc marmor posuit cari Genitoris honori,
In quibus collectum par erat ejus amor.

tenderness his lordship parted with him. "Do," says my lord, "and he will take notice of you: If he don't, he won't do well. But pray," says he, "have you got any wine for me in the morning, and some bitters, if I should want to carry any to the scaffold?" Upon inquiry, there was no bitters left in the bottle, and therefore his lordship gave the warder a shilling to send for a bottle of Stoughton's elixir. When the man was gone, the warder recollected that there was some burnt brandy and bitters left in a bottle, which his lordship had with him to Westminster-hall, when on his trial, and informed him of it. "'Tis very well, very well, Sir," says he; "pray take it in your pocket, and give me a sop if I should want it." After this, a circumstance happened which surprized me prodigiously. His lordship, who was 80 years of age, took up a book with a small print, (I think it was the size that the printers call Long-Primer) and read by candle-light near two hours without spectacles. Upon inquiry, I was informed that his lordship never used any. I knew he did not in the day time, but I thought he could not be able to see without their assistance by candle-light. This, I suppose, might be owing to his lordship's manner of living, as also was that circumstance of his never having the head-ach. I have observed already, that his lordship was never drunk in his life; and he has often declared, that he thought eating of suppers was doing violence to nature, and committing a sin against the body. He seldom took any breakfast; always made a very hearty dinner, but never eat a morsel for supper. As his lordship had a great share of learning, and spoke the Latin, French, and English fluently, and some other modern languages indifferently, we asked his lordship concerning his education. He said, he studied some years at Aberdeen, and disputed his philosophy in Greek. From this topic he went to religion again, and assured us, that he was bred a Protestant; but going abroad, and having some disputes with father *****, he found himself very much staggered in his principles, and prayed to God to direct him in the right way: that after this, he studied divinity and controversy three years, and then turned Roman Catholic. "This is my faith," says he, "but I have charity for all mankind, and I believe every sincere honest man bids fair for heaven, let his persuasion be what it will; for the mercies of the Almighty are great, and his ways past finding out."

After this, he pulled out a silver crucifix, and either kissed it or rubbed his mouth with it, I do not know which. Then handing it about, "Here's a crucifix," says he, "did you ever see a better? Observe how strong the expression is, and how finely the passions are delineated. We keep pictures of our best friends, of our fathers, mothers, &c. and pray why should not we keep a picture of him who has done more than all the world for us?"

His lordship then asked some question about Mr. Secretary Murray, which I cannot recollect.

VOL. XVIII.

lect, for indeed I did not very well understand it, and then said, "We had a better secretary when the association was signed." After this, he mentioned Mr. Solicitor Murray, and said, he was a great man, and he believed would meet with some promotion, if he was not too far north.

About nine o'clock he desired the warders to undress him; and his breeches, shoes, and stockings being pulled off, he stood before the fire to warm him as usual. The warder asked his lordship, if he would please to go to bed? "Not yet," says he, "I will warm my feet a little more first." "I think we have a very bad fire," says the Warder. "That's not my fault," quoth his lordship, joking; "you may e'en make a better an you like it." Which he did, and then standing up by his lordship, told him, He was sorry that the morrow was to be such a bad day with him; "Bad! for what?" says my lord; "Do you think I am afraid of an axe? 'Tis a debt we all owe, and what we must all pay; and do not you think it better to go off in this manner, than to linger with a consumption, gout, dropsy, fever, &c. though I must needs own, my constitution is so good, that I could have lived twenty years longer, I believe, if I had not been called hither." Here my lord offered to put off his coat and waistcoat; and as it was his custom to pull them off by the bed-side, the warder reminded him of it. "Good now," says my lord, "I had forgot that I was so far from the bed; but perhaps you might have forgot too, had your head been to be cut off to-morrow."

Thursday. On this fatal day his lordship awaked about three o'clock in the morning, and prayed most devoutly. At five he got up, called for a glass of wine and water, according to his usual custom, and seemed still as cheerful as ever; then being placed in his chair, sat and read till seven, when he called for another glass of wine and water. About eight o'clock he desired Mr. Sherrington, one of the warders, to send his wig, that the barber might have time to comb it out. He then called for a purse to put his money in for the executioner, and desired it might be a good one, lest the gentleman should refuse it. Mr. Southbey, one of his lordship's warders, I remember, brought him two purses, the one a green silk knit, and the other a yellow canvass, but which his lordship made choice of I really forgot; however, it was a purse, as he observed, that no man would dislike with ten guineas in it.

As his lordship was now within a few hours of death, and had behaved with such surprizing intrepidity during his whole confinement, I was the more particular in observing every little incident that happened. But though he had a great share of memory and understanding, and an awful idea of religion and a future state, I could never observe, in his gesture or speech, the least shadow of fear, or indeed any symptoms of uneasiness. His behaviour was all of a piece, and he was the same factitious companion now, as he was before sentence was

passed against him. About half an hour after eight the barber brought his lordship's wig, which not being powdered so much as usual, on account of its being a rainy day, he seemed angry, and said, "That he went to the block with pleasure, and if he had a suit of velvet embroidered, he would wear it on that occasion." After this, he spoke to the barber again about his principles, and told him his notions were extremely singular: "For the soul," said he, "is a spiritual substance, and can no more be dissolved for a time, or buried with the body, than it can be annihilated entirely;" and at the same time smiled. "My lord," said the barber, "you will see that." "Yes," answered his lordship, "I hope to be in heaven by one o'clock, or I should not be so merry now." His lordship then saluted the barber, and bid him farewell; and the barber returned the compliment, and wished my lord a good passage; for these were his words.

At half an hour after nine his lordship called for a plate of minced veal, eat very heartily, and desired the other gentlemen that were with him to drink some coffee or chocolate, or both, which were brought for them; he then called for some wine and water, and drank the healths of several of his friends.

At ten a terrible accident happened upon the hill, by the fall of a scaffold, which put all the people in great confusion; several persons were killed, and numbers maimed and bruised. At eleven the sheriffs of London sent a message to demand his body, which being communicated to his lordship, he desired the curtains might be drawn, and that the gentlemen would retire for a few minutes while he said a prayer, which request was immediately complied with; but in a little time he called for them again, saying, "I am ready."

When his lordship had come down the first pair of stairs, general Williamson invited him into his room to rest himself. On his first entrance he paid his respects to the ladies with great politeness, then to the gentlemen, and talked very freely. He asked the general in the French language, "Whether he might have the honour to see his lady, to return her his last thanks for the favours and civilities he had received?" To which the general answered in the same tongue, "My spouse is so greatly affected with your lordship's misfortunes, that she cannot bear the shock of seeing you at this time, and begs to be excused." He then made his addresses to all the company, and set out; but going down stairs, he complained of them, (the stairs) and said, they were very troublesome to him. When he came to the door, he bowed to the people, and was then put into the governor's coach, and carried to the outer gate, where he was taken out of the governor's coach, and delivered to the sheriffs of the city of London and county of Middlesex, who conducted him in another coach to a house near the scaffold which had been lined with black cloth for his lordship's reception: here he was taken into their immediate custody, and

all his friends and relations denied entrance. Upon which his lordship instantly applied to the sheriffs for the time being, and desired that his friends and relations, who accompanied him from the Tower, might be permitted to see him. Mr. Alderman Alsop came to the bottom of the steps himself, and desired his lordship's friends to walk up. After we entered, my lord thanked the sheriffs for this favour, and said, "It was a considerable consolation to him, that his body fell into the hands of gentlemen of so much honour;" and added, "I will give you, gentlemen, and the government no farther trouble, for I shall make no speech; though I have a paper to leave, with which you may do as you think proper." Here my lord put his hand in his pocket, and delivered a paper to one of the sheriffs, and then told them, they might give the word of command when they pleased, and added, that he was accustomed to obey command, for he had been an officer in the army many years. After this a gentleman present began to read a prayer to his lordship while he was sitting; but my lord called one of the warders who attended him to help him up, that he might kneel. He then said a prayer by himself, which nobody could hear; and turning about, was again set down in his chair, and seemed very cheerful. Mr. Sheriff then asked his lordship, "If he would refresh himself with a glass of wine?" My lord thanked him, but said, "He could not drink any without warm water with it;" and that not being to be had in that place, his lordship took a little burnt brandy and bitters, which, as I observed before, he had ordered one of the warders to take in his pocket; and, turning to Mr. Sheriff, told him, "He was ready to go whenever he pleased." "My lord," replied the sheriff, "I would not hurry your lordship;" and taking out his watch, said, "There is half an hour good, if your lordship don't tarry too long upon the scaffold." My lord then desired that his clothes might be delivered to his friends with his corpse, and not given to the executioner, and said, "For that reason he should give him (the executioner) ten guineas."

He then asked, if he might have the axe brought him to feel if it was sharp, and desired that his head, when taken off, might be received in a cloth, and put into the coffin. At this Mr. Sheriff stepped aside, and observed to some gentlemen present, "That he had received a warrant in the usual form for the execution of his lordship, and as it had not been customary of late years to expose the head at the four corners of the scaffold, he really thought he might indulge his lordship with a promise as to that point, for he did not think he could expose the head (though it was desired, and indeed ordered by a message) without being liable to censure;" adding withal, "That he was truly sensible of the duty he owed his majesty, and should always pay a great regard to the orders he received from his grace the duke of Newcastle, or any of the ministry." And then turning to his lordship, told him, "That

what he had desired should be punctually observed." My lord thanked Mr. Sheriff very kindly, and then saluted his friends, and told them, "He hoped his blood would be the last spilled on that occasion."

When his lordship came into the passage leading to the scaffold, he called to a gentleman, and asked his name, who replied, it was North. "Well," says he, "let it be North and Gray." And added, with a smile, "Come, my lord North and Gray, conduct me to the block." When his lordship was going up the steps to the scaffold, he looked round, and seeing so many people, "God save us!" says he, "why should there be such a bustle about taking off an old grey head, that cannot get up three steps without two men to support it?"

Here turning about, and observing one of his friends very much dejected, his lordship clapped him upon the shoulder, and said, "Cheer up thy heart, man; I am not afraid, why should you?"

The first person he sought when he came upon the scaffold was the executioner, who was immediately presented to him; and after he had made his obeisance, my lord put his hand into his pocket, and pulled out a purse with ten guineas, saying, "Here, Sir, is ten guineas for you, pray do your work well; for if you should cut and hack my shoulders, and I should be able to rise again, I shall be very angry with you." After this, he desired the executioner to shew him the axe, which he refused to do without leave from the sheriff; but upon application, this request was immediately granted; and when it was brought to him, he took hold of it, and feeling upon the edge, said, "he believed it would do." Then he rose from the chair which was placed upon the scaffold for him, and looked at his coffin, on which was wrote, Simon Dominus Fraser de Lovat, decollat. April 9, 1747, Ætat. suæ, 80.

He then sat down again, and repeated the following line out of Horace:

"Dulce et decorum est pro Patriâ mori."

In English, "Tis a glorious and pleasant thing to die for our country."

And after that a line out of Ovid:

"Nam genus et proavos, et quæ non fecimus ipsi,

"Vix ea nostra voco."

In English, "For those things which were done either by our fathers, or ancestors, and in which we ourselves had no share, I can scarcely call our own."

He then desired all the people to withdraw from him, except his two warders, who supported his lordship, while he said a prayer. After this he called for Mr. William Fraser, his lordship's solicitor and agent in Scotland; and holding up his gold-headed cane, said, "I deliver you this cane in token of my sense of your faithful services, and of my committing to you all the power I have upon earth." And

then again embraced him. His lordship now called for Mr. James Fraser, and embracing him also, said, "My dear James, I am going to heaven, but you must continue to crawl a little longer in this evil world." And taking his leave of both, he delivered his hat to Mr. William Fraser, and desired him to take care that the executioner did not touch any of his clothes. He then took off his wig, ordered his cap to be put on, and putting off his clothes, delivered them with his wig to Mr. Fraser; and having unloosed his cravat and the neck of his shirt, he kneeled down to the block, took hold of the cloth which was placed to receive his head, and pulled it close to him: but being placed too near the block, the executioner desired his lordship would remove a little farther back, which he did; and having placed his neck in a proper manner, he told the executioner he would say a short prayer, and then drop his handkerchief as a signal. In this posture he remained about half a minute, and then threw his handkerchief upon the floor, when the executioner at one blow severed his head from the body, which being received in a scarlet cloth, was wrapped up, and, together with his body, put into the coffin, and carried in a hearse back to the Tower, where it remained till four o'clock, and was then taken away by an undertaker.

A Copy of the PAPER delivered to the Sheriffs by Lord Lovat.

As it may be reasonably expected I should say something of myself in this place, I declare that I die a true, but unworthy member of the Holy, Catholic, Apostolic Church.

As to my death, I cannot but look upon it as glorious

I sincerely pardon all my enemies, persecutors, and slanderers, from the highest to the lowest, whom God forgive, as I heartily do, and die in perfect charity with all mankind.

I sincerely repent of all my sins, and firmly hope to obtain pardon and forgiveness for them, through the merits and passion of my blessed Lord and Redeemer Jesus Christ, into whose hands I recommend my soul. Amen.

In the Tower, April 9, 1747. Lovat.

Of the carrying into effect the judgment against Lovat, Mr. Laing (4 Hist. of Scot. 300, 2d edit.) says, that "whatever his character or his crimes might be, the humanity of the British government incurred a deep reproach from the execution of an old man on the very verge of the grave."

Queen Anne spared the short remains of the life of an old man who had been guilty of repeated treasons. Lord Griffin, who early in the reign of William the Third, had been attainted of treason (see a short Note of his case in the Case of Dr. Cameron, A. D. 1753, *infra*, and some particulars concerning him in Lord De la Mere's Case, vol. 11, p. 509; Crone's

Case, vol. 12, p. 1237; Kennet and the other Historians; also the Lords' Journals; and Foster's Crown Law, 110, 111, 113) engaged in the French project for invading Scotland in 1708, (see the Case of Stirling, vol. 14, p. 1395), and being taken on board the Salisbury, a rule was made by the Court of Queen's-bench on May 15, 1708, for his execution, but the queen, in consideration, as it is stated, of his advanced age, reprieved him from time to time till his death in November, 1710. See Boyer's History of Queen Anne, pp. 337 et seq. Appendix, 55.

See in Mr. Wilkes's Case, A. D. 1770, in this Collection, lord Mansfield's account of some particulars respecting the reversal of the outlawry of lord Griffin.

To the fortitude with which this very worthless old man (Lovat) met his fate, Mr. Belsham has applied the observation of sir Dudley Carleton, "that it is much easier for a man to die well than to live well."

To the objection insinuated (pp. 724 et seq.) against the testimony of H. Fraser, as being in expectation of a pardon from what he should depon against the prisoner, see what passed upon the objection to Mrs. Perreau's testimony in the Case of Mrs. Rudd, Leach's Crown Cases, cit. Peake's Law of Evidence; In Scotland, it is held that a *socius criminis* brought forward on the part of the prosecution, and undergoing an examination, is *eo ipso* intitled to be free of any after punishment for that offence. See Hume's Comment. Trial for Crimes, vol. 2, chap. 13, p. 177, and Mr. Burnett's account of the Case of Dregborn in a Note to p. 417 of his Treatise on the Criminal Law of Scotland, and a fuller report of that Case, N° XXI, of the Appendix to the same work. Mr. Burnett's account of the matter appears not to be altogether free from perplexity. In the text, p. 417, he says, "In the case of an accomplice, it is now held, that the very act of calling and examining him as a witness on the part of the crown, goes far to operate as a discharge or acquittal to him from all prosecution for that crime; but as the witness is not bound to criminate his associates, or even to make a full disclosure of all he knows, so as to entitle him to this indemnity, the implied pardon, by his being brought forward as a witness for the prosecutor, ought to have no effect to disqualify him, or to impeach his testimony in any way." And see the Note H. In the act (16 King William's first parliament, June 30, 1690) for rescinding the forfeiture of Fletcher of Saltoun, (see his Case, vol. 11, p. 1023) one of the grounds assigned is, "that the principal witness was under the terror of death and temptation of a remission as standing charged with, and a prisoner for, the same alleged crimes, and not pardoned till he had deposed in court." And see *Rex v. Rudd*, Cowper, 331.

The law concerning examination upon the *Voix Dire* (p. 730), is well stated by Mr.

Peake in his valuable Treatise on the Law of Evidence.

The Paper delivered by lord Balmerino at the place of execution (see p. 523), is imperfect; being printed as it had been in former editions. Having met with a scarce report of the Paper entire, I have subjoined the passages omitted in the Trial, as follows:

A True Copy of the PAPER which was read by ARTHUR LORD BALMERINO, upon the Scaffold at Tower-Hill, and delivered by him to the Sheriffs of London, just before his Execution, on Monday, Aug. 18, 1746.

I WAS brought up in true, loyal, Anti-Revolution principles, and I hope the world is convinced that they stick to me.

I must acknowledge I did a very inconsiderate thing, for which I am heartily sorry, in accepting of a company of foot from the princess Anne, who I know had no more right to the crown than her predecessor, the prince of Orange, whom I always looked upon as a vile, unnatural Usurper.

To make amends for what I had done, I joined the king when he was in Scotland; and when all was over, I made my escape, and lived abroad till the year 1734.

In the beginning of that year, I got a letter from my father, which very much surprised me. It was to let me know, he had the promise of a remission for me: I did not know what to do; I was then, I think, in the canton of Berne, and had nobody to advise with: but next morning I wrote a letter to the king, who was then at Rome, to acquaint his majesty that this was done without my asking or knowledge, and that I would not accept of it without his majesty's consent.

I had, in answer to mine, a letter written with the king's own hand, allowing me to go home; and he told me his banker would give me money for my travelling charges, when I came to Paris, which accordingly I got.

When his royal highness came to Edinburgh, as it was my bounden and indispensable duty, I joined him, though I might easily have excused myself from taking arms on account of my age; but I never could have had peace of conscience if I had stayed at home, when that brave prince was exposing himself to all manner of dangers and fatigues, both day and night.

I am at a loss when I come to speak of the Prince; I am not a fit hand to draw his character, I shall leave that to others. But I must beg leave to tell you, that the incomparable sweetness of his nature, his affability, his compassion, his justice, his temperance, his patience, and his courage, are virtues seldom all to be found in one person. In short, he wants no qualifications requisite to make a great man.

Pardon me, if I say, wherever I had the command, I never suffered any disorders to be committed, as will appear by the duke of Roc-

cleugh's servants at East Park; by the earl of Findlater's minister, Mr. Lato, and my lord's servants at Cullen; by Mr. Ross, minister at Nairn (who was pleased to favour me with a visit when I was prisoner in Inverness); by Mr. Stewart, principal seryant to the lord President, at the house of Culloeden, and by several other people. All this gives me great pleasure, now that I am looking on the block, on which I am ready to lay down my head: and though it had not been my own natural inclination to protect every body as far as lay in my power, it would have been my interest so to do; for his royal highness abhorred all those who were capable of doing injustice to any of the king his father's subjects, whatever opinion they were of.

I have heard, since I came to this place, that there has been a most wicked report, spread and mentioned in several of the news-papers, that his royal highness the Prince, before the battle of Culloeden, had given out orders that no quarter should be given to the enemy. This is such an unchristian thing, and so unlike that gallant prince, that nobody that knows him will believe it. It is very strange, if there had been any such orders, that neither the earl of Kilmarnock, who was colonel of the regiment of foot-guards, nor I, who was colonel of the second troop of life-guards, should ever have heard any thing of it; especially, since we were both at the head quarters the morning before the battle. I am convinced, that it is a malicious report, industriously spread to excuse

themselves for the murders they were guilty of in calm blood after the battle.

Ever since my confinement in the Tower, when major White or Mr. Fowler did me the honour of a visit, their behaviour was always so kind and obliging to me, that I cannot find words to express it; but I am sorry I cannot say the same thing of general Williamson: he has treated me barbarously, but not quite so ill as he did the bishop of Rochester; and had it not been for Mr. Gordon, a worthy clergyman's advice, I should have prayed for him in the words of David, Psalm cix. from the 6th to the 15th verse.

I forgive him and all my enemies.

I hope you will have the charity to believe I die in peace with all men; for yesterday I received the Holy Eucharist from the hands of a clergyman of the church of England, in whose communion I die, as in union with the episcopal church of Scotland.

I shall conclude with a short prayer.

O Almighty God, I humbly beseech thee to bless the King, the Prince, and duke of York, and the dutiful branches of the royal family: endue them with thy holy spirit, enrich them with thy heavenly grace, prosper them with all happiness, and bring them to thine everlasting kingdom. Finally, I commend to thy fatherly goodness, all my benefactors, and all the faithful adherents to the cause for which I am now about to suffer: make them happy here, and in the world to come. This I beg for Christ's sake, in whose words I farther pray, Our Father, &c.

520. Proceedings against ÆNEAS MACDONALD alias ANGUS MACDONALD, for High Treason, at St. Margaret's-hill, Southwark, December 10, and at the Court of King's-bench, Easter Term: 21 GEORGE II. A. D. 1747. [Foster's Crown Law.]

IN the year 1747, a bill of indictment was found against him under the special commission in Surrey for the share he had in the late rebellion. The indictment ran in the same form* as those against the other prisoners, without any averment that he was in custody before the 1st of January 1746-7. But the counsel for the crown were aware of the exception taken in the case of Mr. Townley and others, and that since the whole proceeding against the prisoner was subsequent to January 1746-7, the answer then given would not serve the present case. That bill was therefore withdrawn before the prisoner pleaded to it: And a new bill, concluding with an averment that he was apprehended and in custody before the 1st of January 1746-7, was preferred and found against him. On that bill he was

arraigned in July 1747, and his trial came on the 10th of December following.

The overt acts charged in the indictment were sufficiently proved. And also that the prisoner was apprehended and in custody before the 1st of January 1746-7.

The counsel for the prisoner insisted that he was born in the dominions of the French king, and on this point they put his defence.

But apprehending that the weight of the evidence might be against them, as indeed it was, with regard to the place of the prisoner's birth, they endeavoured to captivate the jury and bystanders, by representing the great hardship of a prosecution of this kind against a person, who, admitting him to be a native of Great Britain, had received his education from his early infancy in France; and had spent his riper years in a profitable employment in that kingdom, where all his hopes centered. And speaking of the doctrine of natural allegiance,

* See this form in Townley's Case, p. 330, of this Volume.

they represented it as a slavish principle, not likely to prevail in these times; especially as it seemed to derogate from the principles of the Revolution.

Here the Court interposed, and declared, that the mentioning the case of the Revolution as a case any way similar to that of the prisoner, supposing him to have been born in Great Britain, can serve no purpose but to bring an odium on that great and glorious transaction. It never was doubted that a subject born, taking a commission from a foreign prince, and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. (Dyer, 298. 300. 1 Hale, 68. 96) It was so ruled in doctor Storey's case*. And that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince by naturalizing or employing a subject of Great Britain to dissolve the bond of allegiance between that subject and the crown.†

However, as the prisoner's counsel had mentioned his French commission as a circumstance tending in their opinion to prove his birth in France, the Court permitted it to be read, the attorney general consenting. It was dated the 1st of June 1745, and appointed the prisoner commissary of the troops of France, which were then intended to embark for Scotland.

The Court, with the consent of the counsel

* See it in this Collection, vol. 1, p. 1087.

† As to this, see vol. 5, pp. 504, 507, 508.

As to the *forum originis*. Thus far the circumstance of birth within the realm of Scotland, is a material consideration, that it grounds a jurisdiction over any one, for the crime of treason against this his native land and lawful sovereign; from whom he can never withdraw that primitive and intrinsic allegiance, which he contracted in his infancy, through the nurture and guardianship of the British laws and government, in that weak and helpless season of life. If, therefore, a Scotsman shall enter into the service of any foreign power which is at war with Britain, and be taken in the field, whether in or out of this realm; he shall not be treated as a prisoner of war according to his commission, or like the native subjects of that power, but as a criminal and a traitor, and one who is liable to the pains of treason, as well with respect to his property, if he have any in Scotland, as his person. Thus in 1665, on occasion of the rupture with Holland, colonel John Kirkpatrick, and eleven persons more, all of them soldiers of fortune, and officers of rank in the service of the United Provinces, suffered outlawry as traitors, for continuing to bear arms in that service, and acknowledging the States by a new oath, as their sovereign and master. So likewise in later times, Angus Mac Donald had sentence as a traitor, for acting under a French com-

mission for the crown, permitted the cartel between France and Great Britain for the exchange or ransom of prisoners likewise to be read. And observed, that as it relateth barely to the exchange or ransom of prisoners of war, it can never extend to the case of the prisoner at the bar, supposing him to be a subject born. Because by the laws of all nations, subjects taken in arms against their lawful prince, are not considered as prisoners of war, but as rebels; and are liable to the punishments ordinarily inflicted on rebels.

Lord chief justice Lee in his direction to the jury, told them that the overt acts laid in the indictment being fully proved, and not denied by the prisoner, or rather admitted by his defence, the only fact they had to try was, whether he was a native of Great Britain? If so, he must be found guilty. And as to that point, he said the presumption in all cases of this kind is against the prisoner,* and the proof of his birth out of the king's dominions, where the prisoner putteth his defence on that issue, lieth upon him. But whether the evidence that had been given in the present case (which he summed up very minutely) did or did not amount to such proof he left to their consideration.

The jury found him Guilty, but recommended him to mercy. He received sentence of death as in cases of high treason; but was afterwards pardoned upon the conditions mentioned afterwards.

MACDONALD at the suit of RAMSAY.

While Mr. Macdonald lay under sentence of death, a creditor of his, — Ramsay, obtained leave from my lord chief justice at his chambers to charge him in custody of the sheriff, in an action for a considerable sum of money; and accordingly he was so charged.

In Easter-term, the 21st of the king, Mr. Attorney General acquainted the Court, that his majesty had given orders for preparing a pardon† for Mr. Macdonald to pass the great seal, upon condition of his retiring out of his majesty's dominions, and continuing abroad during his life. And that one of the secretaries of state had sent his warrant to the keeper of the New Prison to deliver Mr. Macdonald into the custody of a messenger; but that the keeper refused to obey this warrant, alleging, that as his prisoner stood charged in an action at the suit of Mr. Ramsay, he could not deliver him into the custody of a messenger

mission, in 1745; though he had been carried to France in his infancy, and had afterwards continued to reside in that country, to which all his possessions and prospects attached him." Hume's Comment. p. 78.

* See in this Collection, vol. 14, p. 994, and East's Pleas of the Crown, c. 2, § 8; there referred to.

† "Mr. Macdonald was pardoned upon very equitable and easy terms." See vol. 5, p. 507; and Foster as there cited.

without incurring the danger of an escape. Mr. Attorney concluded with a motion, that the process Mr. Macdonald stood charged with at the plaintiff's suit might be discharged.

He was supported in this motion by sir John Strange and the Solicitor General. It was said by Mr. Attorney, but not strongly insisted on, that a person under an attainder is *civiliter mortuus*; his person and estate are absolutely at the disposal of the crown; and consequently he is not liable to civil suits. And to this purpose he cited Trussel's Case. (1 Leon. 326. Cro. Eliz. 213.)

To this point Mr. Henley and Mr. Ford for the plaintiff insisted, and so the Court agreed, that the later resolutions have been, and the law hath been long settled, that an attainted person is liable to civil suits: but by the rules of the Court he ought not to be charged, without leave of the Court, or of a judge at his chambers.

The point reported by Leonard and Croke to have been adjudged in Trussel's Case came afterwards under consideration in actions brought by other persons against that very man (Co. Ent. 246. a. b. Cro. Eliz. 516, Co. Ent. 248. 2 Aud. 38. Moor, 753. 5 Inst. 215,) and was ruled quite otherwise.

The point chiefly insisted on by the counsel on the side of the motion was, that to charge the defendant in this case, so as to make his person liable, would be a means of defeating the king's pardon; because he would be thereby disabled to comply with the terms of it. It would be in effect saying, that his majesty shall not grant a pardon on these conditions, he shall pardon absolutely, or not at all.

To this purpose they cited Foxworthy's Case, reported in Salk. 500. 2 lord Raym. 848. Far. 153. And the Case of Coppin and Gunner in 2 lord Raym. 1572.

But the Court said, We cannot judicially take notice of his majesty's intentions touching the pardon. The crown, in case of pardons, signifyeth its pleasure finally and irrevocably by the great seal, and by that alone. A pardon may not pass at all, or it may be upon other conditions than are suggested at the bar, or it may be a free pardon. And therefore till the pardon is passed, it is too early for the Court to give any opinion upon the main question. Accordingly the Court gave no opinion; and Mr. Attorney took nothing by his motion.*

Mr. Macdonald having afterwards made his creditor Mr. Ramsay easy with regard to his debt, the action was withdrawn. And he was in December 1749, delivered into the custody

of a messenger by virtue of a warrant for that purpose from the duke of Newcastle, one of his majesty's principal secretaries of state.

N. B. The person of a man under an attainder is not absolutely at the disposal of the crown. It is so for the ends of public justice, and for no other purpose. The king may order execution to be done upon him according to law, notwithstanding he may be charged in custody at the suit of creditors. But till execution is done, his creditors have an interest in his person for securing their debts. (6 H. 4, 6. b. 7. a.) And he himself as long as he liveth, (Crom. 113, a.) is under the protection of the law. To kill him without warrant of law is murder; for which the murderer is liable to a prosecution at the suit of the crown, and likewise to an appeal (Bro. Appeal 5,) at the suit of the widow. For though his heir is barred by the attainder, which corrupteth his blood, and dissolveth all relations grounded on consanguinity, yet the relation grounded on the matrimonial contract continueth till death.

And if a person under an attainder be beat or maimed, or a woman in the like circumstances ravished, they may, after a pardon, maintain an action or appeal, as their cases respectively may require (3 Inst. 215.) And though before a pardon they are disabled to sue in their own names, I make no doubt that they are entitled to prosecute, according to the nature of their respective cases in the name of the king; who will do equal right to all his subjects.

N. B. During the Trials of the Rebels at St. Margaret's Hill, Southwark, under the commission of 1746, one of the prisoners challenged peremptorily, and for cause, so many of the jurors, that there was not a sufficient number left on the pannel to proceed on his trial. In that case the Court *ore tenus*, (for it was, as hath been already observed, a commission of gaol delivery as well as of Oyer and Terminer) ordered a new pannel, and adjournment for several days. On the day of adjournment the sheriff returned a pannel of the same jurors that had served through the whole proceeding, those who had been challenged by the prisoner, or sworn before, included. And a sufficient number appearing, he was tried.

The like case happened on the trial of one of the assassins in king William's time. Mr. Cook on the 9th of May challenged in the like manner till the jurors remaining on the pannel were not sufficient to make a full jury; whereupon the Court, *ore tenus*, ordered a new pannel, and adjourned to the 14th.* On that day his counsel insisted that a new pannel ought not to have been ordered; but that an Habeas Corpora with a Tales should have been awarded, according to the opinion in Stanford (f. 155.) But the Court declared, that this being a proceeding under a commission of gaol delivery as well as Oyer and Terminer, they might, and indeed always do in the like case, award a new

† N. B. The rule in Foxworthy's Case seems to have been over-hasty, and the reasons on which it is grounded appear to me to be inconclusive: That in Coppin and Gunner seems more equitable; since it secured to the defendant the benefit of his pardon, without prejudice to the plaintiff, who might resort for satisfaction to the effects of the defendant, if he could find any. Foster. Former Edition.

* See Peter Cook's Case, vol. 13, pp. 311, 317—329.

pannel if necessary, *ore tenus*, without writ or precept.

In a mere commission of Oyer and Terminer no pannel is ordered till the defendant hath pleaded to issue, and issue is actually joined; and then it is done by precept in the nature of a Venire. And if in such case there should be a want of jurors, an Habeas Corpora with a Tales may, said the Court, possibly issue; but no Tales can be granted upon a commission of Gaol Delivery. And Mr. Justice Powel upon that occasion said, that if the sheriff had returned all new men without regard to those who appeared and were sworn or challenged on the 9th, it had been well enough.

The reason of the adjournments in these cases was, that the prisoners might have copies

of the new pannels in due time, pursuant to the 7th of king William; otherwise new pannels might have been ordered returnable *instantly*.

The original pannel in 1740, was upon great deliberation ordered, sitting the Court, *ore tenus*, as under the commission of Gaol Delivery; though, as I have already observed, a precept in common form for holding the sessions had issued under the seals of the three chiefs and three senior judges.

Besides the Cases that are here inserted, there are in print reports of the Trials of several other persons for having taken part in this same Rebellion, but they are for the most part very brief, and destitute of particular interest.

521. The Trial of ARCHIBALD STEWART, esq. late Lord Provost of Edinburgh, for Neglect of Duty and Misbehaviour in the Execution of his Office, as Lord Provost of Edinburgh, before and at the Time the Rebels got Possession of that City, in the Month of September 1745; holden before the High Court of Justiciary at Edinburgh: 20 & 21 GEORGE II. A. D. 1747. [Extracted, under the Hand of the Clerk of Justiciary, from the Books of Adjournal of that Court.]

CURIA JUSTICIARIE, S. D. N. Regis, tenta in nova Sessionis Domo Burgi de Edinburgh, vigesimo quarto Die Mensis Martii 1747, Per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, et Carolum Areskine de Tinwald, Commissionarios Justiciarie dict. S. D. N. Regis.—(Lord Strichen Præses.)

Curia legitime affirmata.

THE which day compeared Patrick Haldane of Bearcrofts, esq. his majesty's solicitor, and advocate-depute, and produced, in presence of the said lords, a Writ of Recognizance, signed by his grace the duke of Newcastle, of date the 23rd day of January last by-past, which was ordered to be read and recorded; and whereof the tenor follows.

"Middlesex and Westminster to wit; Be it remembered, That upon the twenty-third of January, in the 20th year of the reign of our sovereign lord George the second, king of Great-Britain, &c. came before me, and acknowledged themselves to be severally indebted unto our said sovereign lord the king as follows, viz. Archibald Stewart, of Edinburgh, merchant, the sum of 5,000*l.*; David Scot, of Scotsarvet, in the shire of Fife, esq.; the sum of 2,500*l.*; James Oswald, of Dunnikier, in the said shire of Fife, esq. the sum of

2,500*l.*; Alexander Campbel, of the parish of Allhallows-Staining, London, doctor of physic, the sum of 2,500*l.*; James Baird, of Downing-street, in the parish of St. Margaret's Westminster, esq. the sum of 2,500*l.*; to be levied upon their several goods and chattels, lands, tenements and hereditaments, by way of recognizance, upon condition, that if the said Archibald Stewart do personally appear before his majesty's court of Justiciary at Edinburgh, at the first sitting of the said Court after the 20th day of March next, then and there to answer to all such matters as on his majesty's behalf shall be objected against him; and also appear from time to time when thereunto required, and not depart the said Court without leave thereof; and, in the mean time, be of the good behaviour, then this recognizance to be void, or else to remain in full force and virtue.

"Signed, HOLLES NEWCASTLE."

Immediately after reading whereof, compeared the said Archibald Stewart, merchant in Edinburgh, and judicially stated himself in Court before the said lords, in terms of and agreeable to the said writ of recognizance, and humbly insisted, that thereby the condition of the said writ was fulfilled, and the same fell to be voided, and he dismissed, if there was no person on his majesty's behalf ready to insist against him.

To which Mr. Patrick Haldane, his ma-

jeaty's advocate-depute, made answer: that the writ of recognizance was not only for Mr. Stewart's appearance this day, but thereafter, from time to time, when thereto required; That, having only had occasion lately to see the said writ, he was not just now ready to insist in any matters on his majesty's behalf against the said Archibald Stewart, as therein mentioned; and moved their lordships would appoint a farther time for his appearance again.

Mr. Stewart, without making any reply, submitted his case to the Court.

"The Lords Commissioners of Justiciary having considered the said Writ of Recognizance, and above debate, they continue the diet, for the said Archibald Stewart's compareance, to Monday the 8th day of June next, and ordain him to sist himself personally in Court that day, without prejudice to the lord advocate to insist against and prosecute the said Archibald Stewart sooner, in behalf of his majesty, if he shall see cause.

"Signed, ALEX. FRASER. I. P. D."

CURIA JUSTICIARIE, S. D. N. Regis, tenta in nova Sessionis Domo Burgi de Edinburgh, octavo Die Mensis Junii 1747. per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areskine de Tinwald, et Hugonem Dalrymple de Drummore, Commissionarios Justiciarum dict. S. D. N. Regis.—(Lord Strichen Præses.)

Curia legitimè affirmata.

The said day, in obedience to the foregoing order, compared the said Archibald Stewart, and sisted himself in court, when he and messieurs Lockhart, Ferguson, Home and Stewart, advocates, his procurators, insisted, That, in obedience to the last Order of Court, in consequence of the recognizance therein mentioned, he had appeared a second time; that, as he pled first, so he now did, that the condition of the said writ of recognizance was fulfilled; and that the same ought to be avoided, and he dismissed, if there was no person yet ready to insist against him on his majesty's behalf, which he had reason to believe was the case.

To which Mr. Patrick Haldane, his majesty's advocate-depute, made answer: That the Lord Advocate, who, at the last diet, attended the service of his country in parliament, was, contrary to expectation, still detained, although he intended to have been in Scotland long before now, when he could and would have proceeded to bring Mr. Stewart to trial in the ordinary way: That, for his part, as advocate-depute, he had no such instructions as he could move in that matter, either just now, or by a proper process; and all he was instructed to ask of their lordships, was a delay of eight days, which could be no prejudice either to Mr. Stewart or his cautioners, and against which time he was pretty well assured his majesty's advocate would be present, and shew cause why

VOL. XVIII,

the writ of recognizance should continue, and satisfy Mr. Stewart how or when he would be brought to trial.

It was replied for Mr. Stewart, that he expected, if there was any thing to be objected to him on behalf of his majesty, considering the long space of time intervening betwixt this and his former appearance, he would have been brought under some prosecution for it ere now; that the absence of my Lord Advocate, however necessary, and his depute's not being properly instructed, was to Mr. Stewart or his cautioners nothing to the purpose; that Mr. Stewart's appearance, now and before, and nothing objected to him, was, as to his cautioners, a liberation of their bail, which was so very great as must appear to be a hardship if it should last any longer; and therefore craved that he might be dismissed, and the bond voided.

It was replied by Mr. Haldane, that the delay sought was so small, as plainly shewed that there was no intention of putting a hardship on any person; and, without farther argument, he doubted not but the Court would continue Mr. Stewart's farther compareance, in terms of, and agreeable to the writ of recognizance, till Monday next the 15th instant.

"The Lords Commissioners of Justiciary, having considered the above debate, they continue the diet for the said Archibald Stewart's farther compareance to Monday the 15th day of June instant, and ordain him to sist himself personally in court that day, without prejudice to the lord advocate to insist against and prosecute the said Archibald Stewart sooner, if he shall see cause.

"(Signed) ALEX. FRASER, I. P. D."

CURIA JUSTICIARIE, S. D. N. Regis, tenta in nova Sessionis Domo Burgi de Edinburgh, decimo quinto Die Mensis Junii 1747. Per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areskine de Tinwald, et Hugonem Dalrymple de Drummore, Commissionarios Justiciarum dict. S. D. N. Regis.—(Lord Strichen Præses.)

Curia legitimè affirmata.

The said day compared the said Archibald Stewart, in obedience to the last order of court, and sisted himself agreeable to his writ of recognizance, and craved the said writ might be declared void; and he dismissed, in case the Lord Advocate was not yet ready to insist against him, as, if he was, he had at least got no notice of it, nor so much as of any time for his trial.

The Lord Advocate thereupon appeared, and represented the former delays were not owing to him, but, in some measure, to Mr. Stewart's own friends, who applied to him at London for a delay, till he should come to Scotland and be present himself; which truly was the reason of his not raising and executing a criminal process against Mr. Stewart to the last diet he appeared. That, to shew his lordship had no in-

3 K

clination to give Mr. Stewart any unnecessary delay, he now was ready to insist, and for that end gave in, and presented to the Lords, a bill signed by him, craving warrant for criminal letters against the said Archibald Stewart, for the crimes and misdemeanours therein mentioned, and fixing the diet for his trial to the third of July next.

Thereafter Mr. Lockhart moved, in behalf of the cautioners for Mr. Stewart, that the writ of recognizance should be voided; and for Mr. Stewart, in place thereof, that he was willing to find new bail for any sum the Lords should appoint and judge reasonable, as the bail he was presently under was by far too extravagant.

To which the Lord Advocate made answer: That the writ of recognizance, on which Mr. Stewart was liberate, was still in force, and behaved to continue, as the cautioners and Mr. Stewart not only became bound that he should appear such a day, but from time to time thereafter, as the Lords should appoint, and not to depart, without leave, out of the court; that this bail was taken by, and given to one of the highest authority, and that it must necessarily continue agreeable to the said writ, till he be dismissed.

Whereupon Mr. Stewart himself, and Mr. Elliot his procurator, waved the motion made by Mr. Lockhart anent renewing the bail, and agreed that the former stand good, and he had no objection why the next diet of comparance might not be the third of July next.

"The Lords Commissioners of Justiciary, having considered the above debate, they continue the diet, for the said Archibald Stewart's farther comparance, till Friday the third day of July next to come.

"(Signed) ALEX. FRASER, I. P. D."

Upon the 3d of July the diet was continued to the 13th of that month.

CURIA JUSTICIARIE, S. D. N. Regis, tenta in nova Sessionis Domino Burgi de Edinburgh, decimo tertio Die Mensis Julii 1747. Per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areskine de Tiwald, et Hugonem Dalrymple de Drummorie, Commissionarios Justiciarum dict. S. D. N. Regis.—(Lord Strichen Præses.)

Curia legitime affirmata.

Intran'

Archibald Stewart of the city of Edinburgh, merchant, and late lord provost of the said city, pannel,

Indicted and accused at the instance of William Grant of Prestongrange, esq. his majesty's advocate, for his majesty's interest, for the crimes of neglect of duty, and misbehaviour in offices and places of public trust, and the violation of the trust and duty of such offices, in manner at length mentioned in the criminal libel raised against him thereanent, making

mention, That whereas, by the laws of this and all other well governed realms, all neglects of duty, and misbehaviours of persons employed in offices and places of public trust; and all violations of the trust and duty of such offices, are crimes of a high nature, and severely punishable; and the public justice of the realm requireth a vigorous prosecution of such offenders, especially when such neglects of duty and misbehaviours are incurred by the chief magistrate of any great or considerable city, in a time of public danger, and open rebellion; and particularly by an act made in the 14th parliament of king James the second of Scotland, chapter 76th, intituled, The Punition of Negligent Officers, "It is ordained and determined, That if any of the king's officers or sheriffs, mayors, bailies, crowners, sergeants, provost of burghs, and their ministers both to land and to burgh, be found faulty or negligent in the execution of their offices, and it may be lawfully proved on him, or notoriously kend; if the said office pertains to him in fee and heritage, he shall tyne his office, and the profit thereof, for an year and a day, and to be punished by the king in his person and goods after the quantity of his trespass; and if his office pertains to him not in fee and heritage, he shall tyne his office for all the times he has it, and to be punished in his person, after the quantity of six trespass, at the king's will." Yet true it is and of verity, that the said Archibald Stewart of the city of Edinburgh, merchant, and late provost of the said city, is guilty, actor, or art and part of the said crimes, or one or other of them, aggravated as aforesaid; in so far as he, being lord provost of the city of Edinburgh, in the year 1745, when a most bold, desperate, wicked, and unprovoked rebellion was raised and carried on against his majesty within this realm, by a large body of armed traitors, headed by the eldest son of the Pretender to his crown, and assisted with troops and money from his enemies abroad, and, at such a juncture, it being his duty, as the chief magistrate of the said city, and the king's lieutenant therein, having authority to command the military force of whatever kind within the city, to have exerted himself with fidelity, vigilance and zeal, for opposing the progress of the rebellion by all lawful methods in his power, and particularly for preserving the city entrusted to his care from falling under the power of the rebels, or becoming a prey to them, he, the said Archibald Stewart, was grossly faulty or negligent in the execution of his said office and duty on so important an occasion, in manifest violation of the trust and duty of his office: and particularly was thus guilty on the 15th and 16th days of September, in the year of our Lord 1745, and upon several other days and times in the said month of September, and the month of August preceding, within the said city of Edinburgh, where he was resident for the time. And moreover, the said Archibald Stewart was not only faulty or negligent in the execution of his office, and

notoriously known to have been such, but was guilty of malversations and counteracting the duty of his office, in such an exigency, in many instances, and particularly, amongst others, in these following: First, That whereas the preservation of the city of Edinburgh, from falling into the hands of the rebels, was of great importance to that city itself, and to the king and the kingdom in general, and the care of it especially incumbent on the lord provost for the time being, and ought to have been looked after with the utmost attention, zeal and vigour, in such an exigency, as when the rebels got to the southward of the body of the king's troops under the command of sir John Cope, of which advice came to Edinburgh in the latter end of August 1745, from which there was reason to fear that the taking of that city would be attempted by the rebels, and to hope that the king's army might soon after come to its relief: yet, in these circumstances, he the said Archibald Stewart, then chief magistrate, and sole military governor of that city, did nothing of his own accord towards providing effectually for the defence thereof; and, on the contrary, every measure for that purpose, proposed, and pressed by the honest zeal of the then magistrates and council, and of many of the citizens and inhabitants, instead of being heartily encouraged and promoted by him the provost, were by him thwarted and retarded, or else absolutely refused or declined; and in this manner it was that he received a proposition made to him in the latter end of August 1745, for raising a regiment of 1,000 men, by voluntary subscription, for defence of the city; against which he formed objections on account of the expence, and affected doubts concerning the legality thereof. And, secondly, He treated in like manner another application made to him in the beginning of September 1745, by a number of gentlemen or citizens for leave to associate themselves under his chief command, as volunteers, for the defence of the city, and service of the government; and, after his objections to the legality of that measure were over-ruled, he would not suffer it to be published or given out that he heartily approved, but barely that he acquiesced in that measure; and yet his reluctance or aversion to it, or uneasiness under it, continued to discover itself on frequent occasions, and particularly by the cold, if not the rude manner in which he behaved towards those volunteers, consisting of a number of very respectable gentlemen and burghesses, when he went to a publick meeting of them, in the New Church isle of Edinburgh, to name their captains. Thirdly, That, in like manner, through the misbehaviour of the said Archibald Stewart, when certain repairs of the city walls, and other works for making it defensible for some time, against an enemy who had no artillery, and were very unskilful in making sieges, had been proposed and advised, amongst others, by the now deceased and famous Mr. Colin Mac Laurin, professor of mathematics in

the college of Edinburgh, and were ordered by the council of the city of Edinburgh to be made, the execution whereof was chiefly incumbent on the lord provost for the time being, yet the same was carried on very slowly and imperfectly, notwithstanding frequent remonstrances and complaints made by divers of the faithful and zealous inhabitants: and, as late as Sunday the 15th of September 1745, when the rebels were marching to, and were come within a few miles of the city of Edinburgh, he the said Archibald Stewart refused to give orders for loading the cannon planted upon the city walls, and, about the same time, he refused to apply for some of the sailors from on board one of the king's ships of war for managing of those cannon, when he could not otherways be provided of fit persons to act as gunners. Fourthly, That about the same time, he the said Archibald Stewart refused to listen to, or to follow several salutary propositions that were made and pressed by well-affected inhabitants, for the greater safety and better defence of the city; such as, that the trained bands, consisting of a promiscuous number of burghesses, whereof many were known to be disaffected, should be laid aside, as had been practised during the Rebellion in the year 1715, and that arms should only be trusted in the hands of such as were known to be well-affected, and that a general search for arms should be made within the city, and that a number of the ablest bodied men of the tradesmen's servants should be employed and armed for assisting to defend the city, when it should be attacked, upon the encouragement of a guinea to be given to each of them; towards defraying which expence an offer was made to the said Archibald Stewart, on the part of the volunteers, to have raised or advanced the sum of 500*l.* sterling. Fifthly, That the said Archibald Stewart misbehaved himself in like manner, in respect of the succours that were brought at the time aforesaid from the country in the neighbourhood of Edinburgh, consisting of numbers of well-affected and zealous subjects, under the conduct of gentlemen of known loyalty and good affection, who came and voluntarily offered their service to assist in defending the city of Edinburgh, without any fee or reward, upon that dangerous and pressing occasion, the approach of the rebels to that city; but these very seasonable and laudable offers were by the said Archibald Stewart very coldly received and ill treated: For instance, he proposed to sir Robert Dickson of Inveresk, who came to Edinburgh upon Sunday the 15th day of September 1745, from Musselburgh, with about 150 volunteers, to offer their services for the purposes aforesaid, that these men should enlist themselves for three months as soldiers in the Edinburgh regiment; a proposition which, instead of being calculated sincerely to provide for the better defence of the city, could no otherways be received by those volunteers, than as an insult and discouragement to their zeal, who, being trades-

men or husbandmen, did not mean to leave their occupations, and enlist themselves as soldiers for hire, but had bravely offered to serve gratis in the then present exigency, which could not last above a few days, before the end of which the city of Edinburgh must either have been relieved or surrendered. Sixthly, That, on the morning of Monday the 16th of September 1745, the said Archibald Stewart received a message from the camp of the rebels, by Andrew Alves, writer to the signet, importing, that the city of Edinburgh would be ill treated by them, unless it should be readily or speedily surrendered; being a message to the same effect with that contained in a letter from the Pretender's son, bearing date from his camp that same day, addressed, For the Lord Provost, magistrates and town-council of Edinburgh, and which letter was thereafter that same day delivered; and yet he the said Archibald Stewart did not immediately commit the said Andrew Alves to prison, for bringing or delivering to him such message, neither did he give notice to any other of the king's officers, civil or military, that he had received such message. Seventhly, That upon the same Monday, the 16th of September 1745, about three of the clock in the afternoon, he received a petition from certain of the inhabitants of the city who opposed the defence thereof, and insisted to have a general meeting called of all the principal inhabitants, to consult what was proper to be done, and he accordingly held and presided in a meeting in the New Church-ale in the afternoon of that same day, upon the ringing of the fire-bell, which was the appointed signal for the volunteers to repair to their alarm-post; the consequence of which was, that few or none of those volunteers, who consisted of a number of the most substantial and best affected burghesses, were or could be present at that general meeting: in which meeting, as every one who had a mind got access, there were numbers of persons present of known disaffection to his majesty's government; and thus, by ill design upon their part, and by the timidity of others who were thus assembled in a tumultuous manner, and a very improper council with which to take measures in a time of immediate and pressing danger, the general cry was given for surrendering the city, and giving up all thoughts of making a defence: And the said Archibald Stewart thus held and took the sense of this meeting, notwithstanding that before he went to it, it was very well known that the rebels were ill armed, and that an offer had been made to him, in aid of the other forces with which the city was provided, to send 100 out of two regiments of dragoons in the king's service, or as many of the dragoons of those regiments as he should desire, to assist in defending the city; but he refused to give his consent or authority for receiving any of these dragoons, though he had requested such party of dragoons, about an hour or two before in that same day, by a writing under his hand, addressed to lieutenant-general Joshua Guest,

then in the castle of Edinburgh. And moreover, at this meeting there was brought in and delivered to the said Archibald Stewart, the letter above-mentioned from the Pretender's son; immediately, or soon after the receiving whereof, that meeting was dismissed, and he, with others of the magistrates and council, withdrew to the council-chamber, where (which is the eighth Article charged upon him the said Archibald Stewart) he caused or suffered the said letter from the Pretender's son to be publicly read, and moved or agreed that an answer should be given to it; which was accordingly sent, first by one, and then by another deputation from the council: all which intercourse was in him the said Archibald Stewart, then lord provost, the more criminal, than any danger or necessity that might be alledged, in order to avoid the same being punishable as high-treason, was owing in great measure to his own backwardness to discharge his duty, by taking all the proper precautions against such danger, with that fidelity and vigour which he owed, by his allegiance and his station, to the city of Edinburgh, and to the king and kingdom. Ninthly, That all this while he the said Archibald Stewart refused or neglected, though frequently applied to for that purpose, to give any orders to the volunteers of the city of Edinburgh, who had been long standing upon the street under arms, how or in what manner they should dispose of themselves, and employ these arms, or how they should dispose of the arms, if they were not to be used or employed for the defence of the city, for which they had been first taken up; and, upon such his refusal or neglect, the said volunteers took and executed the resolution to carry back their arms to the magazine in the castle of Edinburgh, in order to prevent the same from falling into the hands of the rebels. Tenthly, That, on the evening of the same Monday the 16th of September, 1745, he the said Archibald Stewart refused or declined to give his licence or authority for a party sent by the said lieutenant-general Guest, or by lieutenant-general George Preston, governor of the castle of Edinburgh, to remove or spike up the cannon that were then planted upon the city-walls; and, about the same time, he the said Archibald Stewart gave orders to Thomas Dalziel, one of the captains of the city-guard of Edinburgh, whose turn it was to be on duty that night, to keep guard with the usual complement in peaceable times, of one-third of the city-guard, or company, and no more; and, about the same time, he the said Archibald Stewart gave orders to the parties of the trained-bands of the city of Edinburgh, who had been upon guard at the several gates of the city, to quit their posts, and to dispose of their arms in the parliament-house, or some other place or places, where they must be exposed to fall into the hands of the rebels, as soon as they should enter or become masters of the city. And, Eleventhly, In the same evening of the 16th of September, 1745, it was pre-

posed and urged in council, where the said Archibald Stewart was present, and presided, that the whole city arms, being in number about twelve hundred firelocks and bayonets, should be lodged and secured within the castle of Edinburgh, in order to prevent their falling into the hands of the rebels; but he the said Archibald Stewart refused or declined to give any order for that purpose, neither in fact were the city-arms so lodged and secured, but were seized by the rebels upon their entering the city the day following, who came to Edinburgh so imperfectly armed, that the supply of arms which they thus received, appears to have been one principal cause of the disaster that befel the king's forces near Preston-Pans, on the twenty-first day of the same month of September, 1745. And, Lastly, By occasion or means of the several instances above-recited, and other instances during the time above-mentioned; upon one or other of the days of the months of August or September, 1745, of the misbehaviour of the said Archibald Stewart within the city of Edinburgh, of which he was then lord provost, it came to be very notoriously known, that he was highly faulty and negligent in the execution of his office, and to be farther violently suspected and believed, amongst the king's faithful subjects in that city, that he the said Archibald Stewart was secretly in the interest of the Pretender, by reason of the uniformity of his behaviour from the beginning to the end of these transactions, discovering a constant unwillingness or backwardness to provide for, or heartily prosecute the measures that were in a manner forced upon him, in order to the defence of that city, at a time when, if he had observed a contrary conduct, there was at least a high probability, that the city might have been preserved from falling into the hands of the rebels: and in fact the same did fall into their hands, in a very strange and suspicious manner, by a party of the rebels entering the city at the Netherbow port, early in the morning of Tuesday the 17th of September, 1745, when that port was guarded with nothing more than a serjeant's command of the city-guard, and was opened to suffer a hackney-coach to go out, which had just returned from bringing back the second deputation sent by the said Archibald Stewart, and other magistrates and councillors of Edinburgh, to the Pretender's son: all which misfortunes were, in great measure, owing to the misconduct of the said Archibald Stewart, and served to bring a heavy calamity on the city of Edinburgh, and the kingdom in general; at least, at the time and place aforesaid, he, the said Archibald Stewart, being lord provost of the city of Edinburgh, was highly faulty or negligent in the execution of his office, at a time of public danger and open rebellion against his majesty. And for proving that the said Archibald Stewart was guilty as aforesaid, there would be produced against him, by way of evidence, besides very credible witnesses, certain documents in writing, which

should be lodged in the hands of the clerks to the Court of Justiciary, that he might see the same, and whereof a list should be delivered to him, along with the list of witnesses to be adduced against him. All which enormous neglects of duty, and misbehaviours, or part thereof, or his being art and part of the same, being found proven against the said Archibald Stewart by the verdict of an assize, before the lords justice-general, justice-clerk, and commissioners of justiciary, he, the said Archibald Stewart, ought to be punished with the pains of law, to the terror of others to be guilty of the like in time coming.

Pursuers.—William Grant of Prestongrange, esq. his majesty's advocate, Mr. Patrick Haldane, and Mr. Alexander Home, his majesty's solicitors, Mr. Francis Garden, Mr. John Grant.

Procurators in Defence.—Mr. James Ferguson, Mr. Henry Home, Mr. Alexander Lockhart, Mr. George Sinclair, Mr. Charles Hamilton Gordon, Mr. John Stewart, Mr. Gilbert Elliot, Mr. David Dalrymple, Mr. William Binning.

The Pannel having, agreeable to a clause contained in an act passed the last session of parliament, intituled, An Act for taking away and abolishing the heritable jurisdictions in that part of Great Britain called Scotland, &c. given in to the clerk in writing a signed account of the facts relating to the matters charged upon him in the said libel, with the heads of such objections or defences subjoined, as he was advised to make at his trial;

And the said libel being this day openly read, and full debate thereupon, and upon the said signed account of matters of fact, and heads of defences given in for the pannel, in presence of the pannel, court and jury,

“ The Lords Commissioners of Justiciary, in respect of the importance and difficulty that may occur in this case, and by virtue of the power reserved to them in the said act of parliament, ordain both parties to give in Informations to their lordships, and the clerks of court; the pursuers to give in their Informations against Monday the 20th instant, at six o'clock at night, and the procurators for the pannel to give in theirs against Friday thereafter, the 24th instant, at the same hour; and, at the particular desire of both parties, ordain the clerks of court to record the said Informations in the books of adjournal, in place of the minute directed to be made up and ingrossed in the said books by the act of parliament; and continue the diet in this cause, and the said Archibald Stewart his compearance, upon his bond of recognizance formerly recorded, till Friday the 31st of July current, at 4 o'clock afternoon, in this place; and ordain parties, witnesses and assizes, then to attend, each under the pains of law.”

INFORMATION

For his MAJESTY'S ADVOCATE for his Majesty's interest, Pursuer,

AGAINST

ARCHIBALD STEWART of the City of Edinburgh, Merchant, and late Lord Provost of the said City, Pannel or Defender.—July 30, 1747.

The Libel, at the pursuer's instance, against Mr. Stewart, late lord provost of the city of Edinburgh, charges him the pannel with being guilty of very high crimes and misdemeanours, in having many ways acted contrary to his duty, when he was chief magistrate of the city of Edinburgh, in the months of August and September 1745, a time of public danger and open rebellion, headed by the eldest son of the Pretender to his majesty's crown, assisted with troops and money from his majesty's enemies abroad; at which juncture the pannel, by his misbehaviour, suffered the city of Edinburgh, with the cannon and arms therein, as well as other supplies of various sorts, to fall into the hands of the rebels, in manifest violation of the trust and duty of his office. This is the general charge against the pannel, which is in the libel more particularly specified, by a deduction of many particular instances of misbehaviour alleged against him in support of that general charge, which particulars it is unnecessary here to repeat; but for them the pursuer begs leave to refer to the libel itself.

The pannel having been duly served with a copy of this libel, did first of all, in pursuance of the late act of parliament for abolishing the heritable jurisdictions in Scotland, &c. give in to the clerk of court, the day before his trial was to come on, signed by one of his counsel, his account of the facts relating to the matters charged upon him, together with the heads of certain objections and defences which he makes to the libel, and therein says, "That he is not guilty of all or any of the neglects or misbehaviours laid to his charge, and that there is no ground for supposing him disaffected to the government, but much to the contrary; and, in particular he avers, that his conduct, upon occasion and at the time of the late rebellion, will, upon proof, afford the strongest evidence of his real attachment to the government;" and farther says, upon the several matters charged against him,

In the first Article, "That he thwarted no measures that were proposed that seemed legal and expedient; that where any doubts or difficulties occurred, either as to the legality or expediency of any particular proposed, some of which seemed rather to be intended as a snare, he delivered his opinion with a becoming freedom, submitted his reasons to the council or committee, and heartily went into whatever they resolved, after taking advice, in points of greatest importance, with those who bore the highest offices, both civil and military, that were at the time in this town."

As to the second Article of the indictment,

Mr. Stewart says, "That the proposal made for associating a body of volunteers was a point of so much delicacy, as must justify him for desiring advice as to the legality of what was thereby proposed. That so soon as the magistrates found they could safely go into the proposal, the Lord Provost readily acquiesced, and shewed a willingness to have it carried into execution; and that, upon every occasion, he behaved towards them with the utmost civility."

As to the third Article, "The magistrates of Edinburgh, with the rest of a committee appointed by the council to provide for the defence of the town, readily listened, and cheerfully received every proposal that appeared calculated for the defence of the town, in which nothing was by them delayed; and the execution of these matters was committed to proper persons, chosen and appointed for that purpose by the council and committee." He does farther say, "That the guns were charged in the proper time, and all endeavours used to supply the town with proper gunners."

The Provost does in like manner say, "That what is loosely charged in this article of the indictment, of his having refused the proposals of those who were zealously affected, is not well understood: Every conversation was freighted with a proposal, many of them contradictory, and some of them from sinister motives; such particularly was the proposal mentioned in this Article, which, if sincerely meant, ought to have been proposed in council, which never was done."

As to the fifth Article, "The Provost thinks he behaved kindly to every man who came, or pretended that he came, to the assistance of the town; and denies the instance charged in the libel, nor can he imagine that it was, or can be presumed an affront, although he had offered the putting sir Robert Dickson's volunteers in the way of receiving pay, supposing that to have been the fact."

As to the sixth Article, "Mr. Stewart apprehends there can be no crime in it; for he did communicate the message by Mr. Alves, immediately after he received it, to the gentlemen of the council, who were of opinion, that the message delivered by Mr. Alves ought not to be divulged, for fear of intimidating the inhabitants; and soon after he waited of the then Lord Advocate, to impart that affair, and get his advice what ought to be done, and, conform to the advice then given, committed the said Andrew Alves, so soon as he understood that it was lawful and proper, and there was no criminal delay in committing him."

As to the seventh Article, "Mr. Stewart says, that the meeting in the New Church Isle was not in consequence of any petition delivered him by the inhabitants, which petition was never once under consideration of the committee, nor did he order the alarm-bell to be rung to convocate the inhabitants. Denies that he ever refused to admit any dragoons into the town; but, on the contrary, he expressed a willingness to receive them, providing they were sent."

As to the eighth Article, "Mr. Stewart refuses that he received or gave orders to read any letters from the Pretender, or that he gave orders in consequence of any such letters; any deputation that might have been sent, was the effect of the fears of the inhabitants, who had more of the government of the town at that time than the magistrates."

As to the ninth Article, "The volunteers carried their arms to the castle without applying to Mr. Stewart for his orders, and before he understood the town to be in a defenceless state."

As to the tenth Article, Mr. Stewart says, "That it was the sense of the committee the provost should give no orders; and he believes it will appear, that the messenger from Mr. Guest was told he was at liberty to spike up the cannon, if the general thought proper; nay, he farther believes the messenger was farther told, that he should be shewn where the cannon were. Mr. Stewart does not remember that captain Dalziel was ordered to have but a third of his guard on duty, but believes that the whole guard at that time were not in a condition to do duty, after the fatigue they had previously undergone; the inhabitants had before this time resolved not to stand upon their defence; the Provost remembers nothing of the orders said to have been given to the trained-bands, but believes the contrary will be proven."

As to the eleventh Article, the Provost repeats the first part of his Answer to the preceding Article, and says, "That if any of the city arms fell into the hands of the rebels, it must have proceeded from various unavoidable causes, but cannot be imputed to any fault of Mr. Stewart."

As to the twelfth Article, "Mr. Stewart is confident there must appear, upon his part, a zealous attachment to the interest of the government, by the uniformity of his conduct from the commencement of the rebellion, until the time that the town fell unhappily into the rebels hands; for such is and must be the natural construction of his unwearied application to every part of his duty, and upon considering the proposals made by him in council, with the directions given to those that acted under him."

From this account of the Provost's conduct, in relation to the matters charged upon him, his defences against the libel are:

"1. That the whole of the Charge is laid in a manner too loose and general to be past to the knowledge of an assize."

"2. That the facts therein contained are either misrepresented, or in their nature not criminal."

"3. That no error in point of judgment, if any thing of that kind shall appear, ought to be made the foundation of a criminal prosecution, especially that he was only one of a committee, and acted by their direction."

Before the pursuer proceed to recite the arguments that were offered on behalf of the journal, in support of these defences, when the

trial came on in the Court of Juiciary on Monday the 13th current, together with the replies made on the part of the pursuer to these defences, he shall here, for the better understanding of the true merits of the case, first of all briefly set forth, without any argument, the principal facts which occurred at and about the time libelled, such as he believes can be proved to be true, either by authentic writings, or by parole evidence.

[23d August 1745. Council Record.] The Lord Provost produced in council a letter from one of his majesty's principal secretaries of state, by direction of the lords justices, bearing date 13th August 1745, giving him notice, "That they had received intelligence that the Pretender's son was already landed, or intended to land in Scotland, and recommending it to him the Lord Provost to exert his care and vigilance on this occasion, and make use of such precautions as he should judge necessary for preserving the public peace within the city of Edinburgh." And produced also a copy of his answer to that letter, bearing date 17th of August, promising, *inter alia*, "not to sit down in security, but to keep a watchful eye, in order to prevent, as far as possible, every thing that might disturb the peace of this city;" of which answer the council approved.

The same day the council resolved to levy and raise the number of thirty centinels to be added to the city-guard, and recommended to the Lord Provost and magistrates to direct and ordain the captains and subalterns of the trained-bands to make up full lists of the persons belonging to their several companies, and to report the same to the magistrates against Wednesday then next.

At the same time another order was made, for directing the constables of the city, to make out lists of all the inhabitants and residents within their several bounds and districts, and that they be diligent in inquiring and finding out what strangers may happen, from time to time, to come within this city, and lodge within their several districts; and that all inn-keepers, stablers, and others, who lodge and entertain strangers, should from time to time, and as oft as any strangers shall lodge with them, give in to the captain of the city-guard, a note of their names and designations at their arrival, and of the time of their departure from thence, and order the captain of the guard to report to the magistrates in writing, every morning, lists of the particulars that should be delivered in to them by the inhabitants.

[Tuesday, August 27, 1745.] These resolutions were reported by the Lord Provost, and the other magistrates, with the conveners of the trades, to a meeting of substantial and well-affected burghers, which it had been proposed to summon to give advice on the present occasion. This proposal was made to the Lord Provost on the Saturday preceding, being the 24th of that month, by a citizen of Edinburgh, who had been some time a magistrate, and had been commissioned by other well-affected citizens to

propose such meeting to the Provost, as had been formerly practised on important occasions, and which he represented as what they judged necessary at this time, in order to take measures for putting the city in a posture of defence. This proposition the Provost received at first with a sneer or laugh; but, upon the other's pressing him, as being the opinion and the wish of many substantial burghesses, and what had been formerly practised on the like occasion, the Provost at last consented that there should be such meeting, but said it could not be that day, being Saturday, as many of the burghers would be out of town; and accordingly it was not held till the Tuesday following.

At this meeting, which was held in the New Church Isle at five o'clock in the afternoon, consisting of a great number of the most respectable burghesses, of undoubted loyalty to his majesty, they unanimously approved of the steps already taken, and offered their advice as to the farther steps to be taken, and particularly "That the city should be forthwith put in a posture of defence, and a body of men raised and armed for the defence thereof and the service of the government." The former of these could be of little use without the latter; and to the latter the Provost objected, that the same would be treasonable or illegal, without special warrant from the crown. They replied, that if a warrant was necessary, that might be applied for and obtained. Then the Provost said, that, supposing they should get a warrant, he doubted much if money could be raised by subscription for paying them. To which last objection it was answered by some citizens of considerable wealth and credit there present, that they were ready to undertake and oblige themselves to find money to pay a regiment for three months. Upon this it was resolved, that a committee should be named, out of the council and of the other burghesses, to consult with and take the advice of the lord justice clerk, and such of the other judges as could be found in town, and his majesty's advocate and solicitor, with regard to what farther steps the magistrates and council and community could legally take for preserving the peace of the city, and contributing to defeat the designs of the rebels; and next day the council named their committee accordingly; the result of which was, that application was made to his majesty, in order to remove all doubts, for his special warrant and licence to raise such regiment.

[Saturday, August 31, 1745.] Advice was received at Edinburgh, that sir John Cope, with the troops under his command, instead of marching directly to the rebels, as he had proposed, and was expected, had, upon his march at Dalwinnie, the place where the Fort Augustus and Inverness roads meet, marched forward towards Inverness, whereby the rebels were now got to the southward of the king's army, when there was no force left to oppose their marching southward where they should think

fit, which gave no small alarm to the cities of Edinburgh and Glasgow, and all the country to the southward of the rivers or friths of Forth and Clyde.

[Monday, September 2.] The council of Edinburgh ordered the town-guard to be augmented to the full number of 126 men, officers, serjeants, and drums included.

[Eodem die. The deceased Mr. Mac Laurin's Journal.] "The accounts from the north becoming more and more unfavourable, above twenty gentlemen of known good affection to his majesty and the government, met at Mrs. Clark's tavern, and agreed to apply to the Lord Provost, that he would give orders for putting the town in as good a state of defence as possible with all expedition. It was complained of in this meeting, that an application which had been made the week before to his lordship had not met with due encouragement, but that the persons who waited on his lordship, and their zeal, had been ridiculed, and made the subject of insipid jokes. The company (however) resolved, that, whatever discouragements they might meet with from those whose duty it was to have animated them, they should meet frequently, and promote, to the utmost of their power, whatever may tend to the defence of the town: In the mean time they appointed two of their number, a gentleman who had formerly been a bailly, and Mr. Mac Laurin, to wait on the Provost next morning, with a general instruction to beg he would see to the defence of the town, and offer their assistance; and three particular instructions, 1st, That he would order making moulds for bullets, it having been found on trial that all in the shops had been bought up of late by cadies, (or link boys) who had been sent for them. 2dly, That the sluice of the North Loch, by which the water issues from it, should be shut and secured, that it might fill up. 3dly, That they should propose to his lordship the making a distinction betwixt the inhabitants of known good affection, and such as were suspected, when he came to intrust them with the town's arms, and take proper measures that the city should not be in danger from within, as (had been taken) in 1715.

"Lord Provost did give a satisfactory answer to the two first of these, but as to the third, he did not give the satisfaction desired; but, after a good deal of reasoning, he said, that, if the town came to be attacked, he would so far make a distinction as to intrust the town's arms with the most substantial burghers; he said, that, if a thousand men had a mind to get into this town, he could not see how he could hinder them. In answer to this, the number of trades-lads in Edinburgh, of the gentlemen who would associate to save the town, the unskilfulness the Highlanders had always shown in attacking stone-walls, their want of artillery, and being ill-armed, with the assistance that would be got from the dragoons, in all probability, were urged: it was insisted, our doing something was requisite to save the reputation

of the town, to divert the enemy from coming this way, and to raise a spirit in the country.

"To this he answered, that, to pretend to do when we could do little, was to expose us to ridicule. Other discouraging expressions were used; but, at the end, he said he would be glad of advice from sensible burghers, and have regard to it."

[Thursday, September 5th.] "Little material past till September the 5th, when the same company, with some addition of other gentlemen, met at the same place; and now the danger appearing more imminent, they entered into an association, as volunteers, to serve for the defence of the city at the hazard of their lives and fortunes, under the direction of the Lord Provost. This was signed by all present, and by a hundred before twelve the next day. They appointed some of their number to present this to the Lord Provost, to desire they might be allowed to chuse their officers, and that he would apply to general Guest for arms to them: they were likewise ordered to intreat that the parapet of the town-wall might be cleared, which, in many places, had been stopt up with stone and lime to prevent smuggling; that stairs should be made for getting up to it at proper distances; that cannon should be got from the ships to be placed on the flanks and gates."

This spirit for putting the town in a posture of defence was so generally prevalent amongst the well-affected, and even the least warlike part of the inhabitants, that, of this date, a representation to the Lord Provost, magistrates and council, was signed by the principal and professor of divinity, and twelve more of the ministers of the city of Edinburgh, of whom the total number is sixteen, so that three only were absent or wanting; which representation sets forth, that they have seen and considered a petition to their lordship and honours, subscribed by a considerable number of the inhabitants of this city, well-affected to his majesty's person and government, praying, that the city may be put in a proper posture of defence against the common enemy; that they, the ministers of Edinburgh, judged it their duty to testify their hearty approbation of such design, and their firm resolution to promote the same in their sphere and station, and thereby engage cheerfully to contribute for defraying the necessary expence with their fellow-citizens.

The ministers were as good as their words as to this article; for, out of their moderate stipends, they joined in subscribing for the pay of one hundred men out of the thousand proposed to be raised.

The Lord Provost, however, found also considerable difficulties as to the legality of this measure, which was pressed upon him, of raising the volunteers, and did not give way to it until he had first one signed opinion of his majesty's advocate and solicitor. "That it was lawful for the magistrates to authorize the subscribers, and other well-affected inhabitants, to take up arms in defence of the city, and support of the government." And the Provost,

VOL. XVII.

it seems, not being fully satisfied with this opinion, there was subjoined to it, and signed by the same gentlemen, a farther opinion, [Eodem die, Sept. 6th.] "That it was lawful, and not treasonable, for the magistrates to comply with the desire of the said Petition of the volunteers."

[Mr. Mac Laurin's Journal.] The Lord Provost declared now, and always afterwards, "That he would insist on the privileges of his office, and did not leave the nomination of the officers to the volunteers, but allowed them to make up a list of 30 or 40, or more, from which he would chuse them. He walked with some of the magistrates and volunteers about a part of the town-wall; he then said, he could not see but if 2,000 men had a mind to get into the town, they must succeed; after looking at a part of the wall, he desired Mr. Mac Laurin, one of the volunteers, to take the trouble to make a plan of it; which he promised to do.

"It was thought proper to draw up an article of news concerning this association, to encourage others to join, and rouse the lethargick spirit of the country: after it was written, it was thought decent and dutiful to shew it to the Provost; the words, That this proposal was accepted by the Lord Provost, were altered by him; he would have it, that the Lord Provost acquiesced in this proposal. This alteration was much regretted by those who were sincerely zealous in this cause, being sensible, that, in so critical a time, more than acquiescing was requisite in the magistrates, to animate the burghers, and foreseeing, as it happened, that the trades would not be warm when the magistrates were so cool. The volunteers however soon rose to 400. The expences of the works proposed were much talked and complained of, at this time and afterwards."

[Saturday, Sept. 7th.] The Lord Provost moved in council, that an Address should be drawn up and presented to his majesty, which was unanimously agreed to; and accordingly a very dutiful address was made out and signed; and that same day it was resolved in council to authorize the magistrates and convenor to employ persons, with all possible speed, to put the city in a posture of defence, and particularly the walls thereof.

[Eodem die, Sept. 7th, Mr. Mac Laurin's Journal.] "The plan of the wall was made ready, and presented to the council at six o'clock; the weak places were pointed out, and what was most necessary to be done proposed. The Lord Provost desired an estimate might be made of the expence; but it was answered, that it could not easily be done, and would require time. It was proposed the flanks should be first taken care of, as the time which the rebels would take to come to Edinburgh was uncertain; that the doing as much as we could did not hinder the capitulating, if necessary; that there was a double chance for relief, either from sir John Cope,

3 L

or the Dutch, so that holding out one day or two might save the town; but that dispatch was necessary above all things, and all the workmen that could be got ought to be employed."

[Sunday, Sept. 8th. Mr. Mac Laurin's Journal.] "The workmen cleared a part of the parapet; but the number was very small for this day, and indeed for the whole week, till September 15th. Of this complaints were made every night, but to little or no purpose; sometimes there were only two dozen, when there ought to have been as many hundreds; for now the rebels were at Perth. It was found that the parapet, when cleared, was too narrow in several places, and that it was necessary to add to it by scaffolding. This was done in some places, but so few men were employed, that in others it was not executed."

[Monday, Sept. 9th. Council Record.] The Lord Provost produced in council a sign-manual from his majesty, addressed to the lord provost, magistrates, and town-council of Edinburgh, reciting: "That it had been represented to his majesty, that the lord provost, magistrates, town-council, burgesses, and others of the city of Edinburgh, from their great loyalty and affection to his person and government, were at this juncture willing and ready to raise and maintain, at their own proper charge and expence, by voluntary subscription and contribution, 1,000 foot for the defence of the said city and the support of his government, and that they were desirous of obtaining his royal licence and authority for the same: his majesty does grant the same accordingly; and does farther ordain and command, that the said 1,000 men shall be under the direction of the lord provost, magistrates and town-council of Edinburgh."

This warrant having been read and considered by the magistrates and council, "They appointed, as a committee, the present and old magistrates, conveyer, deacons Lauder and Porteous, or any five of them, the Lord Provost being always one; and, in case of his absence, any nine of them to be a quorum, to consider what is most proper to be done upon this occasion, for levying the said 1,000 foot, and particularly to take in the subscriptions of such of the inhabitants as are willing to contribute for levying and maintaining the said 1,000 foot, with their proper officers to be named, for the purposes mentioned in the said sign-manual, for the space of three months after they shall be so intisted; as also to consider what is proper to be done farther for the safety of the city, and for support of the government; which committee shall meet at the Goldsmiths-hall twice each day, at the hours of eleven in the forenoon, and four in the afternoon; and recommended to the said committee to keep a book, into which all their proceedings and actings shall be regularly ingrossed, to the end the same may be reported to the council from time to time.

"And the magistrates and council nominate

and appoint the Lord Provost to be colonel and commander of the said 1,000 foot, with power to his lordship to conduct and direct them, and the other officers who shall be named to command under him, as the council shall think proper, or as the exigencies of matters shall require."

[Eodem die, Sept. 9th. Mr. Mac Laurin's Journal.] "The work went on but slowly; some of the embrasures in the flanks for the cannon, and in the curtain for the musqueteers, were opened."

[Eodem die.] "A letter was delivered to the Lord Provost, signed by three old provosts, Drummond, Mac Aulay, Osburn; and three old bailies, Nimmo, Blackwood, Wilson; on behalf of themselves and the other volunteers, praying his lordship to apply to the commander in chief for 200 stand of arms; and that he would appoint a place where the volunteers might be instructed in the use of the firelock and bayonet."

[Sept. 10th. Council Record.] "The council appointed Allan Burns, late of the lord Rothes's regiment, to be adjutant to the 1,000 foot commanded by the Lord Provost, which were now levying, and recommended to his lordship to find out proper persons to be officers, to command each hundred men under his lordship."

[Eodem die. Mr. Mac Laurin's Journal.] "A scheme of what was most necessary to be done was drawn up by a volunteer above-mentioned, and shewn to general Guest, and at his desire to an old officer of the dragoons; being approved by him, it was presented to the Lord Provost. It was insisted, that a high house, which takes a part of the wall near the Potter-Row port, should be possessed by a party, and a communication made from the wall to the house, to relieve or bring off the men as occasion might require; but this, so much insisted on, was not yielded till September 16th, when captain Murray approved of it; and then, though it was begun, there was not time to finish it.

"Unhappily at this time the elections of their deacons so much employed the trades, that few came to work on the wall; and it never appeared, that, after repeated complaints, proper authority was employed to oblige them to work in this time of the greatest danger."

The Lord Provost reported, That he had procured from general Guest an order to David Lyon, store-keeper of the castle, to deliver to his lordship, or his order, upon receipt, two hundred muskets, bayonets, and cartouch-boxes, and the like number of flints, with one barrel of powder, and an equal proportion of ball, which are to be distributed among the gentlemen volunteers.

The council also authorized the bailies of Potter-Row and Portsburgh to give receipts for sixty stand of arms, to be by them distributed amongst the inhabitants on proper receipts.

The council appointed the respective dea-

cons to make choice of six persons out of each of their incorporations, to be given in to the council on Friday next, that out of the same lists of six, three may be chosen by the council, to the effect the corporations may elect their several deacons for the year ensuing.

[Eodem die. Sept. 11th.] The Committee above-mentioned, appointed by the council on the 9th, met for the first time, the Lord Provost present, when they gave their opinion concerning some things to be done for the reparation of the walls, that the same should be forthwith executed so far as hitherto undone.

[Eodem die. Mr. Mac Laurin's Journal.]

"Some cannon were got from ships; and it having been earnestly recommended to the Lord Provost, that some hand granadoes should be got, and the city-guard and volunteers taught to use them, a message was sent to the general, and by him to the castle; but it was answered, That they had not above two hundred, and could not spare them. Afterwards, however, one of the volunteers, surprised that there should be so few in such a garrison, so well provided with stores, made a visit to the castle, and was told by the store-keeper, that he had five times that number, and was desired to tell the Provost, that he had a hundred at his service, if he had a mind for them. The message was delivered, but the granadoes never appeared. We found twenty-three that had lien in a chest since 1715, in the town's armoury, but they were never examined.

"A ditch that had been ordered at Wallace's Tower, had been carried on right for some time, but was afterwards, by some mistake, or bad advice, cast on the wrong side of the dyke. This day this was stopt, and a remedy proposed, but not executed for want of time.

"[September 12. A. M.] The Committee above-named, came to some farther resolutions about fortifying the city-walls, and, *inter alia*, recommended to Mr. Mac Laurin to go along with the tradesmen to explain the tenth article of his memorial, in relation to the putting the wall at Leith-Wynd in a better posture of defence."

[Committee's Record.] In pursuance of the Lord Provost's recommendation, the Committee resolved, That it be recommended to some of the city-guard, Edinburgh regiment, and gentlemen-volunteers, that they do learn the exercise of throwing the hand granadoes.

"[Eodem die. P. M.] The Committee resolve, That the council should invite those who have any quantities of grain at Leith, or other parts near to the town, to bring the same into this city, to be lodged in the city's granaries, to be kept therein from the enemy, rent-free."

"[September 13. Council Record.] The Provost reported, That, on the 12th current, he had given receipt to the store-keeper of the castle for a hundred muskets, bayonets, and cartouch-boxes, with half a barrel of powder, and ball in preparation; for the use of the volun-

teers of this city; and also that he had given receipt for two hundred stand of more arms to the use of the city's regiment.

"The proceedings of the Committee for levying the city-regiment, and forwarding the necessary steps to be taken for the safety and defence of the place, named the 9th current, were read over, and unanimously approved by the council, which recommended to the Committee to continue in their diligence."

The council then proceeded to make the short leets for the election of new deacons; after which there is nothing entered in the council record, till the 18th of September, the day after the rebels got possession of the town, when there were some proceedings relating to the annual election, which did not take effect.

[Eodem die. Minutes of the Committee.]

"The Lord Provost, and other members of the committee present, recommended to bailie Robert Baillie, and his committee upon the public works, and such of this committee as pleased to attend, or any three of them, bailie Baillie being always one, to see the whole particulars contained in the former minutes fully executed, without loss of time, and to take the advice and direction of such proper persons without doors, as they shall judge necessary for executing the whole particulars: with power to the said committee to press such workmen as shall be judged proper for completing the whole works before specified.

"[September 13. Mr. Mac Laurin's Journal.] The day of the election of the deacons there was very little done on the wall; the deacons could not be got; some houses in St. Mary's Wynd, that had large windows into the town, were shewn to some magistrates, and afterwards to the Provost: but no orders were given about them. This day the carriages of the cannon were examined, and any necessary reparation ordered.

"[Saturday, September 14th, Committee Record.] The Lord Provost in the committee reported, That he had this day signed an order for payment of 1,000*l.* sterling to the receiver general, to account of the cess due by the city.

"The Committee resolve, That the cess books, and those by which the annuity and poor's money is collected, shall be transported from the several collectors offices to the castle of Edinburgh for preservation; and the Provost wrote a letter to general Preston, the governor of the castle, praying him to receive the said books, and keep them for the use of the city."

This is the last entry made in the register of the proceedings of this committee, which does not appear to have met again after this Saturday the 14th.

"[Eodem die. Mr. Mac Laurin's Journal.] Little work on the walls and scaffoldings, the cannon were all proved and the shot got ready.

"[Sept. 15. dit. Journal.] The Lord Provost brought captain Murray to town to give his advice, and, not till this day, he ordered some works within the gates, which were begun immediately. There were more men em-

ployed this day than ever before ; and every body seemed to exert themselves : but the Lord Provost having never named the field-officers to the volunteers, they were now nine independent companies ; and, upon a motion to go out with colonel Gardner, they unhappily divided in opinion, which produced some heat amongst them. A most unlucky signal was pitched on to call them to their arms, the ringing of the fire-bell, which never fails to raise a panic in Edinburgh. This happened in time of divine service ; the churches dismissed in confusion and terror : and this was the first appearance of fear in the place : this signal ought not to have been proposed or allowed by the magistrates at such a time, the rebels not being far from us.

" This day most of the cannon were carried to the flanks, and in this as much regard as possible was had to the weakest places ; so that there were three on St. Mary's Wynd, which raked it. About six, one of the volunteers, with the chief of the bombardiers, came to the Provost, to have an order to load them ; he kept them waiting till eight, and then desired another to sign the order for him. They begun, though in the night ; but, after they came to the Bristo port, they were obliged to wait from half an hour after ten, till near one, for want of a centinel to place on the loaded gun, though they sent messages for centinels to the guard and council. This put a stop to their progress that night ; the guns were all loaded with small shot, and, as they flanked the curtains and gates, it was the more dangerous to leave them without centinels during all that time, while the rest of the wall was guarded, and, ' All is well,' was heard go round regularly ; there were no centinels from Bristo port to the West port, but one or two below."

On the evening of this 15th of September, when the rebels were within a few miles of the city, and it was apprehended that they might have come up to it during that night, it was resolved at a meeting with the Lord Provost, and others of the council, with the captains of the volunteers, that 700 men should be upon duty all night, to guard the walls all round the town, who were to consist of 400 trained bands, 40 of the new regiment, 100 volunteers, 90 sappers, 40 Dalkeith volunteers, 30 excise-officers.

[Monday, September 16. Mr. Mac Laurin's Journal.] " The works went on cheerfully till four or five at night ; a work was thrown up to defend the pass to Mountresay, some gates were shut up, some more cannon were got, and carried to the bastions and gates ; we were told that only 5 gunners were got at one o'clock, but were promised that pains should be taken to get more.

" Betwixt two and three o'clock, some burghers were said to be carrying about for subscriptions a petition to the magistrates, praying the town should capitulate. The alarm being great at the West port, the guns there were loaded, and the other works pressed on, so that

they were almost finished, when an account came, that a meeting in the New Church had agreed to capitulate. One of the volunteers called for the Provost, to know what was to be done to the cannon ; but was told, that his lordship had not time to speak to him. The call of, ' All is well,' did not go round the wall this night as the former, and the town seemed to be quite off its defence ; the volunteers delivered their arms into the castle."

Here Mr. Mac Laurin's Journal ends, which is all in his own hand-writing ; and, as he was himself a volunteer, and served the town as a chief engineer, to devise and direct the methods of fortifying the same ; as he was a person of great and eminent abilities, of excellent judgment as well as great learning, and of perfect probity and veracity ; as he had opportunity to know all the facts which he relates, and which he set down in writing recently after they happened, with great distinctness and precision ; and as the pursuer has reason to believe that his relation will be confirmed by the testimony of living witnesses, he has chosen, in this deduction of the facts, in order to make the charge and the defence better understood, to make use of the very words of professor Mac Laurin, as the most accurate and genuine relation of the facts that could be made, so far as he goes.

The events of Monday the 16th, when, after so much preparation for a defence, the city of Edinburgh was in effect surrendered, and opened its gates to the rebels, were various, and deserve to be more minutely recited. In the morning of that day provost Stewart received a message from the camp of the rebels, which was delivered to him by Andrew Alves, writer to the signet, importing, That the city of Edinburgh would be ill-treated by them, unless it should be readily or speedily surrendered. Upon receiving which, the Provost did not commit the said Andrew Alves to prison, neither did he give notice of this incident to any other of the king's officers, civil or military, nor did he so much as advise or charge Mr. Alves to forbear repeating or relating that message of his in the town, who went directly from the Provost to the street, and repeated his story to a circle of people who came round him, amongst whom one gentleman advised Mr. Alves to go and tell what he had been relating to his majesty's Advocate ; upon his doing which, the Advocate advised the Lord Provost to commit Mr. Alves to prison, which was now done too late to prevent the disclosing or spreading the threatening message which he had brought.

About two o'clock in the afternoon of that day, a petition was set on foot, which was put into the Lord Provost's hands about three, addressed to the lord provost, magistrates and council, and entitled, Representation of the under-subscribing inhabitants of the city of Edinburgh, and it is signed by 48 persons, setting forth, " That being deeply affected with a sense of the great danger to which the

city is presently exposed, by a rebellious army marching up thereto in order to attack it, and being, at the same time, sensible of our inability to make such a defence as with any probability may defeat their design of entering the same, without endangering the lives and properties of the inhabitants, and exposing the city to rapine and plunder, in the event of our being obliged to surrender, and that there is but small, if any prospect of assistance from the military; therefore praying them, who are the governors of the city, that, before they came to any resolution, either of defending or giving up the town, they will call a meeting of all the principal inhabitants and heritors at present in the place, to consult with them what is proper to be done in an affair of so great importance."

About the very time that this petition was going forward, a letter was signed by the Lord Provost, together with his majesty's Advocate and Solicitor, addressed to the honourable lieutenant-general Guest, in the words following: "Edinburgh, 16th September 1745. Sir, We are of opinion, that it would be for his majesty's service, that one hundred of the dragoons should be ordered in to the town of Edinburgh, to assist in defending this town."

A little after this, and betwixt the hours of three and four of the afternoon of this day, Mr. Walter Grosset was sent by the lord justice clerk to the Lord Provost of Edinburgh, to know whether he the Provost intended to defend the town or not, to press the defence thereof, and to assure him, that, if he resolved to defend it, not only the 100 dragoons he had applied for, but as many more as he pleased to desire, should forthwith be ordered in to his assistance. Mr. Grosset, in his way to Edinburgh, met the Lord Advocate coming from the town, and having acquainted him with the message lord justice clerk had sent by him Grosset to the Provost, he the advocate approved thereof, and desired Mr. Grosset to make all possible haste in delivering the same, and getting the Provost's answer.

Mr. Grosset found the Lord Provost in the Goldsmiths-hall, delivered to him the above message, and insisted for a direct answer, and that, to prevent mistakes, the same might be put in writing; which, after some conversation on the subject, the Provost gave him in writing, directed to the lord advocate and the lord justice clerk, in the following words: "You know the councils I was witness to: Was I to desire his majesty's troops to come into the town now, I might be upbraided, after that, for having laid a snare for his majesty's forces; should I refuse them, I may afterwards be accused for tamely delivering up the town of Edinburgh: I desire your lordships to be explicit, and tell me whether it is your opinion or not they should come in; and send your orders in writing."

Upon Mr. Grosset's receiving this answer, he told the Lord Provost, that he had already assured him, that it was the lord justice clerk's

opinion, that the town should be defended, and that therefore he must answer for the consequences of this unnecessary delay; and as for the lord advocate's opinion, that had already been given in writing an hour or two before, when he, along with the Lord Provost himself, had signed a letter to general Guest, requesting 100 dragoons to assist in defending the city.

About four o'clock in the afternoon, that is, about an hour after the petition above-recited was presented to the Lord Provost, praying for a general meeting of the inhabitants, to consult or deliberate with the magistrates and council, whether to defend or give up the town; such meeting was accordingly held in the New Church Isle, the Lord Provost being in the chair, and presiding.

At this meeting there happened to be present some of the reverend ministers of the city of Edinburgh, and some other persons of known good affection to his majesty and his government, according to whose observation, the far greater part of the persons there assembled were reputed of a quite contrary character; and indeed it was impracticable, at this meeting, to gather the true sense of the citizens in general, supposing it had been now seasonable or fit to deliberate in a popular assembly, whether to give up or pursue the defence of the city, for which hitherto so many preparations had been making, because the greater part of the most substantial and well affected burghesses, who were in arms as volunteers, had no notice of this meeting, or the intent of it, and could not possibly attend it, being at that very time under arms with their respective officers, waiting for orders from the Lord Provost or colonel, in what manner they should be disposed of, or act for the defence of the city.

At the meeting thus assembled, and thus composed, the general cry was for giving up the city without making any defence; and the reverend Mr. Logan minister, and others, who attempted to speak in opposition to this measure, were borne down with clamour and noise.

During this meeting Mr. Lindsay, deputy secretary of war, came with a message from general Guest to the Lord Provost, upon the general's hearing the rumour that there was a meeting of the inhabitants to deliberate about giving up the town to the rebels, to ask the Provost if he continued to be of opinion, that the dragoons should come into the town. To which the Provost answered, That he would neither bid nor forbid them, but that the general might do what he thought proper. Upon which Mr. Lindsay very naturally asked him, how he came to scruple about giving directions concerning the dragoons, when he had an hour or two before sent a written request to the general to obtain them. To which the Provost answered, That he had only signed that request at the desire of the Lord Advocate.

Towards the close of this general meeting, there was brought into it, in a manner that appeared somewhat mysterious, being handed in

from the door, from one person to another, in the crowd, a letter addressed, for the lord provost, magistrates, and town-council of Edinburgh, signed Charles P. R. bearing date, From our camp this 16th September, 1745, and in the following words :

" Being now in a condition to make our way into the capital of his majesty's ancient kingdom of Scotland, we hereby summon you to receive us, as you are in duty bound to do; and, in order to it, we hereby require you, upon receipt of this, to summon the town-council, and take proper measures in it for securing the peace and quiet of the city, which we are very desirous to protect: but if you suffer any of the usurper's troops to enter the town, or any of the cannon, arms, or ammunition now in it, whether belonging to the public, or to private persons, to be carried off, we shall take it as a breach of your duty, and a heinous offence against the king and us, and shall resent it accordingly. We promise to preserve all the rights and liberties of the city, and the particular property of every one of his majesty's subjects: but if any opposition be made to us, we cannot answer for the consequences, being firmly resolved at any rate to enter the city; and, in that case, if any of the inhabitants are found in arms against us, they must not expect to be treated as prisoners of war."

This letter was not read out in the general meeting in the church; for, as soon as the subscription to the same was read, the meeting broke up, and the Lord Provost, with the members of council there present, returned to their council-chamber, where this letter was again produced and read; after which it was moved, or agreed to by the Provost, that an answer should be sent to it, which was accordingly sent, first by one, and then by another deputation from the council, who went out to the camp of the Pretender's son, who was then about two miles to the south-west of the city, upon the water of Leith, in the parish of Collington. The return, brought in writing, to the first of these deputations, was in the words following :

" His royal highness the Prince Regent thinks his Manifesto, and the king his father's Declaration already published, are a sufficient capitulation for all his majesty's subjects to accept of with joy. His present demands are, to be received into the city as the son and representative of the king his father, and obeyed as such when he is there. His royal highness supposes, that since the receipt of his letter to the Provost, no arms or ammunition have been suffered to be carried off or concealed, and will expect a particular account of all things of that nature. Lastly, He expects a positive answer to this before two o'clock in the morning, otherwise he will think himself obliged to take measures conform. At Gray's-Mill, 16th September, 1745. By his highness's command, (Signed) J. MURRAY."

It is proper here to observe, that after the first deputation was sent out to the camp of the Pretender's son, notice was brought to the

Lord Provost, and the others assembled with him in the council-chamber, that sir John Cope, with the troops under his command, was arrived off Dunbar. This news was brought by Mr. Walter Grosset, who brought the original letters from Dunbar, giving notice of this event, together with a letter from the Lord Advocate, who was then at Musselburgh, certifying, that these were the original letters. All these Mr. Grosset delivered to the Lord Provost in the council-chamber; upon perusing which the Provost said, This news had come too late, for they had come to a resolution to capitulate, and had sent a deputation to the camp of the rebels for that purpose, and shewed to Mr. Grosset the letter above-recited from the Pretender's son, as the occasion of that resolution. Mr. Grosset then proposed to send after the deputies to bring them back; and for that purpose another member of the council was accordingly sent, but he did not overtake them.

About this time Mr. Drummond and Mr. Mac Aulay, captains of the volunteers, and who had been both formerly provosts of Edinburgh, (as the former now is) upon hearing of sir John Cope's arrival, came to the council-house, and insisted that the defence of the town should be now resumed, as there was so near a prospect of their obtaining relief, and proposed the ringing of the alarm-bell, as a signal to bring every body back to their posts.

To this the Provost answered, That he must be careful of the blood of the inhabitants; and that, as certain of their number had been sent out as deputies to treat, should they be in the hands of the rebels whilst the alarm-bell was rung, they, the deputies, might be ill used by the rebels; and also urged the former objections, of the difficulty and danger of defending the town. To this Mr. Grosset replied, That he knew the situation of the town so well, and the condition of those who were to come against it, who had no cannon and few arms, that he would undertake to be one of fifty that should defend the weakest place of it, till the troops should come to their relief. To which one of the council assenting, the Lord Provost seemed to give way to the resolution of defending the town, provided general Guest would agree to let them have from the castle what arms should be wanted. This Mr. Grosset undertook to procure, and went directly, accompanied by provost Coult, one of the council, to general Guest in the castle; who told him for answer, That he was glad the Provost had come to a resolution to defend the town, who might depend upon the utmost assistance that he the general could give them; and that as soon as the city arms should be put into proper hands for that purpose, what farther arms were wanting should be ready to be delivered to them from the castle.

Upon their return to the Provost, and reporting the general's answer, Mr. Grosset was told, " That as the person who had been sent to bring back the deputies had not overtaken them, the provost and council, as they had en-

tered upon a treaty, had come to a resolution not to defend the town."

It was then proposed and insisted on, that the cannon and arms should be delivered into the castle. For answer to which the Provost referred to the letter from the Pretender's son, and observed the danger which the town would incur, if they should remove their arms. To which provost Drummond replied, That if they, by giving up the town, assisted the rebels with arms to fight against the king's troops, would not they, upon retaking the town, be apt to look upon the inhabitants as enemies, and use them accordingly?

After receipt of the above answer to the first deputation, the council agreed to send out a second deputation, in order, if possible, to gain some more time. The answer to which second was also brought in writing, though not signed, as the former was, and in the following words: "His royal highness has already given all the assurances he can, that he intends to exact nothing of the city in general, nor of any in particular, but what his character of regent entitles him to: this he repeats, and renews his summons to the magistrates to receive him as such."

This second deputation returned to Edinburgh early in the morning of Tuesday the 17th of September, in a hackney-coach, which entered the city at the West port, and set down the deputies at Mrs. Clark's tavern, where the Lord Provost and others of the council were waiting for them, to receive their report, and then the coach drove down the street towards the Cannongate; and at the Netherbow port, which was then kept by a serjeant's command of the city-guard, the gate was opened to let out the hackney-coach, and a body of rebels, who were waiting without the gate, headed by Sullivan and Lochiel, rushed in at the gate, and became at once masters of this capital.

The rebels, immediately after their becoming masters of the city, seized all the cannon, arms and ammunition belonging to it; and the day following, being Wednesday the 18th, they issued a proclamation, requiring all persons in the shire of Edinburgh, forthwith to deliver up, at the palace of Holy-Rood-House, all the arms and ammunition they had in their custody, on pain of being treated as rebels: and on Thursday the 19th, they sent a message in writing to the city of Edinburgh, requiring, on pain of military execution, that 1,000 tents, 2,000 targets, 6,000 pairs of shoes, and a proportional number of water cantines, should be furnished to their army against the 23d, and promising payment as soon as the present troubles should be over. All which were accordingly furnished; and for that purpose a tax laid upon the inhabitants of 2s. 6d. upon each pound of their real rent, within the city, Cannongate, and Leith.

Thus was the city of Edinburgh, which had, in their address to the king of the 7th of this very month, said with great truth, "That this city hath always distinguished itself by a firm

and steady attachment to revolution and whig principles, and a hearty abhorrence of all popish and arbitrary government: and particularly, that, during the rebellion in the year 1715, their zeal for his late majesty was equalled by few, and surpassed by none; and, at the same time, assured his present majesty, that, at this time, they would stand by him with their lives and fortunes, and employ every power they were possessed of, and all the means his majesty should put in their hands, to disappoint the attempts of France and the Pretender." This city, which had given so many reasons to expect better things of it, was, after mighty preparations for a vigorous defence, thus poorly delivered up, without striking one blow, to an half-armed rabble, at a time when the king's army was within a day's march of the city, to the great discredit and reproach of the city itself, in the eyes of the world, who were ignorant of the particular circumstances and causes of so strange an appearance, to the hearty grief and sorrow of all its well-affected inhabitants, who are by far the greater part of them, to the triumph of the Pretender's son and his adherents, to the ruin of many unfortunate persons, who, by this appearance of success, were encouraged to engage in the rebellion, to the real and high detriment, not of the city itself only, but of the public; the rebels, by this capture, having been there furnished with arms, tents, and provisions of all kinds, which contributed chiefly to their obtaining the victory at Preston Pans a few days after; and that again, to the continuance and farther progress of the rebellion, to the immense addition to the expence of the public, the great interruption of commerce and credit, the progress of his majesty's enemies abroad, and the interruption of the internal tranquillity of this kingdom, until that was happily restored by the conduct and success of his royal highness the duke.

It was natural for all the world, at first sight, to lay the blame of an event, which has brought on and contributed to so many and great mischiefs, principally on the Lord Provost of Edinburgh for the time, being the chief magistrate and governor of the city; and the question now brought to trial is, Whether he was, or was not guilty or culpable in his deportment in that high office, during the transactions libelled, and above more particularly recited? The libel charges, that he was guilty of gross neglect of duty, and misbehaviour in his office on that occasion; and whether he was or not, must depend upon a due comparison of the duty of his office, with his actual behaviour, to see how far the one comes up to the other, and wherein he was alleged to be deficient; and to have counteracted his duty, the libel fairly and particularly sets forth, and thereby gives him the better opportunity to clear himself, if he be able..

Upon the libel being read in court on the 13th current, and the pannel being asked by the Court, as usual, what he had to say for himself, he said, in effect, that he was not

guilty, and that his conduct upon the occasion libelled, had been agreeable to his duty; and then left it to his counsel to offer and make good his defence at large; of whom five were accordingly heard at great length, and the substance of their arguments, as far as the pursuer could observe and recollect them, was as follows:

They took notice that the pannel had already suffered very great hardships by his long confinement, for the space of fourteen months, without being brought to trial, which, to a man engaged, as he is, in considerable trade and business, they said was a punishment greater than he merited, supposing all that is alleged in this libel were true. They said, that the source of this hard usage was the malice of certain enemies of the pannel in the city of Edinburgh, who, in order to ruin his credit and interest in this city, had set themselves to find fault with his conduct during the rebellion, had industriously misrepresented that conduct, and raised a popular clamour against him, which, having reached the seat of government, had produced the severities he has already met with.

That he was however now glad of an opportunity of having his conduct brought to trial by the certain test of judicial evidence, hoping that he would now be declared innocent upon examination, who, by popular clamour, had been pronounced guilty without examination.

At the same time it was also urged, though not very consistently with this last declaration, that the pannel could not competently be brought to trial at all in this court upon this libel; that the particular statute of king James the second, upon which it is laid, was almost three hundred years old, and was gone into desuetude; that, whilst it was in force, it was never meant to concern any more than the behaviour of magistrates in their judicial capacity, or ordinary administration on such occasions as commonly or yearly occur, but never to concern the extraordinary office of magistrates in time of war or open rebellion, when it may be very incident to them to err or commit mistakes, as many an honest burghess may be very well qualified to discharge the duty of provost, or other magistrate of his burgh, in quiet and peaceable times, from whom it cannot be expected, that in such an exigency as an open rebellion, he should be able to act the part of an expert military commander or governor of a town, and that the department of the Provost on such occasion, could not be tried at all at common law; that it was an improper question to be tried by a jury, who might very properly try a single issue, as whether a man was guilty of murder, robbery, or the like, but very unfit to give judgment upon a series of facts relating to the department of a provost, whether it was or was not agreeable to his duty; and therefore it was said, that the only competent method, by the constitution of this kingdom, for trying and

punishing trespasses such as those alleged in this libel, was by the authority of the legislature itself, in such manner as had been practised in the case of Alexander Wilson, who had been lord provost of Edinburgh at the time of the murder of captain John Porteous.

It was farther said, by way of more particular answer to the matters charged in this libel, that the same contained nothing criminal; that, as to the first Article, concerning the raising of the Edinburgh regiment, it was no crime in the Provost to entertain a doubt concerning the legality thereof, and to hesitate to commit what he apprehended might have been treasonable, and that he was justified in his doubt by the ablest advice given for applying for his majesty's special warrant, which was accordingly obtained.

That, as to the second, concerning the volunteers, he had the same reason to doubt concerning the legality of that measure, and it was no crime in him that he could not perceive any difference betwixt authorizing a body of armed men who were to serve without pay, and another body who were to receive pay: or that the one might be authorized without his majesty's special warrant, which had been advised to be necessary or proper in respect of the other; that, more particularly, as to this Article, the Provost had reason to take offence, that the measure was so far concerted and carried on by the volunteers, as that they brought him a petition, signed by ninety or a hundred persons, without his privacy, or previously consulting with him: this he had reason to consider as a designed neglect and insult upon him; and yet, as soon as he was advised that the thing might be lawfully done, he gave way to it; and it was a very slender circumstance to be charged as a crime, that he chose to have it said that he acquiesced in that measure, rather than that he heartily approved it, or that he should be charged with a defect of civility or good manners towards these volunteers.

As to the third, concerning the repairs of the city walls, it was observed in general, That the Provost was not the sole person answerable for any slowness or defect of care and diligence in this respect, though he had been singled out, and made the sole object of this prosecution. He was but one of many, who behoved to act by the authority of his council, and of the committee appointed to take the special direction of what concerned the defence of the city; and that all his conduct was agreeable to the sense of these two bodies, and approved by them, and without them he could do nothing; for that the king's warrant concerning the regiment, being addressed to the lord provost, magistrates and council, and having ordered that the regiment should be under the direction of them all, and the council having appointed a committee for that purpose, and to consider what farther should be done for the safety of the city, the Provost was thus limited in the legal exercise of the known duty of his office; that, however, the Committee, whereof he

was one, had given the necessary orders for the repairs, and warrants for impressing workmen for that purpose; that the cannon upon the walls were actually loaded on Sunday the 15th, and applications were made to procure gunners for managing them.

To the fourth Article it was said, That no proposition could be accepted or rejected by the Provost alone, but by the whole council: that as to the proposition in the Article mentioned concerning the trained bands, of the purging that body of disabled or suspected persons, it was true that the Provost was averse to it, and chose rather to undergo any hazard, than take upon him to fix such mark of infamy upon a number of his fellow-citizens, without any certain ground of charge against them.

To the fifth Article, That here again the pannel was charged with defect of civility or good manners (a very unusual point of ditty); and that supposing the fact true, of the conversation with sir Robert Dickson, it was not unreasonable, nor could justly give offence, for the Provost to propose such method for finding subsistence to the ordinary men, as inlisting them in the Edinburgh regiment, which would also be a means to insure their attendance and service for a limited time, so as they might not be at liberty to withdraw at pleasure, and this perhaps when the city should be under the most pressing exigency.

To the sixth, That the only thing here imputed to the pannel as an offence, was his not immediately committing Andrew Alves to prison, the doing which might have been of bad consequence, to deter others from bringing intelligence to the Provost concerning the rebels or their designs; and that at best it was not a very clear case, that it was at all lawful or competent to commit Mr. Alves for only repeating to the Provost what the rebels had said to him, when they seized him and made him their prisoner; that his receiving the message, or hearing what Mr. Alves said, could be no crime; and, as soon as he heard it, he repaired to the council-chamber, then held in the Goldsmiths hall, where he imparted this piece of intelligence to some others of the council, who agreed that it should be concealed, lest it should intimidate the inhabitants; that, however, soon after, the Lord Provost saw the Lord Advocate, and, in pursuance of his advice, actually committed Mr. Alves.

To the seventh and eighth Articles it was said, That Monday the 16th of September 1745, was a day of universal distraction in the city of Edinburgh; that the two regiments of dragoons of Hamilton and Gardner, who, with the whole city-guard, had been posted at the Coltbridge, a mile west from Edinburgh, about three afternoon, retreated, and past by the north side of the town, eastward, which greatly heightened the panic of the citizens, being thus abandoned by the only military force they had in their neighbourhood, and no news of sir John Cope or his army was now come, and at the same time the chief civil officers of the crown

VOL. XVIII.

had left the city; and yet, in this situation, the Lord Provost, in the Goldsmiths hall, where many of the council and other inhabitants were assembled, declared himself ready to act his part for the defence of the town; but that he was now seconded by few: but at this juncture, one Mr. Grosset arrived, and delivered a message to the Provost, that he should send for, or consent to receive a party of dragoons; at which he, the Provost, was surprised, having been present the night before at a council of war, where it was resolved to be improper to bring any of the dragoons into the city; upon which he gave his answer in writing to that message, which is above recited: that the inhabitants, anxious to know the resolutions of the council, pressed into the room in a crowd; and then somebody else, not the Provost, proposed to adjourn to the New Church Isle; that, on the way thither, a gentleman on horseback told loudly, that the rebels were near 8,000 strong, which still heightened the panic; that yet, in the New Church Isle, the Lord Provost spoke as he had in the council-room, declaring himself ready, if the citizens were so disposed, to do his part for defence of the city; that at this meeting, the letter from the Pretender's son was brought in, to the reading of which he, the Provost, objected, and thereupon returned with his council to the Goldsmiths-hall.

That the inhabitants had now the direction of affairs in their hands, and they were governed by their fears and terrors; that the higher civil officers of the crown being gone, the magistrates sent to their own assessors for advice; but they also were all gone, excepting one, who declined giving any explicit opinion on such high matters; upon which the letter was read, and found to be to the same purpose with Alves's message, and then they thought themselves under an unavoidable necessity to send out a deputation, in order to procure a delay, and gain some time for the expected relief to come.

To the ninth and tenth it was said, That the defence of the town was now given up as impracticable; and that upon serious deliberation it was the unanimous opinion of the council, that no direct order should be given by the Lord Provost concerning the arms of the volunteers, or the cannon upon the city-walls, for fear of incensing the lawless multitude of rebels to put their threats in execution.

The same answer was given to the eleventh Article relating to the city-arms, to which there was now added, and not till now, a matter of fact never formerly alleged by the pannel, neither in his examination before the committee of the Privy council, on the 7th December 1745, nor in the signed answers returned by him to his libel, and it must appear very strange if it was true, that the most plausible answer he had to make to this very heavy Article should never have been once mentioned till now, being, that he the Provost could prove that he sent a message to general Guest, proposing that he should send a party of soldiers to take away the city-arms and carry them up to the castle.

3 M

Upon the twelfth Article it was said, That the opinion of the citizens of Edinburgh, or any number of them, concerning the pannel, could afford no evidence that he was actually guilty; and that, upon the whole, the surrender of the city was owing to a train of unavoidable accidents, for which he the Provost was not blameable.

Notice was also taken more than once, by the pannel's counsel, that he himself had a very large property, consisting of a stock of wines, lying in his cellars at Leith, which would be exposed to the discretion of the rebels in case of their coming to Edinburgh; but the conclusion drawn from this fact was not, to the pursuer's observation, distinctly spoke out or explained by his counsel; so that the pursuer is still at a loss to know what use was meant to be made of that observation, whether by way of argument to evince the sincerity of Mr. Stewart, in desiring to keep the rebels at a distance, that his own moveable estate, of so great value, might not come under their power; or if it was meant to be offered by way of excuse for him, that he was afraid of giving offence to the rebels, by opposing them with vigour and zeal, because they might have it in their power to hurt him deeply in his private fortune or effects; and therefore the pursuer must leave it to them to explain their own meaning or intent, in alleging and insisting on this matter of fact.

It was farther observed for the pannel, though not very consistently with the allegation, that there was nothing material relevant or criminal charged upon him in these Articles; that the charge therein contained, if it amounted to any crime at all, was no less than that of high-treason; for that such, no doubt, it was, if he pursued measures that had no other tendency than to betray the city, whereof he was chief magistrate, into the hands of the rebels: it would have been this crime in case the Provost had acted with that ill intention, which is the essential requisite to render the actions of men at all criminal or punishable; and if the Provost had no such intention, then, supposing he had committed several errors in his conduct, these were no more than errors in judgment, and such mistakes in matters prudential, in difficult and dangerous times, when a magistrate must act one way or other, ought never to be imputed to him as a crime; for though the part he chuses do not prove successful, the opposite conduct might have been no more so, and, in that case, that very opposite conduct might, with the same facility, have been laid hold of as the ground of a prosecution: for example, if he had brought in the dragoons into the city, and these afterwards had fallen into the hands of the rebels; or, suppose he had found means to suppress the threatening letter from the Pretender's son, and the inhabitants had stood to their defence, and yet the town had been stormed, and the rebels had then cut the throats of the inhabitants, supposing he had escaped the massacre, it is easy to imagine

what a heavy charge might have been formed against him, as having been the author or cause of such calamities: and therefore, since his conduct is not alleged to have been directly treasonable, it proceeded at worst from mistake, or errors in judgment, which is no crime at all that is punishable by the law in a free country, such as this is.

It was farther observed, that the pannel was not so much as charged in the libel with disaffection to his majesty's government; and that however the facts libelled might be apt to make some impression, in maintaining a charge of that sort, they could not be combined or laid together to an end or purpose that was not directly libelled; that the facts alleged in the libel might indeed amount to a proof of this proposition, that the Provost was in his judgment averse to the measure of defending the city of Edinburgh, as a thing that was impracticable, and therefore not eligible or prudent to be attempted; and it was contended, that this was not even an error in judgment, for that he was in the right in being of that opinion, for that the city of Edinburgh is no strong or fortified place; and though it is surrounded by an old wall, and a lake upon one side, and that the rebels had no artillery, it had been very practicable for them to have made their way into the town; they might have blown up the gates, or a part of the wall, with gun-powder, or have set fire to the houses on the west-side of St. Mary's Wynd, that enter from without, and yet are a part of, and adjoining to the town.

All this was, so far as the pursuer could observe or recollect, the substance of what was urged by the several counsel for the pannel in his defence; and in reply to these things, it was, and is now, on behalf of his majesty, and for the public interest, observed as follows:

It is admitted for the pursuer, that the counsel for the pannel have rightly observed, that the facts charged upon him, if it had been charged that they were done *dolose et male animo*, of set purpose or design to have put the city of Edinburgh into the hands of the rebels, would have amounted to high-treason; for the lord Hale says, in his Pleas of the Crown, vol. 1, p. 168, "If a captain, or other officer that hath the custody of any of the king's castles or garrisons, shall treacherously, by combination with the king's enemies, or by bribery, or for reward, deliver them up, this is adherence to the king's enemies."

And again, p. 169, he says, "The truth is, if it were delivered up by bribery or treachery, it might be treason: but if delivered up upon cowardice or imprudence, without any treachery, though it were an offence against the laws of war, and the party subject to a sentence of death by martial law; yet it is not treason by the common law, unless it was done by treachery."

And if the pannel, without being engaged in the interest of the Pretender, or without receiving any direct bribe from him or his adherents, did even suffer himself to be moved by

the fear of their hurting his private property in his wine-cellars at Leith, to neglect or counteract any part of his duty as Lord Provost of Edinburgh, this was at least bordering extremely near upon high-treason.

The atrocity and the nature of high-treason is excellently described in the Digests of the civil law, in the title *Ad legem Juliam majestatis*, l. 1, in these words: "*Proximum sacrilegio crimen est, quod majestatis dicitur, § 1, majestatis autem crimen illud est, quod adversus populum Romanum, vel adversus securitatem ejus committitur, quo tenetur is, cujus opera, dolo malo, concilium initum erat,—quo armati homines cum telis lapidibusve in urbe sint, convenienter adversus rempublicam; locave occupentur, vel templa; quove cœtus conventusve fiat, hominesve ad seditionem convocentur:—Quove quis contra rempublicam arma ferat: quique hostibus populi Romani nuncium literasve miserit, signumve dederit, feceritve dolo malo, quo hostes populi Romani concilio juventur adversus rempublicam.*"

It is true, that, in this description, the '*dolus malus*,' or the ill design, is an essential ingredient; and it is in general true concerning all crimes, as it is well expressed in the rescript of the emperor Hadrian, l. 14, '*Ad legem Cornelianam de sicariis*,—in maleficiis voluntas spectatur, non exitus:" but the '*voluntas*,' or the '*dolus malus*,' is to be gathered from the facts by the judgment of the Court or the jury, by whom the party is tried against whom the facts are charged, which may very possibly have proceeded from a treasonable design against the crown or the public.

The king, however, may, if he be so graciously pleased, waive the insisting against a criminal for the highest crime with which he may be possibly chargeable; so the lord Hale, p. 374. "All treason is misprision of treason and more; and therefore, he that is assisting to a treason, may be indicted of misprision of treason, if the king please." *Stanf. P. C.* 37. 6. *Co. P. C.* 36. 2 *R.* 3. 10. 6.

"The judgment in case of misprision of treason, is loss of the profits of his lands during his life, forfeiture of goods, and imprisonment during life."

And the same lord Hale, p. 143, reports "a Case, where there was a consultation of the judges, where he was present, in the year 1675, relating to the weavers in and about London, being offended at the engine-looms for making of ribbons, who rose in great numbers to destroy those engines in different counties, and did damage to the value of several thousand pounds.

"Five of the judges seemed to be of opinion, that this was treason within the act 25th Edward 3, upon the clause of levying war against the king; or at least upon the clause of the statute of the 13th Charles 2, chap. 1.

"The other five judges were not satisfied that this was treason within either of these statutes.

"Many of them therefore concluded, that if

Mr. Attorney should think fit to proceed as for a treason, the matter might be specially found, and so left to farther advice——

"Upon the conclusion of this debate,—Mr. Attorney, upon consideration of the whole matter, it seems, thought fit to proceed for a riot, and caused many of them to be indicted for riots, for which they were convicted, and had great fines set upon them, and were committed in execution, and adjudged to stand upon the pillory."

In the present case, the doubt is not concerning the tendency of the facts charged upon this pannel, namely, That it was to give up the city of Edinburgh, the capital of North-Britain, not to the king's enemies only, but to a Pretender to his crown; and the doubt is only, *quo animo* this was done, whether with a treasonable intent, or through cowardice, or negligence, or imprudence; and this might have been left to the jury to judge, in case he had been charged with high-treason. It is therefore one signal instance of the mildness and benignity of his majesty's government, that the pursuer has been ordered to prosecute this pannel, "not for high-treason, but for a high misdemeanour, in having many ways acted contrary to his duty, and thereby suffered the city of Edinburgh, with the canon, arms, ammunition, and provisions, to fall into the hands of the rebels;" and when the pannel's own counsel are sensible that the facts charged upon him are such, as, at least, border so near upon high-treason, and might have been charged as such, they cannot be permitted at the same time to plead, or, at least, they ought not to be listened to when they plead, that the facts here charged have no relevancy in them, or do not amount to any crime or offence whatsoever.

The other observations above recited were extremely groundless. That this libel does not charge the pannel with disaffection to the government, and that the opinion of the well affected citizens, mentioned in the 12th Article, That he was secretly in the interest of the Pretender, cannot infer his being actually guilty of any crime whatever, for disaffection is not the name of a crime known in the law; no man can be tried for that disposition of his mind, but for the effects which it produces; and, if the facts here charged had been alleged to have been done by the pannel through disaffection to his majesty and his government, that would have been in reality, or in effect, a charge of high-treason, which was not the thing intended in the present case.

And as for the other remark, it was far from the meaning of the pursuer to alledge, that any man can be punished merely for the opinion of others concerning him: But that fact is mentioned in the libel for this reason, that, when the main question, moved by this trial, is, Whether the pannel was, or was not culpable or negligent in the execution of his office as lord provost of Edinburgh, during the rebellion, it is a fact or circumstance strongly

tending to evince that he was so guilty, if it be true that the whole tenor of his behaviour was such, as to induce a general suspicion or belief amongst the well affected inhabitants, that their provost was secretly in the interest of the Pretender; for, whether they were or were not in the right in that suspicion or belief, they, being so immediately and so deeply interested, could not fail to be constantly attentive to the conduct of their provost; and, if that was such as produced in them such apprehension or belief, that very thing is one demonstration, supposing that they carried their conclusion too far, that his conduct was not such as became a faithful, vigilant, and zealous magistrate upon that occasion.

The nature of the office of Lord Provost of the city of Edinburgh is well known to this court. It is partly the same that belongs to the chief magistrate of every royal burgh in the kingdom, and partly arises from the particular grants to the city of Edinburgh; they are sheriffs within themselves; the Lord Provost is the high sheriff, and, of late years, as well as formerly, has acted as such, and tried causes even capital, and the bailies are, *ex officio*, his deputy sheriffs.

The Lord Provost is the king's lieutenant within the city, he is colonel of the city-guard by the act of parliament authorising that, and he is chief commander of the city trained-bands or militia; and this very provost claimed, and was allowed to be the colonel of the volunteers, and was by the council declared to be colonel of the Edinburgh regiment of 1000 men, that was to be raised and paid by the voluntary subscriptions of the inhabitants: In short, the whole military power within the city was in him, and the chief executive power, in all respects.

Neither is it true, that the order in the king's sign-manual for the regiment, that the same should be under the direction of the Lord Provost, magistrates, and council of Edinburgh, was either intended or had the effect to derogate in the least from the legal powers and privileges of the Lord Provost; that warrant was granted on the application of the whole council of Edinburgh, the regiment was to be maintained by them and their fellow-citizens, the end proposed by it was the defence of his majesty's government, but more especially the preservation of the city of Edinburgh against the rebels; it was therefore very properly and graciously declared, that this regiment should be under the direction of the magistrates and council of Edinburgh; that is, it should not be withdrawn from the immediate service of that city, or sent elsewhere, like the rest of his majesty's troops, at the discretion of his generals, where it might be of use for his service, without the consent of the magistrates and council of Edinburgh. But this did not hinder the Lord Provost from being, according to the constitution of the city, the colonel or chief commander of that regiment, as well as of all the other military force within the city. It

cannot be supposed to have been the sense of his majesty's order, that the whole town-council, consisting of thirty-three persons, should act the part of a colonel, or have the immediate command of a regiment: the utmost effect that order could have, was, that the whole council should have power to give general orders as to the manner of employing the regiment, such as every prince or state are daily known to give to the generals or commanders of their armies, who are not the less vested with the powers of commanders, that they are subject to such direction or controul.

Neither is it true, that the appointment of a committee, in the terms above-recited, was an obstruction or hindrance to the Provost's acting in the manner that the libel requires of him, unless he can say, which he has not done, nor can do by any thing that appears on record, that either the council or the committee resisted his will, or that they opposed or over-ruled him, by majority of voices, in any one thing that he proposed to be done towards the preservation of the city.

His station, therefore, gave him power sufficient, and rendered it his duty to be the chief person to devise, order, and execute every thing that was proper for preserving his own city from the rebels; and, if the facts be true that are in this libel charged, it is left to the judgment of this court, whether his conduct was agreeable to his duty; or if he was not, on the contrary, faulty or negligent in the execution of his office, and guilty of manifold misbehaviours in it on the occasion libelled.

That occasion called for the most earnest, vigilant, and active discharge of the duty of chief magistrate, vested with such powers as he had; and, to illustrate this, the pursuer begs leave to quote a passage from a learned author, *Ærodi rerum ab omni antiquitate judicatarum pandectæ*, in the title, *De officio præfecti vigilum*, whereof the rubrick is in these words: "*Negligentiam, in iis qui ad summum reipublicæ pertinent, esse capitale*, cap. 1. *M. Militius, Cn. Lolius, L. Sextilius, triumviri nocturni, cum incendii arcendi causâ, quod Romæ in sacra via exortum esset, cum hamis et dolabris, omnique familiâ publicâ evocati, tardius advenissent: à tribuno plebis die dictâ ad populum, damnati sunt: leves ob causas, inquit Valerius: sed disciplina necessaria.*

"*Idem fere apud nos, senatûs judicio, cum adhuc illic essemus advocati, Gabastoni, præfecto vigilum, accidit: qui vocatus ad sedandam scholarium de suo prato seditionem, non venisset. Nam indignum esse, qui, ut excubet reipublicæ, ab omnibus aliis muneribus excusetur, et præsens vice est absentis: is in tanta necessitati, ubi minima mora summi momenti est, segnem, tardum ac negligentem se præbeat, aut (quod minus quoque est ferendum) contumacem.*—*Et quando omnibus viribus opus est, nulla causa, nulla excusatio proficit.*

"*Cap. 2. P. Bilus quoque triumvir nocturnus, à P. Aquilio, tribuno plebis accusatus, quod vigilas negligentius circumspiceret, populi*

judicio concidit. Nam quod levius sit in aliis causis: in his, ut in re militari, capitale esse. Quia puncto seepetemporis, maximarum rerum occasiones amittuntur: neque in hujusmodi his errare fas est, aut dicere, Non putabam."

It was upon the same principles that are here set forth, and followed in practice in the Roman republic, as well as the French monarchy, that our old statute 1457, in the libel recited, was made, for the punition of negligent officers, and namely, "provosts of burghs, and others, who should be found faulty and negligent in the execution of their offices, and it may be lawfully proved on them, or notoriously known;" but with this difference indeed, that every offence of this kind is not made capital, as 'mitiores pœnæ nobis semper placere,' "but only that they be punished, in their persons and goods, after the quantity of their trespass, at the king's will." This is such a statute as hardly enacts any thing positive, or other than what is included in the common law of this and all other civilized nations, and therefore never can go into disuetude. And it seems unnecessary to offer any answer to the groundless distinction advanced by the pannel's counsel, betwixt the duty of a provost, or other magistrate, upon common or ordinary, and extraordinary occasions, there is neither law nor reason for that distinction. No man should undertake the office of a pilot, who can only hold the helm in his hand in serene weather, and is incapable to do his duty when a storm rises. And the allegation of this distinction ill becomes the pannel, who is a gentleman by birth and education, and, as such, superior to the ordinary rank of burgesses, who may be, and often are raised to the office of chief magistrates.

Such, for instance, was the character of provost Wilson, a brewer in Edinburgh, who was lord provost of that city when captain Porteous was murdered, who, upon the same principles that are above-mentioned, was punished by an act of the tenth of his majesty, merely for being faulty or negligent in the execution of his office; for the act recites the murder of captain Porteous, "And that, for some time before the committing the said murder and riot, it was commonly reported in the said city of Edinburgh, that some such atrocious fact would be attempted, which, by proper care in the magistrates, citizens and inhabitants of the said city, might have been prevented; notwithstanding which, Alexander Wilson, provost of the said city, and then actually resident therein, and fully apprised of the said wicked design, did not take any precautions to prevent the said murder and riot, nor use the proper or necessary means to suppress the same, or to preserve the peace of the said city, or, after the perpetration of the said fact, to discover, apprehend, or secure the authors, actors or abettors thereof, in manifest violation of the trust and duty of his office of chief magistrate of the said city.—And to the end that the said enormous misbehaviours and

neglects of duty may not go unpunished, and that other persons may not presume, through hopes of impunity, to be guilty of the like for the future, it is enacted, that the said Alexander Wilson be disabled from holding any office of magistracy, &c."

Here the conviction by the parliament itself proceeds altogether upon negatives, or neglects of duty in the provost or chief magistrate, upon a very singular and extraordinary occasion; and so far it is a precedent in point to the present case, which in other respects appears to be vastly more atrocious than what provost Wilson was guilty of, who, it seems, did not give credit to the reports that were current before that extraordinary attempt was made, and suffered himself to be surprised and disconcerted, when the mob was suddenly raised which committed that murder; instead of which, here was long warning, and many precautions seemingly taken by the Provost, heartily intended by many of the citizens, to avert evil of a much higher nature, tending to overthrow the constitution and establishment of this united kingdom.

It appears quite unnecessary to answer the allegation offered for the pannel from this precedent, which has surely not the least tendency to prove, that the offence, which was here punished by the legislature itself, was no ways punishable by the common law, or the general statutes of this realm.

And as little can it avail the pannel to enter now into an argument upon the expediency of the resolution in general, of putting the city of Edinburgh in a posture of defence against the rebels; for though it be true, that before any resolution was taken upon this question, it was very lawful and competent for the Lord Provost to declare his opinion, if it was such, for the negative; yet, after it was a resolution formed by the council of the city, with the consent and approbation of the most considerable citizens of all ranks, many of whom had previously solicited that such measures should be taken; and after he, the Lord Provost, had seemingly concurred, and given way to the general sense of the citizens, as well as of the council, it surely then became his duty as the first magistrate, who had the chief executive power in his hands, to exert himself, *bonâ fide*, for the execution of the general measure that had been thus resolved; for better indeed had it been never to attempt such defence, than not to go through with it until actually overpowered by superior force; or that, to the great expence and discredit of the city, after many preparations to provide a force for its defence, and application to the crown, which was readily granted, for a warrant to authorize the regiment, and to the inhabitants for a subscription to pay it, which was filled up with great alacrity, and many of the chief of them pressed for leave to venture their persons, as well as contribute their money for the cause which they had so much at heart, when, to furnish arms, the king's arsenal in the castle

was at their command, and a considerable force assembled, that the Provost should so manage matters, as that the defence should be thrown up just at the time that it became needful to make use of all these preparations.

This will require some better excuse, than that the Provost, in his private opinion, was averse to the measure in general of defending the city, or that he was afraid of provoking the rebels to rob his wine-cellars at Leith, (if that be meant by taking notice of his great property there) for it is certain the Provost professed to concur with the general sense of the city, to provide for and resolve to make a defence; and, even upon Monday the 16th of September, in the afternoon, in the council-chamber, and at the general meeting in the New-church, it has been alleged, as a part of his defence, that he still declared stoutly for adhering to that resolution; and in these circumstances, for his counsel to say for him by way of apology for his conduct in the Articles libelled, that the same proceeds from, or is to be accounted for, by his disapproving in his judgment of the general measure of making any defence, and offering reasons now in support of the justice of that opinion, instead of excusing him, is in reality to accuse him very deeply of acting all along with a duplicity, which must have been highly criminal, professing to concur in the execution of a measure, which in his heart he disliked, and, as the execution of it chiefly belonged to him in virtue of his office, managing that in such a manner as to defeat the design.

As to that design itself, the most sanguine promoters of it never pretended to maintain that the city of Edinburgh was capable of holding out a regular or a long siege; the very number of the inhabitants, and the mouths to be fed, must render this impracticable; but, as the circumstance which exposed them to be at all visited by the rebels, was the misfortune of sir John Cope's getting to the northward of the rebel army in the Highlands, and as he was known to be returning from Inverness, through the low country, along the eastern coast, and as other succours were daily expected from Holland, it was very reasonably concluded, that the pressure upon the city of Edinburgh could be but of short endurance, and that, very possibly, keeping out the rebels a single day might save the city altogether from falling into their hands; and the event in a great measure justified the expectation; for, upon the evening of Monday the 16th September, when the first deputies were sent out by the Provost and others to the rebels camp, to treat about the surrender demanded by the letter from the Pretender's son, those deputies had not yet reached that camp, when authentic advice came, that sir John Cope, with his army, was arrived at Dunbar, which is but 20 miles from Edinburgh: a very signal instance of the truth of what is said in the passage above quoted from *Ærodius*, "quod

puncto sæpe temporis maximarum rerum occasiones amittuntur."

What then was the occasion, or whence arose the necessity that obliged the pannel, on the afternoon of Monday the 16th September, to abandon the defence of the city, for which so many preparations had been made and continued till this very hour, and when, though the enemy was at hand, there was all the reason in the world to believe that succour and relief from the king's troops was not far off, as the event that very evening accordingly proved, by the actual arrival of sir John Cope off Dunbar, and authentic notice thereof being sent to Edinburgh at the juncture of time already mentioned?

The answer to these questions made for the pannel, in the debate upon his libel, have been, "That, on the afternoon of this Monday, the 16th of September 1745, the city of Edinburgh was in great consternation, occasioned by the approach of the rebels, and the threatening messages sent from them, by the retreat of the dragoons from Coltbridge, and the withdrawing of the civil officers of the crown from the city; that, in these circumstances, the general cry of the inhabitants, at a public meeting assembled, was for abandoning the defence of the city; after which the fears of the inhabitants was the governing principle, the multitude had the power in their hands, and there was no longer any regard paid to magistrates or legal authority."

But to this it is replied, That the retreat of the dragoons the pursuer does not take upon him to approve or justify; very possibly it was made sooner and farther than it was necessary, though it cannot be said that the two regiments of dragoons, with the city-guard of Edinburgh, if the whole rebel army had come up to them, ill armed as it was, would have been a match for such a superiority of numbers: but when the resolution was taken to defend the city of Edinburgh, they did not, nor could reckon upon these two regiments of dragoons, as what they could rely upon, or promise themselves to be always attending for their assistance; and when the defence of the city was abandoned, they were no farther removed than Musselburgh, which is but four miles off, and an offer was made to the Lord Provost to bring them back, or any number of them he should desire, to assist in the defence of the city.

That the withdrawing of the civil officers could afford no just cause for abandoning that defence; the lord justice-clerk had only gone from Edinburgh that day about noon, to dine at his own house about three miles off, and was returning in the afternoon to the city, when he got notice by the way, that the rebels were by that time at the West port of the city, which was not true, but afforded a very just reason for his returning to his own house; and though the lord advocate at this time also withdrew from the city, and went as far east as Musselburgh, yet, before he left the town,

he had concurred with the provost and the solicitor, in procuring an order from general Guest, for 100 dragoons to march into the city, to encourage and support the loyal inhabitants in defence of the town. And he renewed his advice by Mr. Grosset, whom he met going into the city in the afternoon, with a message from the lord justice-clerk relating to those dragoons. And of what use could a single civil officer be in the case of a siege? Or, to what purpose should he shut himself up within the walls, and expose himself, in case of the town's being taken, to become a prisoner in the hands of the rebels?

And as for the affrighted multitude, who are said to have got the government into their hands, it was the fault of the Lord Provost if he permitted this to be: none of the forces under his command were withdrawn, and he had still at least 1,200 well-armed men under his command, the walls of the city repaired and planted with cannon, and the castle and its garrison ready to assist him: and, in this situation, why did he suffer himself to be despoiled of his authority, or to be governed by the real, or by the affected terrors of the timorous, or of the disaffected multitude? Why did he give way to a general meeting, in the church, of an assembly so composed? Why did he not tell them that the city had already taken its measures and its resolution to stand upon its defence, and order all who did not chuse to depart the city, or to act in its defence, to repair to their respective houses, and keep within doors? He had still the legal authority in him, and the means in his hands to make that to be respected, when he had so great a body of men in arms under his command.

In these circumstances, the methods he pursued demonstrated the end which he had in view, namely, to deliver up, instead of defending the city; for, in order to justify himself in abandoning that defence, he ought to have gone another way to work, than to assemble a promiscuous multitude in the church, exclusive of the volunteers. If there was truly any change of circumstances occurred, that made it reasonable now to lay aside thoughts of that defence which had been so long provided for and pursued, he should have summoned a council of the same, or the like persons with those who had first contributed to the resolutions of making any defence at all, that is, his own fellow-magistrates and councillors, with the chief officers of the volunteers and trained-bands, and deliberated with them upon the supposed change of circumstances; and if, in such council, it had been debated and resolved, by plurality of voices, to be now impracticable, or inexpedient to persist any longer in the measure formerly concerted, of defending the city, that resolution might have justified or acquitted him; but nothing of this kind is alleged, and thereby he has taken the whole upon himself. He consulted with a disaffected multitude, as some of the persons present in

it, of undoubted credit, say it was: and there is no record of any resolution of the town-council, or of the committee above-mentioned, of Monday the 16th of September, when this change of measures was brought about, nor any record of the council after Friday the 13th, before the rebels entered the city, nor of the committee after Saturday the 14th.

As for the particular facts or articles charged upon the pannel, the pursuer has reason to believe he can prove every one of them; but he now says, that neither the separate relevancy, nor the proof of every one of them, is essential to the conclusion of this libel, whereof the general scope and averment is, that the pannel, at the time and upon the occasion libelled, was faulty and negligent, or guilty of malversation in the discharge of his duty; and, for making out this, particular articles are specified: and although every one of these shall not appear separately material, or shall not be proved, it is no matter, if enough be proved to make out or support the general charge.

The case is of the same nature as if a civil action were brought, for instance, for removing a suspected tutor by the kindred of the infant, in order to which a number of articles of misbehaviour were alleged in the libel; in which case, though some of these articles should not be proved, or well accounted for by the defender, yet, if any number should be made good and accounted for, the general allegation of the libel would be proved, and the pursuers behaved to prevail in the conclusion of their action.

At the same time, to touch briefly at the particular Articles, it is replied to the answer to the first, That it is not the pannel's doubt concerning the point of law that is charged as a crime, but his urging that doubt, *inter alia*, demonstrates his backwardness to pursue any measures for defence of the city, for the doubt itself was extremely groundless. There are sundry old laws against private leagues or bonds among the subjects, which have nothing to do with the present case; but the only law, upon which the pannel's objection, that it would have been high-treason to arm without authority from the crown, can be founded, is the 5th act of the Restoration parliament 1661, entitled, Act asserting his majesty's royal prerogative in the militia, and in making peace and war, &c. which act declares, "That it is and shall be high treason to the subjects of this kingdom, or any number of them more or less, upon any ground or pretext whatsoever, to rise or continue in arms to maintain any forts, strengths of garrisons, to make peace or war, or to make any treaties or leagues with foreign princes or estates, or among themselves, without his majesty's special authority and approbation first interposed thereto."

Now, in the first place, whilst this act continued in force, it surely could never be meant to comprehend the case of the king's subjects being called out, by the magistrates acting under his authority, to take arms for his

service; for instance, if the militia of any county should be called out by the high sheriff, or lord lieutenant, to resist a foreign enemy, or a domestic rebel: and the chief magistrate of a burgh within his district, has the like power to the sheriff, or lord lieutenant, to defend the burgh over which he presides.

But, 2dly, This act, upon which the doubt is singly founded, is repealed by the act of the 7th of queen Anne, chap. 21, which provides, That nothing shall thereafter be high-treason in Scotland, but what is such in England. And farther provides concerning certain crimes therein mentioned, viz. Theft in landed men, murder under trust, fire-raising and assassination, which were declared to be treason by particular statutes in Scotland, shall hereafter be adjudged and deemed to be capital offences. But concerning the fact which is made treason by this act 1661, no such provision is made.

The pursuer's replies concerning the other Articles are already in substance made in the foregoing argument, and he shall not prolong this paper to go through them minutely, and shall only farther observe, That, as to the new defence offered to the eleventh Article, concerning the city-arms, that though it comes with a bad grace to be now for the first time proposed, the pursuer does not oppose the pannel's being allowed to prove this allegation, and all other facts and circumstances that have been by him alledged for his vindication or defence against the charge contained in this libel. In respect whereof, &c. WILL. GRANT.

INFORMATION

For ARCHIBALD STEWART, of the City of Edinburgh, Merchant, and late Lord Provost of the said City, Pannel or Defendant,

AGAINST

His MAJESTY'S ADVOCATE for his Majesty's Interest, Pursuer.

July 28, 1747.

Before entering upon the objections to the relevancy of this libel, it may not be improper, first of all, to lay before the Court a genuine and succinct account of every fact and circumstance which any way concerns the conduct of the pannel, or can give any light to form a judgment of it during the period mentioned in the libel.

Upon the 17th of August, 1745, the pannel, then Lord Provost of the city of Edinburgh, had the honour to receive a letter from the marquis of Tweeddale, one of his majesty's principal secretaries of state, of the 13th current, acquainting him, "That their excellencies the lords justices, having received intelligence, that the Pretender's son was already landed, or intended to land in Scotland, had recommended it to him to give notice to the Provost thereof, that he might exert his care and vigilance on this occasion, and make use of such precautions as he should judge necessary for preserving the public peace within the bounds of his jurisdiction."

To this letter the Lord Provost wrote an answer on the 17th, as follows: "It is with pleasure I assure your lordship, that this town was never better affected, nor more peaceable than at present. Nothing shall be neglected on my part to preserve people in their duty towards their king and their country; and we trust in God that no threatened dangers shall ever reach us; at the same time, we are not to sit down in security, but will keep a watchful eye, in order to prevent, as far as it is in our power, every thing that may disturb the peace of this place."

The above letter was laid before the magistrates when it came to hand, and the answer was approved of by the town-council, at a meeting on the 23d of August, and, in pursuance of these resolutions taken by the Lord Provost and council, the following Orders were forthwith issued.

August 23. Orders were given to levy and raise thirty centinels to be added to the city-guard, agreeable to the powers given them by act of parliament, and to provide them with clothing and all other necessaries.

Recommended to the Lord Provost and magistrates to direct the captains and officers of the trained bands, forthwith to make up full lists of all the persons belonging to their several companies, and to report the same to the magistrates against Saturday next; and that the captains warn and premonish them all to be ready, in case of any disturbance, to appear with their best arms, upon an hour's warning, at the ordinary places of rendezvous.

Orders were given for directing the constables of the city to make out full and ample lists of all the inhabitants and residents within their districts, and report the same to the magistrates; and to be diligent in inquiring and finding out what strangers may happen from time to time to come within the city, and lodge within their several districts.

Orders for proclamation, requiring and ordaining all inn-keepers, strangers, and others, who lodge and entertain strangers, from time to time, and as oft as any stranger shall lodge with them, to give in to the captain of the city-guard a note of their names and designations at their arrival; and of the time of their departure, under a penalty for each transgression; and the captains of the guard ordered duly to report to the magistrates, in writing, every morning, lists of the particulars that should be delivered in to them by the inhabitants.

These Orders, most of which proceeded upon motions made by the Lord Provost, were all agreed to by the magistrates and council, and signed by him in their presence; and care was taken of the due and punctual execution of them all, without any loss of time.

The next day, being Saturday, August 24th, it was suggested to the Lord Provost that it might be fit to call a general meeting of the inhabitants, to consider what was to be done on this occasion; to which he agreed, and con-

municated the proposal to the council at their next meeting on Monday, August 26, who also approved of it; and accordingly the meeting was ordered, and the most substantial and well-affected burgesses were invited to assist with their counsel and advice; and at the meeting, which could not be convened sooner than next day, August 27, the above resolutions and orders were reported to them by the Lord Provost; and the meeting "unanimously approved thereof, and gave his lordship and the council their hearty thanks for the wise and prudent measures they had already taken; and, farther, offered it as their advice to the magistrates and council, to name some of their own number, and such other of the burgesses as they should think fit, as a joint committee to consult with and take the advice of the Lord Justice-Clerk, Lord Advocate, Mr. Solicitor, and such of the lords of session as can be found in town, with regard to what farther steps the magistrates, council and community can legally take for preserving the peace of the city, and contributing to defeat the dangerous and wicked designs of the enemies to his sacred majesty, his royal family, and present happy constitution."

August 28. The committee were accordingly named by the council next day, and that very evening met with the king's counsel, and such of the judges as were in town, at the lord justice-clerk's house, where it was proposed, that a regiment of a thousand men should be levied for the defence of the town, and service of the government, to be subsisted, for three months, on the charges of such of the inhabitants as were willing to sign an association for that purpose. And as it had been, for some time, a general subject of conversation and debate without doors, how far it was legal to levy such regiment without a special order from his majesty, the opinion of the learned and honourable persons present was asked upon this point, and they all agreed, that it could not be legally done without his majesty's warrant. Upon which it was resolved that the Lord Advocate should make application for such warrant; and that, in the mean time, trial should be made of the inclinations of the inhabitants to concur in this measure, how soon the warrant should be obtained from his majesty.

August 30. The Lord Provost and magistrates were employed in receiving proposals for putting the town in a posture of defence; and the Lord Provost wrote letters to the magistrates of boroughs, and ministers, for about the distance of fourteen miles round the city, begging that they would send as early intelligence as possible, by express on horseback, of any bodies of armed men they could discover marching towards this city.

August 31. About the same time many different orders were given by the Lord Provost to proper persons, with a view to put the town in a posture of defence, which were afterwards executed, particularly for clearing the town wall, building stairs to get up to the wall,

VOL. XVIII.

making communications from one place to another, raising a work at Wallace's Tower, to prevent the communication by the back of the castle. This last work had been directed at first in a very proper manner by bailie Robert Baillie, overseer of the public works for this year; but bailie Gavin Hamilton afterwards stopt it, and gave a different direction, by which that work was for some time retarded.

Monday, September 2. The Lord Provost signed an order in council for augmenting the town-guard to the number of 126 men.

September 3. Bailie James Stewart and Mr. Colin Mac Laurin applied to the Lord Provost, with a message from some gentlemen who had met the evening before, desiring in general that he would see to the defence of the town; and particularly, first, That he would order moulds to be made for casting bullets. 2dly, That the sluices of the North-Loch should be filled up. And, 3dly, That a distinction should be made betwixt the inhabitants of known good affection and others, before he came to intrust them with the town's arms.

The Lord Provost agreed to the first two proposals, and ordered the immediate execution of them; but as to the third, he demurred. He observed to them the inconvenience of making distinctions amongst inhabitants upon bare suspicions, especially about the time of an approaching election, when parties were forming, which would lead them to spread calumnies against one another upon by-views; that this might occasion heats and dissensions dangerous to the peace of the town, and even strengthen the disaffected by combining them together; that, where any real ground of complaint could be condescended, he was ready, not only to exclude such persons from serving in the trained-hands, but also to oblige them to find security for their good behaviour. After this reasoning the gentlemen did not insist farther upon that part of their proposal, nor lay it before the council, who were the proper judges of the expediency of such measures, had they thought it fit to be insisted on.

September 4. The Lord Provost met with the same two gentlemen, and several other burgesses, in a tavern, and, after a good deal of conversation upon the several expedients proposed for defence of the town, he desired they would digest their proposals, and give them in, in writing, which he would either immediately comply with, or give them an answer in writing. This they seemed cheerfully to agree to, and promised to give him in their proposals, but never did it.

September 6. Some of the same gentlemen presented to the Provost a petition signed by about 80 or 90 of the inhabitants, offering to serve as volunteers for defence of the city against any attack, and particularly in contributing to erect the necessary and proper barricades for defending the ports and several avenues to the city, and praying that the city-wall might be instantly repaired, and stairs put up, &c. to appoint proper places of rendezvous,

3 N

furnish them with necessary arms, and allow them to name their officers.

The Provost told the gentlemen who had met with him two days before, That, after what had past at that meeting, he expected they would have communicated to him their intentions, as they promised; but he never would mind any personal neglect in a matter where the public safety was concerned, and therefore should take care to present their petition to the magistrates without delay, and return their answer.

September 7. He did accordingly order a meeting of the magistrates to be summoned against eleven next forenoon; and that there might be no unnecessary delay from any doubtfulness concerning the legality of this measure, the Provost advised with the lord advocate upon that point in his way to the meeting; and having got his and the solicitor's opinion of the lawfulness of it, he forthwith met with the magistrates, and laid the petition and opinion before them; upon which they cheerfully approved of the proposal, and applauded the zeal of the petitioners.

Immediately after, the Provost went to the volunteers, who were met in the New-church Isle, and told them their petition was to be complied with in every particular, except the nomination of their officers: but, notwithstanding that did of right belong to him, yet, as he wished of all things they might have such officers as they inclined to obey, if they would give him a list of 20 or 30 of their number, he would confine his nomination to that list. They complied. He named six of the fittest persons in the list for captains, with whom they were highly pleased, and he left the nomination of the subalterns to themselves, for which they returned him thanks.

The same day the Lord Provost moved in council, that an Address should be drawn up and presented to his majesty, which was unanimously agreed to; and a dutiful address was accordingly drawn out, approved and signed; after which it was resolved, "To authorize the magistrates and conveyer to employ persons with all possible speed to put the city in a posture of defence, and particularly the walls thereof."

In consequence of this, workmen were immediately sent for, and the Lord Provost ordered them forthwith to fall to work, under the direction of Mr. Mac Laurin, and to work night and day, Sundays not excepted, till all was finished, and gave warrants for impressing workmen.

September 8. The Provost, of his own accord, ordered all the powder that was in the town's magazine to be carried to the castle; which was so punctually executed, that he behaved afterwards to take from the castle what was necessary for the service of the town.

About the same time he wrote an order to Robert Davidson, tacksman of the meal-market, to clean out the granaries, and provide meal.

September 9. This morning the Provost

having occasionally heard that his majesty's sign-manual, authorizing to levy the regiment proposed, had come the day before to the lord advocate's hand, he went and waited on his lordship, and, upon receiving the sign manual, he immediately called a council, and produced the same, which was addressed to the lord provost, magistrates and town council of Edinburgh; and recites, "That it had been represented to his majesty, that the lord provost, magistrates, town-council, burgesses, and others of his city of Edinburgh, from the great loyalty and affection to his person and government, were at this juncture willing and ready to raise and maintain, at their own proper charge and expence, by voluntary subscription and contribution, 1,000 foot for the defence of the said city, and the support of his government; and they were desirous of obtaining his royal licence and authority for the same: his majesty therefore, reposing entire trust and confidence in the lord provost, magistrates and town-council of his said city, did thereby authorize and empower them to raise, form and discipline 1,000 foot to be employed for the purposes above mentioned; and his majesty did thereby farther order and command, that the said 1,000 men shall be under the direction of the lord provost, magistrates and town-council of Edinburgh: for the doing whereof this shall be a sufficient warrant."

As by this warrant the direction of the regiment was placed in the magistrates and town-council, so, as soon as it was read they took the direction into their own hands, "and appointed, as a committee, the present and old magistrates, conveyer, deacons Lauder and Porteous, or any five of them, the Lord Provost being always one, and, in case of his absence, any nine of them, to be a quorum, to consider what is most proper to be done upon this occasion for levying the said thousand foot; and particularly to take in the subscription of such of the inhabitants as are willing to contribute for levying and maintaining the said thousand foot, with their proper officers, to be named for the purposes mentioned in the said sign-manual, for the space of three months after they shall be so enlisted; as also to consider what is proper farther to be done for the safety of this city, and for support of the government; which committee shall meet at the Goldsmiths-hall, twice each day, at the hours of eleven in the forenoon, and four in the afternoon; and recommended to the said committee, to keep a book, into which all their proceedings and actings shall be regularly ingrossed, to the end the same may be reported to the council from time to time."

At the same time, the council "ordered the serjeants, corporals and drums of the city-guard to beat up for volunteers to complete the thousand foot; and they nominated the Lord Provost to be colonel and commander of the said thousand foot, with power to him to conduct and direct them, and the other officers who shall be named to command under him

as the council shall think proper, or as the exigencies of matters shall require."

And the Lord Provost shewed his cheerful concurrence in this measure, by a subscription far beyond any other that was made to this regiment.

September 10 to 13. From this day, to the 13th of September, there are daily proceedings of the council and committee above named, who went on with all diligence in raising the men, taking in subscriptions, providing arms, grain, and other necessities, and doing every thing that was judged proper for putting the town in a posture of defence. It is unnecessary to trouble the lords with reciting minutely every particular which appears to this purpose from the records of the council, and the minutes of the committee, which regularly met for carrying on the business intrusted to them; and the Lord Provost appears, by their minutes, to have been present at every soderunt.

The pannel is desirous to abridge the trouble of the Court, in reading a long story, as much as possible; and therefore shall but just mention a few of the many instances of his care and concern in carrying on the general measure now resolved on, for the defence of the town, about this period.

That whenever any complaints were made of the slowness of the workmen, that they were not going on with that diligence they ought, the Lord Provost severely reprimanded them, and gave fresh warrants to press men and carts, with strict orders to lose no time.

That bailie Robert Baillie, who had the inspection of the public works, with his committee, were ordered to see that every thing was done that was necessary for the defence and preservation of the town; and he had the charge of impressing workmen and carts, and exercising all the authority that was necessary for carrying on the public works with the utmost dispatch.

That the Provost, on the 10th of September, wrote a letter to captain John Dalrymple, and also applied to captain James Murray, to take upon them the command of the volunteers: but they both refused to accept of a command of men who had not been accustomed to military discipline.

That the Provost moved in the committee, to recommend to some of the city-guard, Edinburgh regiment, and gentlemen volunteers, that they should learn the exercise of throwing the hand-granadoes.

That, in order to preserve the public money from falling into the hands of the rebels, the Provost called a council, and proposed, that what was owing of the king's cess should be paid up to the receiver-general, though it had not been paid by the inhabitants to the collector; and for that purpose the Provost forthwith signed an order on the cash account for 1,000*l.* sterling, payable to the receiver-general, to account of the cess due by the city, which was delivered to the receiver-general.

September 13. That the proceedings of the

committee for levying the city's regiment, and forwarding the necessary steps to be taken for the safety and defence of the place, were read over in presence of, and considered by the council, and unanimously approved of, and the council recommended to the committee to continue in their diligence.

September 14. Notice having come to town this morning, that the rebels had passed the Forth some miles above Stirling, and were directing their march towards Edinburgh, and colonel Gardiner's dragoons were retiring before them, the Lord Justice-Clerk sent a message to the Provost, desiring he would meet with him, and some lords and gentlemen of the army, and others, whom he was to bring from the country, in order to concert what was to be done in this exigence. The Provost immediately went to Lord Justice-Clerk's house, and told his lordship he was sensible how much he stood in need of such advice; that he would always be ready to follow it, and would be sure to attend them whenever called for.

He went on still in doing every thing that could be thought of as necessary to provide for the defence of the place. He signed a warrant this day, along with lord Somerville as justice of peace, to press men and carts for carrying sand and other materials to the ramparts and works about the walls, which was accordingly executed; and also to bring in hay, corn, and provisions into the town, and John Walker and William Mercer were sent to Leith for that purpose.

This day also the Provost ordered 24 men to attend captain Bryden in mounting the cannon upon the walls;

And granted warrant to bring into the town all the ladders, arms and ammunition, which were in the Cannongate, Potter-row, and other suburbs adjacent to the town, that they might not be seized by the rebels.

Sunday, September 15. We are now come to Sunday the 15th of September; and as the proceedings of this day, and the next, are greatly misrepresented, as well as curtailed in the pursuer's information, it is necessary to be a little more particular in reciting them.

Upon Sunday morning, when the committee were met in the Goldsmiths-hall, a gentleman came with a message from general Guest, to acquaint them, that when it was proposed, at a meeting at his house, to order Hamilton's regiment of dragoons to join Gardiner's, and make a stand against the rebels, the general made a difficulty, in regard he had no body of foot to sustain them. Upon which a captain of the volunteers undertook, that, at least, 250 of these gentlemen would be ready to march upon any service the general would order them; he believed more would, but he could answer for 250, providing the Provost would allow 50 of the town-guard to go along with them; and the gentleman desired to know if the Provost would consent.

On first hearing of this proposal, the Provost had some difficulty to part with the town-

guard, as being the body of men he could most depend upon, in case of any occasion, to defend the town; on which bailie Robert Baillie said, he thought 50 of the town-guard could not be better employed than in supporting so many of the volunteers, if they marched out; and instantly the Provost, upon recollection, agreed, and answered, "Mr. Baillie, you are in the right; in place of 50, they shall have the whole town-guard, and as many of the Edinburgh regiment as are capable of doing service."

The Provost immediately went down in a coach, along with the gentleman who had brought the message, and told the general the resolution of the committee as to sending out the town-guard and the Edinburgh regiment; upon which the general sent orders to Hamilton's regiment to march through the town and join colonel Gardiner's.

The Provost came up to town from the general's in a coach, along with provost Drummond, the first captain of the volunteers, and by the way met two of their officers, who came into the coach, and told them, they were sure the volunteers would not comply with the measure proposed, and that they were now separated, and had gone home.

The Provost asked Mr. Drummond what would be the best signal to bring the volunteers together? He said they had only two, three guns from the castle, or ringing the alarm-bell. The first, says the Provost, is not in our power, as the castle is shut; and the other, in time of divine service, may alarm the town. No help for it, says Mr. Drummond, the bell must be rung.

The bell was accordingly rung, which alarmed the people, and made them leave the church. The volunteers convened in the Lawn-market, and buzz'd Hamilton's dragoons as they past along. Their officers applied to the Provost, and asked if he had ordered them to go out and join the dragoons? He told them, he had no power to order them any where out of town; but he had consented, that as many as were inclined should go out with the town-guard and Edinburgh regiment, to sustain the dragoons in opposing the rebels. The measure was generally not liked by the volunteers, and was imputed to the Provost as if he had been the first proposer, as one of their officers told him with a good deal of warmth.

After many expostulations among themselves, at last Mr. Drummond marched up on the head of his company, and some others followed. They went the length of the West port, and then returned.

Two of their officers went forward to stop the town-guard and Edinburgh regiment, who had marched on to sustain the dragoons, and found them between the Coltbridge and Brucehill: but the Provost being informed of this, sent orders that the city regiment and town-guard should march forward, and take their orders from the commanding officer. General Guest, when he heard of the return of the volunteers, was vexed at the disappointment, and said, if

he had expected it, he would not have ordered Hamilton's regiment to go out to join the other in defence of the town.

The Provost sent up Mr. Stewart, chief constable, to the castle, with a signed order for a number of matches for the use of the cannon mounted on the town-walls, which were accordingly delivered, and brought down to the Goldsmiths-hall.

The Provost convened the trained-bands under their proper colours and officers, and gave them notice to hold themselves in readiness upon a minute's warning, and three companies of them were ordered to mount guard.

He also ordered the constables to search houses, of which there was any suspicion, for arms and treasonable papers.

This afternoon brigadier Fowkes came to town, and the Provost was called in the evening to Lord Justice-Clerk's, where Lord Advocate, general Guest, brigadier Fowkes, and several other gentlemen of the army were present. A proposal was made, that the dragoons might be brought into town, with a view to give them some rest and refreshment, and have their horses fed on the street: but after the thing was debated among the gentlemen of the military, who considered that the avenues of the town might be taken possession of by the rebels, the streets barricaded, and the houses lined, and that the dragoons might very probably, by this means, fall into the hands of the rebels, it was agreed to be a thing not to be attempted.

From this the Provost went along with major Cochran, captain Murray, provost Drummond, and others, to the house of Mrs. Clark vintner, where a disposition was made of the several corps of armed men into different quarters of the town, particular guards assigned them, and places for their alarm-post condescended on, where each of them should appear on the proper signals; copies of which were given to the commanding officers of the different corps.

This afternoon the Provost met with sir Robert Dickson upon the street, who had come in with a considerable number of volunteers; he received him with great civility, as both his personal character and errand deserved; immediately gave orders that his men should be lodged in the Kirk, and that a sufficient quantity of bread and ale should be carried there for a refreshment to them without delay.

About this time messages were sent to the castle and Leith, to procure gunners for loading the cannon. Mr. Guest could afford us none out of the castle; bailie Scot made search over all Leith, assisted by David Dryburgh, Charles and Alexander sheriffs, and sent us up what could be found there; application was also made to the Urilla man of war, and the answer returned, that the captain could send none.

By orders from the Lord Provost, the great guns upon the walls were begun to be charged on Sunday evening, and the gunners employed continued to charge them till two o'clock next morning.

The Provost this evening sent up an officer of the town-guard to beg the general would order a signal to be put up in the castle, to discover the road the rebels should take to Edinburgh, that measures might be taken to turn the whole force as much as possible to that side; and an answer was returned, that his request should be complied with.

All this Sunday evening, from seven to twelve, the Provost was constantly employed, either in the Goldsmiths-hall, or at the different guards of the town, conversing with the military men about orders, or with the captains of the trained-bands. At twelve at night he began the grand round, which lasted till about four o'clock in the morning.

Monday, September 16. Having gone home for an hour or two, he was upon the streets again at six in the morning, reviewing the barricadoes that were making at the ports, and superintending the other public works about the town.

At nine o'clock, he ordered bread and ale to be carried out to the dragoons; and upon Mr. Fowkes's applying to him for the town-guard and Edinburgh regiment to be sent out to join the dragoons, he immediately ordered them to parade in the Parliament-close, and march out, which they did.

He next gave orders that mutton, beef, &c. should be bought, and boiled in all the taverns in town, for the use of the dragoons; and went through several of the taverns with Mr. Baillie and Mr. Hamilton, and gave directions thereabout.

Being informed by colonel Clayton, that the provisions first sent out were not sufficient, he expressed his displeasure that his first orders had not been fully obeyed, sent to the bakers and brewers, and caused prest carts to carry out provisions.

Between ten and eleven o'clock, when sitting in a closet in the coffee-house with commissary Leslie, Andrew Alves came in to them, and said, That, in his way to town, he happened to ride near the rebels; that the duke of Perth knew him, and ordered him to come nearer; and upon hearing he was going to Edinburgh, said, I understand the Provost and magistrates are making great preparations against us, but we are resolved to pay them a visit; if they will keep their arms in their possession, and allow us to come peaceably into town, they shall be civilly dealt with, if not, they must lay their account with military execution, or words to that purpose: and turning to a young man he called the Prince, he asked him, Whether or not that was his pleasure? Which the other seemed to assent to. The Provost said, "Mr. Alves, this is a very extraordinary message; but they will find we are not to be intimidated by threats."

The Provost went immediately over to the Goldsmiths-hall, and acquainted two gentlemen of the committee of what Mr. Alves had said, and consulted with them what was proper to be done. They were of opinion it was most proper to neglect it, and take no step that might pub-

lish to the inhabitants the threatening they had received.

The Provost, after reviewing some of the works about the town, on his return to the street, was informed, that Andrew Alves had adventured to repeat to others what had passed betwixt him and the rebels; upon which he went straight to the Lord Advocate to ask his advice; where he found Mr. Alves, and, by the advocate's advice, he signed a warrant for committing him.

Monday, September 16th, afternoon about three o'clock, the Provost being then in Mrs. Wilson's, was called out from the company by Mr. Baillie and Mr. Forrest, who acquainted him, that a petition to the magistrates was handing about among the inhabitants, desiring they might be consulted upon what was proper to be done upon this juncture. At this the Provost was surprised, as well as vexed: However, as soon as he came out to go to the Goldsmiths-hall, he was met by a great crowd of inhabitants, who delivered to him the petition, which is produced in process, praying, "That the magistrates, before they came to any resolution, either of defending or giving up the town, would call a meeting of all the principal inhabitants and heritors, at present in the place, to consult with them what is proper to be done in an affair of so great importance." Upon this the Provost immediately went to the Goldsmiths-hall; they followed him, and endeavoured to crowd in: Upon which he was provoked, and asked, If they meant to enforce their petition by numbers; begged they would be gone, and leave it to the magistrates, who were to consider what was most expedient to be done with respect to the place; and immediately he caused the drum to go about, and order the inhabitants to retire from the streets, who were all in an uproar upon hearing that the dragoons had retreated from the rebels.

The Provost, in his way to the ports, met with the lord advocate and solicitor, who asked him, if he did not think 100 dragoons might be of use to be brought into the town; and he agreeing that they might, the advocate asked him to sign a letter in conjunction with him and the solicitor, to general Guest, to send in 100 dragoons; which the Provost immediately did, and then went on to see the gates barricadoed.

After the gates were barricadoed, he ordered Mr. Stewart the constable to mount the walls, and look out for the dragoons; and so soon as he should see them come near the walls, to open the gates and let them in. He had before provided a large quantity of hay for the use of their horses.

As he was returning up the Westbow, a citizen of very considerable substance, and undoubted loyalty, came to him, and said, "He applied to him in name of himself, and many of the most considerable citizens, to expostulate and beg, that the defence of the town might not be insisted on, which could only tend to expose the lives of the citizens." To

which the Provost answered, "That his request could not be granted."

In returning to the Goldsmiths-hall, the Provost gave captain Hamilton orders with respect to the city-guard, 20 of them to remain at the West port, 20 to go to Bristo port, 20 to the Netherbow, and 40 of them to remain in the guard, to move to any place where they should be most needed, which was allowed to be a very proper disposition.

During all the way in his return, the cries of the people were heard on every side, "What, would he have them all murdered, by defending the town after the dragoons had run away?" And other words to that purpose.

As soon as he was returned to the hall, where the committee was met, he sent bailie Hamilton, Robert Baillie, and John Forrest, for the Lord justice-clerk, lord advocate, and the solicitor, to beg they would come and assist them with their counsel, saying, he chused to be determined only by their advice. They returned, and reported that they had all gone out of town.

The Provost expressed great concern when he found himself destitute of the advice he most relied upon at so critical a juncture, and then desired that the officers of the army should be sent for, and the officers of the volunteers who were convened at their posts by the ringing of the alarm-bell. Most of the captains, and some other officers of the volunteers came; but no other military men were found in town, except captain James Murray and major Cochran. The Lord Provost addressed himself to them, and said, "That, for his part, he was willing to encounter any danger for the defence of the town: He hoped the inhabitants would do their duty, and hoped the enemy might be kept out until assistance should come to their relief; and asked Mr. Murray what was his opinion?" Who said, he pitied him, but was at a loss what advice to give: And being farther pressed by the Provost, he answered, That if the volunteers, trained-bands, and other armed men within the town, were disposed to do their utmost, he believed they might make a good defence; but if they were not disposed to fight, he would advise the sending the government's arms to the castle.

The Provost said, "He hoped those gentlemen who had undertaken the defence of the town, would not now abandon it when the danger drew near, but remember what expence the town had been at, what assurance they had given to his majesty, and what they had promised to perform, when the danger was at a greater distance." He then asked all the captains and officers of the volunteers that were present, what he could expect from them? One said, he did not find any disposition in his men to fight: Another told, that there did not remain fifteen of the company to which he belonged; but as he had promised to risque his life in defence of the town, he would still do it; though he was sure not five of the fifteen would follow him. And others of them declined to make any answer at all.

About this time Walter Grosset came into the Goldsmiths-hall, and he said he was sent by the Lord Justice-Clerk and Lord Advocate, to desire the Provost would send an order to general Fowkes to bring the dragoons into town. To which he answered, that he was surprised at the message, after what had passed the night before; that he would sign no order, as he had no power over the dragoons; but if they pleased to send them in, they should be made very welcome, and we should join them in defence of the town.

Mr. Grosset said, That the Lord Advocate and Justice-Clerk thought it proper that the Provost should sign the order. To which he answered, That he did not chuse to make himself accountable for the dragoons, after what he had heard in the Lord Justice-Clerk's last night; but thought it more proper that they should send their orders, if they had altered their way of thinking about that matter. Mr. Grosset desired to have the Provost's answer in writing, with which he readily complied.

About this time the fears of the inhabitants had brought a great crowd into the Goldsmiths-hall, and about the door of it, who all cried out against the madness of defending the town, when all the officers civil and military had left it, which shewed they understood it could not be defended. The crowd still increasing, a member of the council proposed they should go to the New Kirk Isle, as they were like to be smothered in that narrow place: upon which the Lord Provost left the hall, and went out to the Parliament-close, where great numbers came up to him remonstrating, in the strongest terms, against attempting any defence, which could have no other effect, but to expose them to military execution.

The Provost did all he could to reanimate the people; but when he was talking to them, Mr. Cunningham of Gardiner's dragoons came up to him on horseback, with a message from lieutenant colonel Whitney, desiring he would order the dragoons' baggage to be forthwith sent out to them, because they were going to Haddington; that they found they had been greatly deceived in the number of the rebels; for now they computed them to be near 8,000. This account, which was given by Mr. Cunningham in the hearing of the crowd, did greatly contribute to increase the terror of the inhabitants, who were heard crying every where, What a madness it was to pretend to stand out against such a number!

The Provost expostulated with them in the New Kirk Isle, "That he hoped they would not now abandon the defence of the town; that he was ready to concur in it to the utmost of his power, and expected the danger would not be so great as some men's fears made it." But upon this such a noise was raised, that nothing could be heard but a general cry for giving up the town, not above two or three of the whole multitude present appearing to be of a different opinion.

About this time a letter was thrown in, di-

rected to the Lord Provost and magistrates, which was opened by Walter Orrock; and when he told it was signed by Charles P. R. the Provost stopt him, and said, he would not witness the reading such a letter: upon which many calling out to read, he said he had been too long there, and with difficulty got to the door, and returned to the Goldsmiths-hall, where the magistrates also came, and a great number of the inhabitants, and immediately they sent to convene the town's assessors; but only one of the four was to be found: they asked his opinion what was to be done with respect to the letter, and whether it should be read? But he having declined to give any opinion, and the inhabitants expressing the utmost uneasiness both within and without doors, the letter was read without any authority from the Provost, and contained a threatening of their highest resentment, in case any opposition was made to their entry, or that any of the cannon or arms were allowed to be carried off.

After this nothing was to be heard but loud cries against a fruitless opposition, and against delivery up of the town's arms to the castle, which, it was said, would occasion destruction to the city; and many in the hall insisted that a deputation should be sent out, to beg that hostilities might not be commenced against the city, until they had time to deliberate what answer they should return; and, as it was believed the enemy was at the gates, the deputation was immediately hurried away, viz. bailies Gavin Hamilton, John Yetts, David Inglis, and conveyer Norrie.

The volunteers in the mean time did, without applying to the Lord Provost for orders or directions, of their own accord, take a resolution to give up their arms to the castle, which they forthwith executed, and thereby dismist themselves from the service.

One of their principal officers, whose zeal or bravery was never at any time called in question, upon his return from the castle, was met on the street by a gentleman, who told him, the rebels were not near so numerous or formidable as they had imagined, and that it would be a shame to surrender the town to them. But the officer answered, It might be so, but it could not now be helped; that information had come too late.

And some hours before, another gentleman of the same corps had sent a message to his wife, begging her not to be under any fear about him, for the town was to be given up.

At this time a message came from the castle, by Robert Griffith a gunner, desiring that the cannon on the town-walls might be nailed up. It was the opinion of the committee, that the Provost should give no orders in these matters, after what had past; but he told the messenger, that Mr. Guest was at liberty to do what he thought best for the service of the government, and nothing hindered him to spike up the cannon, if he thought fit: and he was also told, that the town-officers would shew him where the cannon were, for that purpose.

About the same time the adjutant of the city regiment wanted to know what should be done with the arms under his care; and was told, that it was not thought proper the Provost should give orders thereanent; that the council was afraid the city might suffer from the cruelty of the rebels, and even that they themselves might suffer from the populace, if such orders were given; but, at the same time, that the soldiers of the new-levied regiment, possess of those arms, should be privately acquainted to return them to the castle; and by this means the whole arms of the city regiment were returned, except those of the men upon guard.

But it was not practicable to get the arms of the trained-bands conveyed to the castle in this manner. These arms were in possession of the substantial burgesses and householders of the town, who considered them as their own property, having been bought with their own money when admitted burgesses: and as most of them had not only their wives and children, but the greatest part of their substance within the town, they would not consent to expose all that is dear to them to the rage of an incensed enemy, for the sake of keeping those arms out of their hands, especially as they were in themselves of very little value, being generally old guns without bayonets, bought at half-a-crown or three shillings a-piece, more for show than use, as they were never otherways employed than at a birth-day parade.

But, of little value as they were, the Provost was desirous, if possible, they should be saved out of the hands of the rebels; and as neither he nor the council were able of themselves to compel the inhabitants to part with them, he thought of the only expedient that could be taken in such a case, which was to send a message to the castle to inform Mr. Guest of the situation of the town, and the general consternation of the inhabitants, and to beg that he would send a party down to take up their arms, as the council was not at liberty to give orders, for fear of the consequences with regard to the town. This message was delivered to general Guest, but was not complied with.

From the Goldsmiths-hall the committee went to the council-house, and were alarmed with the cry, that the rebels had broke into the town. This was owing to the fright of a party of dragoons, who guarded their baggage at the Netherbow port, and when the port was opened to let out the baggage, a great crowd burst in, which the dragoons imagined were the rebels, and rode off as hard as they could, in great terror, to the castle.

Upon this alarm the commandant put the Provost in mind of the threatening sent to the town, that every man who was found in arms should be put to death; and asked the Provost what the trained-bands should do at the Weigh-house and West port, when the rebels had already burst in at the other end of the town? The only answer any man alive could give, in

such circumstances, was, they should quit their arms to avoid being massacred.

After this alarm was over, Mr. Groset arrived with accounts that sir John Cope had been seen off Dunbar, and, as the wind was unfavourable for bringing them up the Frith, it was thought he would land that night at Dunbar, and might soon come to their relief. Upon which bailie James Mansfield was immediately dispatched to call back the deputies, and a town officer was also sent to run the shortest way and stop them; but neither could overtake them.

It being now again resolved, upon this prospect of relief, to put the town in a state of defence, Mr. Groset, and Mr. Lindsay secretary at war, went up to the castle along with provost Coutts, and acquainted the general with the good news of sir John Cope's arrival, and asked if he would think it proper to order the dragoons back for the defence of the city, and whether he would deliver back the arms that had been returned to the castle. General Guest's answer was, that he did not think it for his majesty's service to order the dragoons back to Edinburgh, it being more fit they should join sir John Cope's small army: that the gentlemen of the council might put the burghers arms into the best hands; and if, thereafter, the Lord Provost should find a disposition in the inhabitants to defend the town, he might let him know: and added, that he would send down a message to the serjeant that was nailing up the cannon on the walls, to stop him.

After the gentlemen had returned from the castle, it was proposed in council, by a captain of the volunteers, that the alarm-bell should be rung: but it was objected by some of the members, that nothing of that kind ought to be done till the deputies were returned, lest the rebels, who were apprehended to be very near, should thereby be enraged, and make them suffer for it. One of the reverend ministers of the city, who had been most active and zealous in the service of the government, and some other well-affected burghers, agreed in this opinion; and all of them were positive that nothing could be done for defence of the city, unless the dragoons were brought back: upon which Mr. Groset rose up, and said he would go and endeavour to bring them back; and provost Drummond and he went off upon that errand, but did not again return.

Mr. Lindsay, the secretary at war, asked the Lord Provost, if he would send an order to general Guest to re-deliver the arms which had been sent up to the castle. Had the Provost been capable of any degree of the bad intention the pursuer would now suppose, it was easy to comply with this request, for one-tenth part of those arms would have been of more value to the rebels, than the whole arms that were in the hands of the burghers: but, as his constant intention was to bring no arms or ammunition from the castle, but as there was necessary occasion for them, lest they should

fall into the hands of the rebels, so, agreeably to his intention, he answered Mr. Lindsay, "That, before he gave such orders, he behoved to see a better disposition in the inhabitants to defend the city."

For, since the alarm of the rebels bursting into the town, most of the inhabitants, dreading the execution of their threats against such as should be found in arms, had quitted their arms and gone home.

The gentlemen who had gone to the rebel camp returned, and brought their answer, requiring the city to receive their prince as prince regent, and that no arms or ammunition should be suffered to be carried off or concealed; and demanding an answer against two o'clock in the morning, their camp being then at Gray's Mill, about two miles distant from the city. After receiving this answer, the gentlemen of the council, with some other citizens, continued together deliberating what was to be done, till two o'clock in the morning, many of them expecting relief from the dragoons, which provost Drummond and Mr. Groset had been sent some time before to bring back, if possible, to their assistance.

When the clock struck two, and no relief came, it was proposed to send a second deputation, in order to gain a further time, which was unanimously agreed to; and bailie Robert Baillie, provost Coutts, with two or three other councillors, were sent off to beg a delay till nine or ten o'clock, by reason the burghers were all in bed, and could not be convened for several hours: at the same time they were authorized by the Provost to say, "That he would rather die than comply with the condition of receiving their prince as regent of Scotland."

Messages were at the same time sent to the principal inhabitants and citizens, to come and meet with the council, and concert what was proper to be done; but few of them had come, when the deputies returned with an answer much to the same purpose with the former; and soon after notice was brought, that a part of the rebel army had rushed in at the Netherbow port, and made themselves masters of the city guard, who had been so harassed with the extraordinary duty all the preceding week, and by being out under arms for two days before along with the dragoons, that they were hardly fit to do any duty, far less able to oppose an army of rebels, who were numerous and hardy enough to defeat a regular disciplined body of the king's forces a few days after.

From the above narrative, which is in every particular strictly agreeable to the fact as it happened, it appears in what manner this city had the misfortune to fall into the possession of the rebels, after all possible care taken by the provost magistrates and council, to prevent it. Some of them indeed were of opinion, as well as many other of the wisest and best-affected citizens in the town, that the scheme of defending the city against an attack, was

in itself impracticable. The old walls are hardly sufficient to keep out smuggled goods, but by no means able to endure any siege or attack: besides, there were so many other obvious ways the town might be forced to surrender, by throwing in fire, burning the houses which adjoin to the town in some places where there is no wall, cutting the water-pipes, which would starve the town in a day, &c. that a great many well-affected burghers thought the best thing that could be done for the service of the government, was to dispose of any thing that could be of use to the rebels, and leave the gates of the city open.

But, though this was the opinion of the Provost, as well as many of the council and most substantial citizens, yet, when the other scheme was resolved, the Provost exerted all the vigilance he was capable of to make it effectual, as appears from the circumstances above related. He spent his whole time in the public service, from six o'clock in the morning to 12 at night, sometimes till four next morning, going about viewing the public works, giving orders, advising expedients, taking and desiring to have the best advice: and, at last, when the thing came to the push, he was ashamed to see many, who had appeared keen for the scheme in the beginning, unwilling to carry it to the last execution; and that, in general, the inhabitants were so terrified by the frightful notion they had got of the rebels, that he could find no concurrence to make an opposition, and keep out the city, not even from those who had first taken arms in its defence. He expressed his sentiments in as strong a manner in time of danger, as the prosecutors can now declaim at ease, of the reproach it would be to the city to be surrendered without defence, after all the preparations that had been made, and the assurances they had given his majesty to that purpose; and declared himself ready to mount the walls with the smallest number of men that could support him: but the terror they were in from the cruelty of the rebels, and the little prospect they had of making an effectual defence, without farther assistance than they had within the town, prevailed over his expostulations, and rendered his design abortive, which he was willing to have prosecuted at the hazard of his life.

At the same time it is obvious, that the prosecutors set this event in a very false light, when they suppose, "That the king's army was within a day's march of the city when it was taken by the rebels, and that it was possible to have kept out the town till the army had come up to its relief:" for it is a certain undisputed fact, that general Cope's army was still on ship-board when the rebels took possession of the city, and very uncertain when they would disembark; and that, after all the haste they could possibly make to approach the city, they could not get within six miles of it sooner than the Friday evening, near four days after the city was taken: even the pursuers do not maintain that the city could, by any de-

fence, have been kept out the half of that time. In fact, it is certain that it could not have been kept out many hours. And therefore, take the case in any view, it is highly unjust to lay the blame of the bad consequences, which afterwards followed, upon an event which appears, in the nature of things, to have been unavoidable, as circumstances then stood, and are admitted on all hands.

It is not properly the pannel's business to make an answer to the pursuer's declamation upon the consequences of this event, which, were they founded, could not affect him, who did the utmost in his power to prevent them. But the exaggerations are too obvious to take with the most credulous. It will never go down with any body, that the victory obtained by the rebels at Preston-Pans was owing to the tents or furniture they got out of the city three weeks after it was fought, or to the broken guns that were dropt by the burghers, when it is notorious that greater numbers of the rebels came armed to Edinburgh than were engaged in that action. None of the broad-swords, which were the instruments of the mischief done on that day, were found in Edinburgh. Every one who considers the matter coolly, will own that the case must have been the same, had they had met with sir John Cope's army the day before they came to Edinburgh, as three days after it. All depended on the conduct and behaviour of the two armies, and this city behaved in course to fall to the victor.

Were conjectures of this nature to be indulged, it would be more just to impute the taking of this city to general Cope's not having guarded the passes on the Forth, or fought the rebels when they were in the north in much smaller numbers; by either of which their progress would have been stopt from coming southwards. But, to suppose that a town, which, without any siege, could be laid in ashes by any enemy from without in a few hours, should be able to put a stop to the progress of a rebellion, which was strong enough to stand a pitched battle against the whole forces in this part of the united kingdom, and defeat them, is a stretch of imagination too wild to be listened to even by the vulgar, far less to be insisted on before any court.

It was however the misfortune of the pannel, after all his pains, labour and diligence, and the hazards he was ready to undergo, to be attacked by suspicions, as if he had failed in his duty. To this several different causes contributed, which frequently arise on such occasions. In extraordinary emergents of this kind, zeal in some, and fear in others, never miss to set various passions a-working. A third source occurred, not so blameless as either of the other two. When the accounts first came of a rebellion stirring in the northern parts, the approach of the annual elections, and steps thereto preparative, was what chiefly employed the thoughts of the inhabitants of this town. The danger then was distant, and it was hoped would approach no nearer: but it

was a good opportunity for such as looked with an envious eye upon the present magistracy, as having been too long in possession of the good opinion of the people, to undermine them, by working upon the fears and credulity of others. Surmises and jealousies are easily spread when people are under terror: and, by proposing contrary schemes, they had a good chance, either to bring the magistrates into disrepute with the people, if they opposed them; or to load them with the blame, if when they yielded, the execution of them should, as in all probability it would, in the event prove impracticable.

By such attempts of the interested and designing, it can hardly fail that many of the honest and well-meaning will be led away, when their fears and jealousies are so strongly raised as to get the better of their reason: and this was much increased by reports artificially spread with the same view through the newspapers in different parts of the kingdom, of facts now notoriously known to be false, but which were easy to gain belief at a time when men's minds were in a ferment, jealous of the conduct of one another, and ready to catch at every remotest suspicion.

Under these undeservedly unlucky circumstances, the pannel, conscious of his innocence, set out for London to attend his duty in parliament; and, as soon as he came there, wrote to one of his majesty's principal secretaries of state to acquaint him of his arrival, and that, as he understood many scandalous reports had been spread to his disadvantage, he was ready to wait on his lordship, or any of his majesty's ministers, to give them satisfaction with respect to his conduct.

Two days after, he was taken into custody at his own house, and carried to a messenger's house, where he remained for some time: after that he underwent an examination before the cabinet council, which lasted for several hours, in which he gave full and particular answers to every question that was asked him, and strictly agreeable to the true state of the fact as above set forth; but the malicious reports of his enemies had gained so much ground, that he was after this sent to the Tower, and kept a close prisoner for three months. Thereafter, as the credit of these slanders, supported by no evidence, began to abate, his confinement was relaxed; but still continued till the 23d of January 1747, when he was admitted to bail before one of his majesty's principal secretaries of state, upon a recognizance to the extent of 15,000*l.* sterling, to appear before his majesty's court of justiciary at Edinburgh, at the first sitting of the said court after the 20th day of March then next.

During his long confinement he made many applications, expressing his willingness to meet his trial; and, as soon as he was liberated and came down to Scotland, he applied to the high Court of Justiciary at their first meeting after the 20th of March; and now, at the distance of above a year and a half from his first confine-

ment, he has been at last served with a libel at the instance of his majesty's advocate; and, upon the 13th instant, counsel on both sides were heard before the Court upon the relevancy of the libel, and the Court has been pleased to order informations to be given in.

The counsel for the pannel, in answer to this libel, after setting forth the several steps of the pannel's conduct, and his care, diligence and activity in the discharge of his office, as above represented, did, in the first place, observe, That although a prosecution of this kind against a magistrate, not for any criminal fact alleged to be committed, but for supposed neglects, mistakes, or errors in the execution of his office, is pretty new and extraordinary, and, it is believed, will hardly meet with any precedent before a court of justice; yet the pannel would not decline the jurisdiction of the Court in any trial that can be brought; he is sure his conduct will stand the strictest test of inquiry; and therefore was willing cheerfully to submit the case to the judgment of the Court.

At the same time it was observed, That, after all the pains that had been taken to find fault with the pannel, and to lay upon him the load of the misfortunes which befel the city of Edinburgh during the late rebellion; yet it is very remarkable, that now, when the libel appears, drawn out with the greatest art and skill for that purpose, it does not contain any one fact that is in itself criminal: and even the omissions, charged upon the pannel, are such as are either merely trifling, or at least of a very ambiguous nature, and such as his conduct would have been equally liable to be misconstrued in, had he followed the opposite course, or done the reverse of what he is charged with in the libel.

That, if such are supposed to be relevant grounds of accusation against a magistrate, his situation must be very singularly unhappy, especially when times of danger and difficulty occur: the office he cannot decline to accept of; he can as little decline to act; he cannot stop, but must determine himself one way or other; and, after he has honestly determined, and acted to the best of his judgment, if he is liable, upon the event's turning out unsuccessful, to be tried as a criminal why he did not take a different course, it is impossible for any man, who has the misfortune to be placed in such circumstances, let him take what course he will, to avoid punishment: and this is the more applicable to the present case that,

2do, This libel does not charge the pannel with any disaffection to his majesty, or our present happy establishment, far less does it offer to prove any fact that can infer it; nor is it alleged that any of the articles charged in the libel happened *ex proposito*, or *ex malo animo*. The natural presumption therefore lies for innocence, when the facts are such as can admit of that construction. In this case the presumption is confirmed from the whole tenor of the pannel's conduct in his past life, as well as from his situation in the world. As he is a

gentleman of a pretty considerable property in this country, and who deals in trade to a very large extent, it cannot be supposed he would wish to see confusions arise in his country, or the laws to be put to silence by lawless force: that such disorders must in every event affect him deeply, by ruining his debtors, and hurting his interest in many different respects; and therefore, unless he were supposed to be destitute of common sense, there can lie no probability that he would wilfully do any thing that should tend to increase such disorders, highly mischievous to himself, as well as to his country.

And Stio, It was in general observed, That, in the present case, the pannel had not the sole direction of any one of the Articles referred to in the libel: that, as lord provost of this city, he was only the head of a numerous body of magistrates and town-council, and believed to act by their direction: that, by his majesty's sign-manual, the direction of the city-regiment was also expressly given to the lord provost, magistrates and town-council of Edinburgh; that accordingly the town council did forthwith take the direction into their hands; and named a committee, which was to meet twice a-day, to consider and order what was proper to be done for the safety of the city and support of the government; and though the Provost was named colonel of the regiment, yet, by his nomination, he was limited to conduct and direct them in such manner as the council should think proper.

That the pannel did accordingly act in every particular by the direction and concurrence of the council, and the committee by them named: that no instance can be given where he opposed their resolutions and orders, or followed his own will or judgment in opposition to theirs: and in such circumstances it seems impossible to assign a reason why a charge of guilt should be fixed upon the pannel, when the council, by whose direction he acted, are admitted to be innocent, and to have all along behaved dutifully to his majesty and his government.

And, more particularly, with respect to the several Articles of the libel, it was insisted, That, neither separately nor jointly, can they amount to the charge of a crime against the pannel.

The first Article begins with setting forth, "That, he did nothing of his own accord towards providing for defence of the city." But it is evident this, if true, could be no point of dittay. Had the pannel been of opinion that it was not expedient for the service of the government to attempt a defence of the city, which was the opinion of many well affected councillors and citizens; or if he had been of the contrary opinion, but every thing he could suggest for its defence should happen to be proposed by some other member of the council or committee; in either of these cases the proposition here alledged might have been true, and yet the pannel entirely blameless.

At the same time, that nothing can be more contrary to truth, evidently appears from numbers of instances in the above narrative, where the pannel, of his own motion and accord, suggested and executed many expedients of great importance, towards providing effectually for the safety of the town.

And as to the second branch of this Article, "That the pannel stirred affected doubts concerning the legality of the proposition for raising the city regiment," which doubts the pursuer, in his Information, endeavours to remove, by observing, "That the act 1661, upon which they were founded, is repealed by the act 7mo Annæ, which provides, That nothing hereafter shall be high treason in Scotland, but what is such by the law of England:"

It is answered, That the doubt upon this point is not singly founded upon the statute 1661, but upon the common law, by which the power of arms is one of the king's undoubted prerogatives, and the encroaching upon it has been declared highly criminal, by statutes anterior to the act 1661, particularly by the act 75th, Parl. 1563, which forbids any person of whatsoever quality, estate, condition or degree, to raise men in arms without special license, in writ had from the crown, under the pain of death. This act has never been repealed by any subsequent law, either expressly or by implication; and it makes no exception of magistrates of burghs, but extends to all subjects of whatever condition or degree, nor of raising men upon pretence of the king's service. It is well known no such exception was intended to be implied, either in this statute, or the after laws made in the reign of Charles 2; for the disturbances which happened in those times, and which these laws were intended to prevent, were frequently occasioned by raising men upon such pretences.

But it is unnecessary for the pannel to enlarge on this argument. Were a doubt, in any case, to be constructed as a crime, for which, it is believed, no precedent can be alledged, the pannel must be fully justified in this case, by the authority already mentioned of the honourable judges and his majesty's counsel learned in the law, who agreed in opinion, that the levying this regiment without his majesty's express warrant would be illegal.

And it is still as extraordinary, that it should be made a point of dittay in the second Article, That objections were made to the legality of the association of the volunteers. They were associated in arms for the precise same purposes for which the regiment was to be raised, viz. for the defence of the city and support of the government: And the counsel for the pannel must confess, they cannot observe any solid distinction that should make the one legal when the other is illegal and blameable: And therefore it is somewhat surprising it should be laid as a crime against the pannel, that he did not at first view discover such distinction, especially as he acquiesced instantly in the opinion he got upon that point, and,

without the delay of a moment, proceeded to authorize the volunteers to go on in their association.

This shews that the pannel had no reluctance or aversion to this measure, as the libel would suppose. He took the very first opportunity to inform himself of the legality of it, and cheerfully followed the information he got. Had he demurred a little more, upon a distinction by no means obvious, he could not have been liable to blame, far less to punishment. And it is unnecessary to enlarge upon the rest of this Article, which the pursuer in his Information, does not insist upon, as indeed it is apparently too trifling to enter into a criminal libel.

As to the third Article, concerning the repair of the city-walls, it has already appeared, from the record of the council, that the direction of these repairs was intrusted to a committee under bailie Robert Baillie; that they were often enjoined, from time to time, to carry on the works with the utmost dispatch; that the Provost frequently visited the works; and whenever it appeared there was any want of workmen, he always granted new warrants to impress them. The ditch at Wallace's tower, which Mr. Mac Laurin complains, that, after being carried on right for some time, was, by mistake or bad advice, cast on the wrong side of the dyke, was owing to a direction given by bailie Gavin Hamilton, who altered the orders given by Mr. Baillie the overseer, and, by mistake, caused cast the ditch upon the wrong side of the dyke: And the other delay he complains, in not beginning the communication he proposed betwixt the wall of the town and the high house without the Potter-row port in due time, was owing to an objection made to the proposal, that such communication might very probably afford an opportunity to the rebels to enter the town; upon which Mr. Mac Laurin himself, at that time, agreed it was fit to drop it. And as to all the other works, even by Mr. Mac Laurin's account, which the pursuer refers to in his Information, it appears they were carried on in due time; for he admits they were almost finished on Monday afternoon, when they were told of the meeting of the inhabitants in the New Church.

And as to the complaint of the neglect in providing gunners, and giving orders to load the cannon, the lords have already been informed of the pannel's diligence, in convening men to assist at mounting them on the walls, and sending every where to provide gunners, and ordering matches in due time to light them. They were loaded when the rebels were at six miles distance from the town, which was rather too early, as it is well known that cannon do not serve so well after they have been long loaded.

But then, what relevancy is there in all this, supposing the facts true as laid in the libel? Is it possible to plead that the Provost should be answerable for the execution of works, which, by the council, appear to have been committed

to another committee under a proper overseer? Or will it be laid as a charge against him, that he did not think the sailors proper persons to be employed as gunners, if other gunners could be had elsewhere? Or that he did not give orders to load the cannon on Sunday morning, when it is allowed they were loaded that evening, and too soon for any use that could possibly be made of them against the rebels?

The salutary proposition which the fourth Article charges the Provost with rejecting, will appear to every one, who coolly considers it, a most pernicious one. To make distinctions among the inhabitants, from surmises their enemies might throw out against them without any ground, when their minds are heated and divided into factions, might contribute to set them by the ears together, but never to unite or strengthen their hands in the defence of the city, or service of the government. The pursuer's Information says, that the answer given to this proposal was, that the town's arms should be put into the hands of the most substantial burghers. This answer, if given, was solid and judicious: Men of substance and property are the fittest to be intrusted with the defence of the laws, on which the preservation of their properties depends: And it is truly surprising that the libel, upon this Article, should prefer to this a scheme of arming a number of tradesmen's servants, who were to be allured to come into this service by the bait of a guinea to be given to each of them; which is stated as another salutary proposal offered to the Provost at this time. Such proposals could only proceed from wrong-headed or sinister views. Had the Provost intrusted the city-arms to such low people, whose principles could not be known, and denied them to the most substantial burghers, whose interest was principally concerned in defence of the town, he might justly have been charged with the blame of the consequences: And therefore it is hardly necessary to observe, that, were there any colour of relevancy in this article, it could not affect the pannel, as it is not pretended that the proposal ever laid it before the council, who were the proper judges; and their not doing so is real evidence that they were satisfied of the unsoundness of the scheme, from the objections that obviously occurred against it.

The fifth Article charges the pannel with a cold reception given to sir Robert Dickson, and a proposal made to him, that his volunteers should enlist in the Edinburgh regiment. The first is a very extraordinary article in a criminal libel, and the pannel believes will be found not to be true. The other shews, the great anxiety of the pursuer to find fault with the pannel, let him hold what conduct he will. Had he neglected these volunteers, and refused them meat or pay, he might justly have been found liable to blame; but that cannot be said: He took care to provide them with victuals as soon as they arrived; and the handle taken to charge him is, that he also offered them pay. It is not said that he insisted any should enlist that

did not incline, or that he refused to accept the services of such as were disposed to assist the town without pay: But, that pay should at all be proposed to these volunteers, or enlisting in the city regiment, though it was raised for the very same purpose they professed to come for, viz. the defence of the city, and were to be dismissed as soon as that end was attained; this is the charge: And it is submitted, whether there was the least colour to make this an article in a criminal accusation.

The fact as to Andrew Alves's message has been already explained. The receiving it could be no crime in the pannel: He could not avoid it, unless he had shut his ears before he knew what Mr. Alves was to tell him; and the measure he took upon it was in consequence of the advice of gentlemen of the council, who thought it the most prudent way to take no notice of any thing that might dispirit the inhabitants at that juncture. The ground of the accusation is, that he did not immediately commit Mr. Alves: And if he had immediately committed him, which was the likeliest way to spread the message through the town, he might with better reason have been accused, that he had done it of purpose to intimidate the inhabitants: So this Article, like most others in this libel, turns stronger when it is inverted. If such accusations are allowed against a magistrate, he is in a bad situation: For act he must; and whether he take the one course or the other, he is sure to be brought to the bar as a criminal.

The seventh and eighth Articles charge the pannel with receiving a petition from the inhabitants, keeping a meeting with them, and hearing a letter read from the Pretender's son. The receiving the petition was unavoidable, unless he had shut himself up in a closet, and then he might have been justly blamed for keeping out of the way in time of public danger. As little could the calling of a meeting of the inhabitants, at such a juncture, have been faulty or blameable: But it has been already observed, he called no meeting; but the inhabitants, under terror of the approaching danger, pressed in upon him wherever he went, and would have their complaints and remonstrances heard, and the Pretender's son's letter read, after the pannel had opposed it, and left their company to avoid hearing it.

The part the Provost acted at this meeting, and the pains he took to animate the inhabitants to concur in defence of the city, has been already stated, and, as it is notoriously known, must justify him in the eyes of all mankind against the aspersions now endeavoured to be thrown upon him: But then, taking the Articles as stated in the libel, there is no sort of relevancy in them; neither the holding a meeting of the inhabitants, nor the suffering a letter from the rebels to be read, nor the sending a deputation to them, were they supposed the acts of this pannel, can be said to be criminal in such a case. When rebels are at the gates, and have the lives and properties of the inha-

bitants in their power, the great law of necessity, which, in the nature of things, must make an exception from every human law, legitimates any intercourse that is necessary to save the inhabitants from the threatened destruction.

It is unnecessary to enlarge upon this argument; it is evident, not only from the reason of the thing, but the histories of all countries in which rebellions have ever been raised: It was never before pretended to be a crime in the subjects of any country to treat with rebels when their lives were in their power. The laws forbidding intercourse with rebels, can, from the nature of the thing, apply only to voluntary intercourse, and not to such as is forced by invincible necessity, when subjects are deprived of the protection of the government, and not able to defend themselves against a superior lawless force. Nay, in this very rebellion, has it ever been considered as a crime, in gentlemen who were even in the immediate service of his majesty, to treat with rebels, or enter into paroles or engagements with them, when their lives were in their power? Has it been found criminal in governors of forts, which were built and intended for bearing sieges, as the town of Edinburgh never was, to enter into capitulations with rebels when they found it necessary? Was the mayor of Carlisle tried as a criminal for entering into an express capitulation with the rebels, to surrender a city that is properly fortified, and might be presumed to make a good defence, or for making an express agreement to deliver up the arms and ammunition? Or was he tried for going, after the surrender, as mayor of the city, with the sword and mace before him, to attend the proclamation of the Pretender? The intercourse this mayor had with the rebels was evidently of a much deeper nature than any that is pretended to have been had by the Provost of Edinburgh: But yet so extensive has been the influence of the misrepresentations of his enemies, that he has for a year and a half suffered, and is now brought to trial as a criminal, while the other passes without blame.

The other circumstance charged in this Article, with respect to the pannel's refusing to order the dragoons to come into town, has been fully explained in stating the fact, and it would be improper to trouble the Court with repeating it. He was desirous of the assistance of the dragoons, had signed an application for them along with the Lord Advocate, had brought in provisions to town for sustaining their horses: he told the very messenger referred to in this Article, that the dragoons would be made extremely welcome, and that all the force he had would be ready to join with them in defence of the town: he ordered the constables to mount the walls, to observe their approach, that the gates might be forthwith opened to admit them. And, after all this, will it be charged as a crime upon him, that he scrupled to sign an order to troops, over which he had no power, singly by

himself, which, after what had past, he could take in no other light, but as intended to make him answerable for the consequences that might attend this measure; and when he had been told the night before, by gentlemen of undoubted skill and loyalty to his majesty, that the consequence would probably be to shut up the dragoons, and oblige them to surrender prisoners to the rebels?

Great reason has the pannel to be thankful that he did not fall into the snare the pursuer here complains of him for avoiding, which might have turned out much heavier than all the Articles mustered together in this libel, and six times as many more. Had the dragoons been brought in upon his order, and taken prisoners, as the gentlemen of the military foretold, there would have been another kind of colour to argue, than from any thing that has been yet suggested, that the pannel had given occasion to the unlucky defeat at Preston, by shutting up the dragoons, and depriving the other troops of their assistance, by which they might have been enabled to get the better of the rebels.

Unhappy then must be the situation of every magistrate, if he is to be judged after this measure. It is doubtful and difficult what course ought to be taken. People of skill are divided upon it. If the magistrate take either one or the other side, by this way of proceeding his fate must depend upon the success: nay, if he shall be yet more cautious, and decline to determine either, but leave it to others of more skill and judgment in these matters, as the pannel did in the present case, ready to acquiesce and concur in whatever they should determine, yet it seems he cannot avoid to be held as a criminal: he had before given his consent to the bringing in those dragoons, and was at all times ready to admit them, if it was thought proper to bring them; and yet he must be accused, because he did not sign an order, subjecting himself to the consequences of a measure which was judged, by people of the best skill, to be dangerous and improper.

The ninth Article of this criminal libel, charging the pannel with neglecting to give orders to the volunteers, when they had been long standing under arms, has been already explained in point of fact: that, without applying for orders, they thought fit to determine themselves to give up their arms, and throw up the service; which is a full evidence of their judgment, that the defence of the city was an impracticable measure; and an evidence of so much the greater weight, as neither their zeal in the undertaking, nor their courage in going through with it, had it been found practicable, can at all be called in question.

But, next, as to the relevancy, were the fact supposed to be true, the answer is too plain almost to be stated. The volunteers, and not the pannel, were to blame, in that they either took or executed such resolution without orders from the council. If they had applied to the

pannel for orders, as the libel alleges, it was no wonder, in the situation things then were, that they did not get an immediate return. The Lords have observed in what situation the Provost and Council were at that time, surrounded by the inhabitants, who were alarmed with terrible accounts of the rebels, and frightful threatenings of which they dreaded the immediate execution; the Provost endeavouring to animate and stir them up to the defence of the town, by all the arguments he could use; the inhabitants declining to hearken to any defence; and new accounts coming every moment, which made it uncertain what resolution to take. In such circumstances it ought to have been no surprise to the volunteers, if they had been kept waiting orders for a considerable time; it was their duty to have continued at their alarm-posts, till orders were sent. And it cannot be laid as a load upon the Provost or Council, that the volunteers thought fit to take a contrary course, and give up their arms, without waiting the resolutions of the council.

The tenth Article consists of three branches. The first is, The refusal of orders to spike up the cannon. As to which the fact has been already fully stated, and it is obvious there is no relevancy in it, when it was equally easy for the general to cause nail them without any orders from the Provost or Council. And it is not pretended that any person he sent was opposed in the execution of it, but, on the contrary, the town-officers were ordered to shew them where the cannon were, and the serjeant had actually begun to nail them, until he was stopt by a message from the general, after he had got the account of sir John Cope's arrival, as has been already observed.

The second is, "The orders alleged to have been given to captain Dalziel to keep guard on the 16th September, with one-third of the city guard, the usual complement in peaceable times." But neither is there any relevancy in this, when your lordships consider the circumstances at the time, as confessed on both sides. The volunteers had given up their arms to the castle, so had the men who had been levied in the city-regiment. No prospect of defence of the town, unless some assistance should come from without. In such circumstances, it is a very odd complaint, why was not this whole company of 126 men kept on foot to fight the army of the rebels, which consisted of some thousands? It is plain the whole or a third was all the same in such a situation: and therefore it is unnecessary to add, that the guard had been so fatigued with the severe duty they had undergone for some days before, that the whole of them could not have been able to do duty that night, whatever orders they had received.

The last branch of this Article is, "That the pannel gave orders to the trained-bands, who had been upon guard at the several gates of the city, to quit their posts, and dispose of their arms in such places where they must be exposed to fall into the hands of the rebels." This Article is too ambiguously laid to be ad-

mitted in a criminal libel: the crime is to be inferred from the places where the arms were to be left, and yet those places are not condescended on. This is directly inconsistent with the nature of all criminal procedure, which requires that the libel be laid clear and unambiguous, so as the pannel may know every circumstance of the fact he is called to answer, and be prepared either to exculpate himself, or elide it by a contrary proof.

But, 3dly, It is not conceivable what the libel can mean, by speaking of places where arms would be exposed to fall into the hands of the rebels when they should become masters of the city. It is evident, in that case, in whatever place of the city arms were laid, they must be alike liable to fall into their hands; an order, under pain of military execution, would in a few hours bring in all the arms that were in any town they became masters of, in whosever possession they were: and therefore the libel, as to this Article, is not so conceived as to receive any distinct meaning, or to admit of a proper answer.

The eleventh Article sets forth, "That it was proposed and urged in council, that the whole city arms should be lodged and secured within the castle of Edinburgh, in order to prevent their falling into the hands of the rebels; but the pannel refused or declined to give any order for that purpose; neither in fact were the city arms so lodged and secured, but were seized by the rebels upon their entering the city the day following."

But this proposal, said to have been made in council with respect to the arms, is entirely new; and it is somewhat strange it should be so, if truly made, as these matters have been so much the subject of conversation for almost two years past; nor can the pannel recal any such proposal to his remembrance.

The true state of the fact, with respect to the burghers' arms, has been already laid before the Court: that the Provost did all that was in his power to keep those arms, though of very little value, out of the hands of the rebels: that he sent a message to the generals in the castle, to send a party to take them out of the hands of the inhabitants, as the council could not, for the reasons already mentioned, compel them to deliver them up to the castle: and it will also be proved, if any proof is to be brought in this case, that when the Provost was giving directions to the trained-bands, he told them, that if the rebels approached to the place, he hoped they would do their duty, and behave like men in defence of the city; and if the rebels should prevail, he expected that, at any rate, they would take care to secrete their arms, that they might not fall into their hands.

But, abstracting from these facts, the pannel is advised, that there is no relevancy in this Article of the libel: for, 1st, It is said, that the proposal was made in the town-council, and it is not alleged, or pretended, that the council approved of the proposal, or authorized the pannel to grant the order; and, if they did not, it

was the council, and not the pannel, who declined to concur in this measure; especially as the pannel had truly no right to dispose of the arms, or to send them off without the liberties of the town, without authority of the council. It is a very new ground of accusation against the preses of a meeting, that, when a proposal was made to the meeting, and either rejected, or not approved of by them, he was guilty of a crime, because he did not over-rule the resolutions of the meeting, of which he was but one member, and act beyond or contrary to the directions they thought fit to give him in a matter over which he had no power to controul them: it is believed it will be difficult to find any instance, where an omission of this nature has been made the foundation of a criminal charge.

But, in the next place, when the circumstances of the case are considered, which are notorious to all the world, and confirmed by the production made by the pursuer in this case, every mortal must see why the council could not grant or authorize such order as is here mentioned, had it at that time been suggested or proposed. Repeated threatenings had been sent from the rebels to the town, by writings, which the pursuer has produced, and given out with the libel; a like threatening verbal message was sent by Mr. Alves, all tending to the same import, that, if the town should send off the arms or ammunition in their possession, they should be treated in the severest manner, and suffer all kind of military execution. The inhabitants had no means to defend themselves from the execution of these threats: and was it to be expected, that, when the rebels were at the gates, and the dagger in effect at their throats, they would expose themselves to it for the sake of preserving arms of whatever consequence, much less so insignificant as these burgher arms are known to have been in this case?

It is easy for people at ease and in security to talk of such distresses without much concern; but let them put themselves in the case of those they are to judge of, and then say, whether it is agreeable to the nature of mankind, to expose themselves, and all that is near and dear to them in the world, to such sufferings, upon any consideration whatsoever; whether it is to be expected of them, and whether they ought to be punished for not having done it.

We are not now to judge of the terror of the rebels from what they afterwards did, but from the impressions people were then under of the distresses they might suffer from them. It is well known never enemy was received with greater dread, or painted out in stronger colours of cruelty and barbarity: from the news, papers, from the pulpits, from all the best accounts, nothing was to be expected from them but what was fierce, savage, and inhuman. These things had their good effects, and perhaps were sometimes a little exaggerated from well-meaning motives; they tended to create in men's minds a great abhorrence to the rebels

and their cause; but then, at the same time, they raised an immense terror, such as struck every city in the nation, to which they approached, with the utmost panic and consternation.

The black Friday is not yet out of remembrance, and the impression the approach of the rebels then made, when they were removed from the greatest city in the island, at the distance of more days march than they were of hours or quarters from this town at the period now in question. Let it be supposed, that the rebel army had been marching down from Highgate-hill, or had been at West Smithfield, and had sent in such threatening messages to the lord mayor; if he had no army at hand to defend the city, and had found no disposition in the inhabitants to defend it, would he have adventured to despise the threatening, or to send up the citizens' arms to the Tower, by which their lives and properties must be exposed to the lawless fury and barbarity of the rebels? Or would he have been brought to the bar as a criminal, because he had been careful of the blood of the inhabitants, (an expression that is laid against the pannel in the present case) and because he had not exposed their substance to plunder, and themselves and their families to massacre?

The disproportion is indeed great betwixt the instance put, and that which is the subject of the present question; but both must be governed by the same rules. Every man's life and his all is equally dear to him; and it does not depend upon the greatness or smallness of a city, whether it is lawful for the governors to expose it to the hazard of being destroyed, but upon the circumstances it is under at the time, and the prospect of relief from the impending danger, of which there was none in the present case.

And, with great submission, where is the foundation of the doctrine now pled for the pursuer, in the law, or in the custom of any known country in the world? When was it heard of, that, upon a town or a fort being obliged to surrender, whether to enemies or to rebels, the garrison or the inhabitants were bound to expose themselves to the utmost resentment of the enemy, for the sake of keeping their arms out of their hands? Has it at any time been brought as a charge against the governor of a place, that he gave up the arms to the enemy, when he could not keep out the place? Were not arms and ammunition given up at Carlisle, and at every other fort that has been delivered up to the rebels, either in this or any other rebellion? And is there any instance where that has before been made an article of accusation?

It is no answer, That, where there is no separate castle or citadel, or where that is given up at the same time with the town, the arms must fall in consequence, as there is no place in which they can be preserved: for the pannel is not charged here for the loss of the arms, but for this, that they fell into the hands of the

rebels. And it is well known it is in every man's power to break his gun, and make it useless to the enemy, whether he has a castle to carry it to or not: and therefore, were there any pretence for the charge brought in this case, it must equally affect the commanders of Carlisle, and every fort that has at any time been given up to rebels, why they did not at all hazards destroy their arms, that they might be of no use to the rebels. But, if such an objection was never heard of till this libel appeared, it is a demonstration that the libel in this Article is without foundation.

And therefore it is the less necessary to observe, that, in the present case, had it been the duty of the magistrates or council, to order the burghers' arms up to the castle, let the consequence be what it would to the inhabitants, it is obvious it was not in their power to make their orders effectual. What force had they to compel the inhabitants to a scheme so destructive to themselves? The volunteers had already disarmed themselves, and so could be of no use for that purpose; the city regiment had also given up their arms to the castle; the trained-bands were the burghers themselves, who had their wives, their families, and most of them the bulk of their properties in town, which they were quite averse to expose to destruction by such a measure: and the only force the magistrates had to compel them, was the company of the town-guard, who, if they had been disposed to obey at such a juncture, could very soon have been tied neck and heel by one hundredth part of the inhabitants.

And, 3dly, It is proper to consider, in this case, the uncertainty of the situation to which the magistrates and council were reduced, during the last and most distressing scene of this unlucky affair; sometimes terrified with the immediate approach of the rebels, at other times encouraged with some prospect of relief. Even towards the end of this period, there were some hopes of the return of the dragoons; Mr. Drummond and Mr. Grosset had gone in quest of them: nor was that expectation quite over in the meeting of the council, until they heard the rebels had entered the town. Had the dragoons returned to the city, and animated the people in its defence, the charge against the pannel then would have been inverted, why did he send up the arms to the castle? Why did he carry them out of the way when they might be instantly wanted for defence of the town, and the near approach of the rebels made a moment's delay of great consequence? and the citation might have been adduced, which is misapplied in the present case, "*Quod puncto saepe temporis maximarum rerum occasiones amittuntur.*"

Such was the unlucky situation of the governors of this city at that time, that it would appear, by what has since happened, it was impossible they could escape accusation; the event must make them criminal, however well-intentioned their conduct might be. But their answer is good, that no law, no custom, requires

the inhabitants of any place to expose their lives, the honour of their wives and daughters, and all that they have dear to them in the world, to the fury of an incensed enemy, in order to keep arms out of their possession. The law of humanity forbids it. That, in this case, had the magistrates been so minded, it was not in their power to compel the inhabitants to comply with it: besides, that the vacillant and uncertain state in which matters then stood, made it very doubtful whether it was proper to have done it or not; and, in doubtful cases, it is against common justice to accuse or punish, because of the after event.

These answers would have been good to the magistrates and council had they been brought to the bar to answer for rejecting such proposal as the libel here supposes: they are all equally competent to the Provost, with this additional one, that he is only one member of their body, and cannot be accountable for omitting what the council did not think proper to enjoin him, had they ever so much erred in their judgment.

It would have sounded very oddly in the ears of the world, if the generals in the castle had been brought under prosecution, because they sent to forbid the nailing of the cannon, or because they did not send a party to seize the burghers' arms upon the message already mentioned: it is believed the whole nation would have been amazed at such a prosecution. And yet, with great submission, there is a difference betwixt that and the present case: the generals run no risque by sending parties to execute any thing of that nature within the town; as little did their parties, or the garrison under their charge: but the danger to the inhabitants, who were committed to the care of the magistrates, was but too apparent, as well as too imminent, to be despised by any set of men, who were as destitute of defence and relief as they were at that time.

And the pannel will be forgiven to say, that, if the whole series of his conduct, from the beginning to the end of these transactions, shall be considered, there will appear as little reason to suspect him of any bad intention in this case, as any other subject within the kingdom. The Court has already observed, that the pannel of his own accord ordered all the ammunition that was in the town's magazine to be carried to the castle some days before the rebels approached, and that he caused execute this order so punctually, that it was necessary afterwards to send to the castle for what was wanted for the service of the town. It has also appeared how averse he was to bring arms down from the castle, when the rebels were on their approach to the city, unless he had the highest probability that they were to be used in a proper manner; and that accordingly he refused the offer made by the secretary at war, on the part of the general, to send back the arms which had been returned by the volunteers and city regiments, for this reason, that he did not see a good disposition in the inhabitants at the time, to defend the city; and therefore was

VOL. XVIII.

afraid the arms, if sent, might possibly fall into the rebels' hands. How unjust then would it be, after such evidence of the pannel's sincere and upright disposition in this matter, to suspect him of a bad intention, because he did not enforce an order upon his fellow-citizens, which, if obeyed, might have involved them in misery and ruin, and which it was not in his power to compel them to obey, and which is stated by his accusers as proposed to the council, to which he was subject, and is not alleged to have been by them approved or authorised?

The last Article of this libel is full as extraordinary as any of the rest, viz. "That by occasion of the several instances of misbehaviour above recited, it came to be very notoriously known, that he was highly faulty and negligent in the execution of his office, and to be farther violently suspected and believed, amongst the faithful subjects in that city, that he was secretly in the interest of the Pretender, by reason of the uniformity of his behaviour, discovering a constant unwillingness or backwardness to provide for, or heartily prosecute the measures that were in a manner forced upon him, in order to the defence of that city; at a time when, if he had observed a contrary conduct, there was at least a high probability that the city might have been preserved from falling into the hands of the rebels."

But it is hardly necessary to make any additional answer to this Article, after what has been already observed. It is hoped it is apparent to the Court, that none of the instances recited in this libel, were they true, as most of them are not, could infer any degree of misbehaviour against the pannel: That his conduct, from the beginning to the end of these transactions, has been uniform in the faithful execution of his duty: and that, from first to last, he never shewed any unwillingness or backwardness to concur in any measure that could tend to the service of the government, but contributed more to forward such measures, of his own free motive and accord, than can be pretended to have been done by any who may be pleased to entertain suspicions of him, or by all of them put together.

It cannot however escape observation, that it is an unusual article in a criminal libel, that a pannel is 'violently suspected' by others to have been guilty. The suspicion of others can never infer guilt, nor evidence of guilt, against any man whatever, though the sinister views, which gave rise to those affected suspicions, had not been so apparent as they are in the present case.

And, with submission, it is no good answer that is made to this in the pursuer's Information, That although they should have carried their suspicion too far, in believing the pannel to have been in the secret interest of the Pretender: "yet still their entertaining such apprehension or belief, is one demonstration, supposing that they had carried their conclusion too far, that his conduct was not such as be-

3 P

came a faithful, vigilant, and zealous magistrate on that occasion:" for an apprehension founded upon suspicions, at first raised from indirect views, and thereafter artfully propagated, and more easily spread through the ferment of men's minds, during the times of distraction, can never be either demonstration or evidence of any thing, other than the bad origin from which they at first proceeded. Nor is it fair to lay any stress upon them at all, when it appears they have been carried the length of false and injurious conclusions; the same disposition which has been violent enough to carry them that length, is to be presumed at first to have given rise to them. The pannel's conduct speaks for itself, and stands vouched by notorious facts, which, independent of the suspicions either of the wicked or of the credulous, demonstrate him to have acted a faithful part in the execution of his office, vigilant and zealous for the safety of the town, and careful of the welfare of its inhabitants, of whom he had the oversight in those unlucky times.

And it is truly surprising it should be alleged, "That if the pannel had observed a contrary conduct, there was high probability that the city might have been preserved from falling into the hands of the rebels, or that it fell into their hands in a very strange and suspicious manner, on the morning of the 17th September 1745;" when it is as plain as sunshine, from the facts already set forth, and which are notoriously known to be true, that, without the interposition of a miracle, it was impossible, as circumstances then stood, that this town could miss to fall into the hands of the rebels upon the 17th September 1745. It is notorious, that the dragoons, and all the military force, had then left the town; that the volunteers, before that time, had thought fit to give up their arms to the castle; that the Edinburgh regiment, which was then hardly one-third full, and the men only raised a few days before, had also given up their arms; that the burghers, or trained-bands, declined to go up and expose their lives in keeping out the walls, when the military had wholly deserted them; and they had now understood, by repeated threatenings from the rebels, that any man that appeared in arms would be put to death. The Court has already heard the pains which was taken by the pannel to animate all these different sets of men in the defence of the city, and the success: and when such was the case, where was there any probability that the town could stand out against an army of half the number of the rebels? or where is there any thing strange or suspicious in the rebels becoming masters of the town, when it was thus deserted? Was the pannel to go up, with as many of the company of the town guard as were able to stand, after the fatigues they had undergone for two days before, and make head against this body of rebels? Or, if he had attempted it, would the inhabitants have permitted the town to have been stormed and sacked, which behoved, in such a case, to hap-

pen in less than an hour? It seems evident, that, in such a concurrence of circumstances, nothing could save the town from being taken, unless it had pleased Providence to strike the rebels with such dismay and terror, as many were then un luckily struck with, whose duty it was to have opposed them.

The pursuer is pleased to ask, "Why did the pannel advise with the inhabitants? Why did he give way to a general meeting in the church? Why did he not order them to keep within doors? Why did he not advise with his fellow-magistrates and councillors, or with the chief officers of the volunteers, and deliberate with them upon the supposed change of circumstances? And if in such council, it had been debated and resolved, by plurality of voices, to be impracticable or inexpedient to persist any longer in the measure of defending the city, that resolution might have justified or acquitted him; but that nothing of this kind is alleged, and thereby he has taken the whole upon himself."

But, with great submission, it is a little surprising these questions should be asked, after the notoriety of the facts already stated. It is certain fact, nor is the contrary alleged in the libel, that the pannel acted in this whole matter in concurrence with his fellow-magistrates and councillors. It cannot be said, that, from the beginning to the end of this affair, he ever opposed or over-ruled them in any one article. The officers of the volunteers were also consulted with, and your lordships have heard what accounts they gave the pannel of the disposition of their men with respect to the defence of the town; and that, in consequence of this disposition, their arms were all given up soon after. The pannel ordered the inhabitants to keep within doors, and caused the drum to go round for that purpose: but what force had he to compel them? Numbers of instances are to be found in history, where considerable garrisons have been forced by the inhabitants to surrender a town: and here it is made a ground of accusation against the pannel, that he was not able to over-awe the inhabitants of this populous city, when he had no other assistance, either to defend the town, or to keep them in awe, but such as had been taken a few days before from among themselves, and who were all equally impressed with the same terror of the rebels, and belief of the impracticability of making an effectual defence.

It is apparent the pannel did all that any man could do in the like situation: he tried to animate the people, sent for the civil officers of the crown for advice, and, when he found they had withdrawn, which, whatever gloss the pursuer may think fit to put upon it, is an evidence of their judgment that the town could not be defended, he sent for the best advice and assistance he could get, and never parted with the gentlemen of the council, nor in any thing controuled their advice, until the end of the transactions now in question: and therefore, according even to the doctrine laid down

by the pursuer, his conduct falls to be justified; for it cannot be thought material, that there are no minutes of the town-council or committee remarked in the record after the 13th or 14th of September. The two following days were too much crowded with the many various and important transactions above set forth, which succeeded one another every moment, to take down minutes regularly in writing: but still it is sufficient for the pannel to say, that it neither is nor can be pretended, that in any one particular he controuled or over-ruled the opinion of the committee or the council.

In order to give a greater colour to the charge against the pannel in this case, the pursuer endeavours to represent the office he was possessed of in this city, as superior and independent of the rest of the magistrates and town-council: that he is the high-sheriff, colonel of the trained-bands, city guard, &c. and, in a word, that the whole government and defence of the town was solely devolved upon him. From which it is inferred, that he must be answerable for all miscarriages, as if there had been no other magistrate or authority in the town but what was lodged in himself.

But the pannel is at a loss to discover upon what authority the pursuer builds this absolute power he thinks fit to vest in the Lord Provost of this city; for it does not seem to have any foundation, either in the ancient laws, or in the late regulations laid down by his present majesty with respect to the defence of the town. By the common law, as well as the statutes relative to these matters, the whole magistrates are considered to have an equal concern in the government of the burgh. So says the statute, Ja. 4, parl. 6, cap. 87, and Ja. 6, parl. 18, cap. 17, which "forbids all persons, of whatsoever rank, to convocate or assemble themselves without due intimation to the provost or bailies of the burgh, and their licence obtained thereto: and ordains the inhabitants of the boroughs to assist and concur with the magistrates and officers for settling the said tumults and turbulencies, and punishing the authors thereof." And, as far as the pannel knows, the other magistrates have a joint right to concur with the provost in every thing relating to the government of the borough.

It is of no moment to the present question, that the provost is in use to sit on trials as high-sheriff; for it is not alleged that he acted any thing in that capacity in the matters now called in question before the Court.

It is true, that, by the act of parliament establishing the company of the city-guard, the provost is appointed captain of it; and he is also the commander of the city trained-bands, as being the first magistrate in the town: but still, in these commands, he has no absolute power, but is subject to the directions of the council.

And so it was also regulated by the sign-manual granted by his majesty, in September 1745, authorizing to levy this regiment for the defence of the city. It is appointed to be

under the direction of the lord provost, magistrates and town-council of Edinburgh; and the magistrates and council did accordingly take the direction of it into their hands; and though they paid the compliment to the Provost, to name him colonel of the regiment, yet it was in their power to turn him out, and name another, when they thought fit; and the nomination bears, that he was to conduct and direct the regiment, and the officers who should be named to command under him, as the council should think proper; and therefore, in this military capacity, he acted under the direction of the town-council, from whom his authority proceeded. It is humbly submitted to the Court, how far it is at all congruous to single him out in a trial of this kind, when it neither is nor can be alleged, that at any time he ever varied from or opposed that direction.

In the Information on the other side it is observed, "That notice was taken by the pannel's counsel, that he was possessed of a very large property, consisting of a stock of wines, at Leith, but that it did not appear whether they intended to mention it as an argument to evince the pannel's sincerity in desiring to keep the rebels at a distance, or as an excuse for his not opposing them with vigour and zeal, lest he might be hurt in that part of his property." And upon this some insinuations are thrown out that might have been spared.

But it was not easy to misapprehend the meaning of the pannel's counsel, in the mention they made of the large property he was possessed of in this country, which was no ways particularly referred to the wines at Leith, which makes but a very small part of it, but principally to his personal estate, and debts due to him, to a great extent, by many gentlemen in the country, which could not fail to suffer considerably by such a convulsion as must happen when a rebellion arises in a country. This was overly mentioned by the pannel's counsel, as a circumstance that made it improbable, that any gentleman of common sense, in this situation, would deserve the censure thrown out in the libel, of secretly abetting such disorders; but the pannel's counsel gave no handle for drawing the other inference here insinuated, which is so injurious to the pannel's conduct, and so disagreeable to his character. His conduct stands in no need of such excuses; it will stand the test: he has not shewn, by any thing that has ever passed in this affair, that he put an over-value either upon his life or his property, when his duty came in competition. The wines were of little moment in respect of the other risques he behoved to undergo upon such general distress of his country; and it is unjust to insinuate any suspicion of such low motive, when it is apparent he has given no occasion for it from any part of his conduct, however strictly and rigorously examined.

The pursuer is pleased to argue, "That the facts here charged, if done *doloso animo*, would have amounted to high-treason; and there-

fore it is a great lenity that the pannel is only pursued for misbehaviour; and citations are brought from sir Matthew Hale, to prove that the delivering up the king's castles to his enemies, through treachery, bribery, &c. is high-treason; and from Ærodius, to prove that negligence in public officers may be severely punished."

But the pannel has little occasion to trouble the Court with enlarging upon these authorities, because he cannot discover they have the least connection with the present case: he has no occasion to dispute, that the delivering up the king's forts to enemies or rebels is high-treason; or that wilful faults and neglects in public officers may be punished: But it is, nevertheless, equally true, that when a fort is taken by a superior force, which could not be resisted, there is no crime at all in the case: Nay, in the very page quoted in the pursuer's Information from sir Matthew Hale, vol. 1, p. 168, it is laid down as a rule, That if a subject should swear fealty to the king's enemies, if it is done for fear of his life, and he returns as soon as he can to his allegiance, he is not punishable. It is incumbent on the pursuer to reconcile with this authority that part of the charge which is so much insisted on in this case, and to shew how the same law that excuses a direct adherence to the king's enemies, when compelled by fear of death, can punish the leaving arms to fall into their hands, when compelled by the same terror; or can punish an omission to give an order to abstract them in such circumstances, which is the charge laid in this libel.

The pannel shall not dispute, that it is a lenity to prosecute for a lower crime, when a higher is incurred; but he must be forgiven to think, That does by no means apply to his case, and that the hardships he has suffered are of a pretty singular nature: That, after having lived so long in the world with an irreproachable character, and served his country in parliament with an entire reputation, remote from every sinister view, and thereby deserved the esteem of his constituents, as a mark of which they conferred on him the office of chief magistrate of this city: That, because he had the misfortune to see his country involved in public confusions before the end of his administration, and the city irresistibly overpowered by lawless force, after all the precautions he had taken to prevent it, the malice of his enemies should have so far prevailed against him, as to bring him under a suspicion of guilt, and subject him to the heavy sufferings he has already undergone: And now, when after the strictest scrutiny and inquisition into his conduct for above twenty months past, the charge appears fully drawn out, the bulk of it consists of supposed omissions, or errors in point of conduct, which, if the contrary steps had been taken, might have been equally found fault with, as the event turned out; and the two Articles upon which the chief stress is laid, when the circumstances of the case are considered,

do truly resolve into no more but that he was not able to keep out the town when all assistance had deserted him, nor to prevail with the inhabitants to secrete their arms, when they were under the immediate terror of their lives. These things he hopes will not be imputed to him as a crime, but that he will be relieved from all farther hardships by your lordships' justice, in dismissing the libel as irrelevant, and assailing him from this prosecution. In respect whereof, &c. JAMES FERGUSON.

Upon the 31st July 1747, the diet was adjourned till Monday the 3d August thereafter, and upon that day the diet was farther adjourned till Thursday the 6th of that month.

CURIA JUSTICIARIE S. D. N. Regis, tenta in nova Sessionis Domo Burgi de Edinburg, sexto Die Mensis Augusti 1747, per nobilem et potentem Principem Archibaldum Ducem de Argyll Justiciarium Generalem, et honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areaskine de Tinwald, et Hugonem Dalrymple de Drummorie, Commissionarios Justiciarii dict. S. D. N. Regis.

Curia legitime affirmata.

Intran'

Archibald Stewart of the city of Edinburgh, merchant, and late lord provost of the said city, pannel.

Indicted and accused as in the former sederunt.

The Lords, after arguing upon the Libel and Informations, pronounced the following Interlocutor: "The Lords Justice General, and Commissioners of Justiciary, having considered the criminal libel pursued at the instance of William Grant of Prestongrange, esq. his majesty's advocate, for his majesty's interest, against Archibald Stewart, of the city of Edinburgh, merchant, and late lord provost of the said city, pannel, with the foregoing debate thereupon, they find it relevant to infer the pains of law, that the pannel, at the time and place libelled being then lord provost of the city of Edinburgh, wilfully neglected to pursue or wilfully opposed or obstructed, when proposed by others, such measures as were proper or necessary for the defence of the city against the rebels, in the instances libelled, or so much of them as do amount to such wilful neglect; and find it relevant, as aforesaid, *separatim*, That the firelocks and bayonets belonging to the city, or the cannon mounted on the city walls, fell into the hands of the rebels through the wilful neglect of the said pannel; or that he refused or declined to take proper measures, when required or demanded, which were in his power, for securing or rendering useless to the rebels the said arms: And find relevant as aforesaid, all such acts charged upon the pannel by the libel, which shall appear to have been unnecessarily done by him,

and which did manifestly tend to the preventing or weakening the defence of the city, or the facilitating the rebels getting possession thereof, or their seizing the arms therein. But allow the pannel to prove all facts and circumstances alledged in his defence for eliding or alleviating the crimes charged upon him as above found relevant: And remit the pannel, with the libel as found relevant, to the knowledge of an assize.

(Signed,)

" ARGYLL, I. P. D."

Thereafter a Bill was presented to the said lords for William Grant of Prestongrange, esquire, his majesty's advocate, humbly shewing, That where he brought a criminal libel, at his instance, before their lordships, against Archibald Stewart, esq. late Lord Provost of Edinburgh, for the crimes of neglect of duty and misbehaviour in office, as more fully enumerate and mentioned in the criminal libel raised, and now depending at his instance against him thereant, that the first diet for the Provost's compareance being some time ago elapsed, and standing by adjournment fixed from former diets to this day; and Walter Groset, collector of the customs at Alloa, a material witness in this cause, and though given out in the list of witnesses, along with others, to the said Archibald Stewart, being not then returned from London to Scotland, though daily expected, was not cited, and consequently no execution given in against him to the clerk of court, whereby the complainer would be prejudged for want of his evidence, unless their lordships provided a remedy: That the fact was, Mr. Groset was out of the kingdom, at least in England, and did not return to Scotland till the seventh of July last, when the warrant in the criminal letters for summoning witnesses was useless, by the elapse of the day to which they were thereby directed to be cited, which was the third day of the said month of July; and as the said Archibald Stewart could qualify no loss by allowing Mr. Groset yet to be cited, and that, in the prosecutor's apprehension, it was no ways disagreeable, either to law or practice, to give a farther warrant for citing the said Walter Groset to any short day they pleased to appoint: Therefore praying their lordships for letters of diligence for summoning the said Mr. Walter Groset, as a witness in the said cause, in common form.

Which Bill being publicly read in court, Mr. Alexander Lockhart, as counsel for the pannel, represented, That he had no power from the pannel himself to oppose this Bill, yet as it was new and unprecedented, and might prove of dangerous consequence in after trials, if such a practice was introduced in this court, he therefore objected, that this Bill could not now pass, in regard, that by the constant and uniform practice of this court, all criminal letters, with the executions against the party, witnesses and assizers, are lodged in the hands of the clerks of court forty-eight hours at least before the trial, that the pannel may have an opportunity

to see the same, and not only to object against the formality thereof, but likewise to prepare himself to prove such objections as he may have against the witnesses that appear to be cited: That, if this practice were allowed, it might be in the power of a prosecutor to protract a process for ever; he might give a list of ten thousand witnesses, and only return executions against ten of these, and every now and then drop in a bill, and tell the lords such a witness is a material witness, and therefore must be cited; and, even in the midst of a proof, supposing a relevant objection sustained against a witness, upon account of an informality in the execution, a prosecutor has nothing to do, but to stop short, and tell the lords this was a material witness, and he must have a diligence for citing him of new; and it was submitted to their lordships, whether they would grant such an extraordinary demand; and as little it was hoped they would comply with the present, which was altogether new and without precedent, and might prove of such dangerous consequence in general.

The Lord Advocate answered, That though the diligence now sought was new, yet it was no ways unreasonable or unjust; if the desire of it was granted, he was willing the pannel be indulged with a convenient time for preparing himself to prove, or bring any objections he might have against this witness; that of two remedies the easiest was to be chosen: for, as Mr. Groset was a very material witness, either he must be cited in this way, or, if the lords should not judge that proper, the prosecutors would desert this diet, and raise a new prosecution, which would protract the time; and therefore, as the pannel could be no ways prejudged by this demand, he hoped their lordships would pass the Bill.

" The Lords Justice-General and Commissioners of Justiciary having heard this Bill, as also parties and their procurators *hinc inde* for and against granting the desire thereof, as above, they refuse the Bill.

(Signed,)

" ARGYLL, I. P. D."

His Majesty's Advocate, in respect the lords have, of this date, judged it not competent to give warrant of new for citing Walter Groset, collector of the customs at Alloa, though he had been in the list given to the pannel, Mr. Stewart, but omitted to be cited for the reasons mentioned in the Bill given in for a new diligence for that effect, does not insist against the pannel Archibald Stewart, 'pro loco et tempore,' reserving power afterwards to insist against him as accords.

(Signed,)

WILLIAM GRANT.

" The Lords Justice-General and Commissioners of Justiciary, in respect his majesty's Advocate does not insist against the said Archibald Stewart, they desert the diet against him, and dismiss him from the bar, reserving to his majesty's advocate to insist against him afterwards, as he shall see cause.

(Signed,)

" ARGYLL, I. P. D."

Thereafter Mr. Gilbert Elliot, advocate, protested, that the said Archibald Stewart had fulfilled his bond of recognizance, by comparing from time to time at the several diets of court, and not departing this court without leave thereof, the diet being now deserted, and he dismissed from the bar, that therefore the said bond was avoided; and thereupon took instruments, in the hands of the clerk of court.

PROCEEDINGS IN THE SECOND TRIAL OF
ARCHIBALD STEWART, ESQ.

CURIA JUSTICIARIE, S. D. N. Regis, tenta in novâ Sessionis Domo Burgi de Edinburgh, vigesimo sexto Die Mensis Octobris 1747, per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areskine de Tinwald, et Hugonem Dalrymple de Drummore, Commissarios Justiciarii dict. S. D. N. Regis (Lord Strichen Præs.)

Curia legitime affirmata.

Intran'

Archibald Stewart, of the city of Edinburgh, merchant, and late Lord Provost of the said city, pannel,

Indicted and accused at the instance of William Grant of Prestongrange, esq. his majesty's advocate, for his majesty's interest, for the crimes of neglect of duty, and misbehaviour in offices and places of public trust, and the violation of the trust and duty of such offices, in manner at length mentioned in the criminal letters raised against him thereanent.

N.B. The Libel here mentioned, is the same with the former Libel.

The Libel being openly read, Mr. Archibald Stewart, pannel, craved, That before he should be obliged to plead guilty or not-guilty to the libel, he might be heard by his counsel, whether or not he was obliged to answer to this second libel at all?

Mr. Lockhart for the pannel then insisted, That now, after a former libel had been raised, the cause debated, informations given in, the relevancy determined, and an exculpatory proof allowed to the pannel, there could not, according to the forms of the court, any new libel be raised: that any processes of this kind, that have been deserted, and of new prosecuted, have been always considered as a grievance upon the subject: and by an act of parliament, James 6, parl. 6, c. 78, after repeating the many grievances occasioned to the subjects in the execution of criminal libels, and deserting of diets when such libels are executed, the act directs, "That, for the future, all prosecutors shall find caution to report their letters duly execute, and insist in the pursuit thereof, until the final end and decision of the same, under the penalty in the act mentioned." That however, in former cases, the crown-lawyers have

deserted diets before pronouncing any relevancy; yet there could not be an instance shewn, where, after a relevancy was determined, the diet had been deserted; and if that were the case, it might be in the power of any king's advocate, from a private grudge, to raise a process against a subject, desert the diet, raise a new process, and so on *ad infinitum*; which would be equal to a forfeiture upon the party accused: that the pannel did not of himself intend to make this objection, but was advised to do so by his lawyers; he being always unwilling to form any objection that might in the least conduce to put off his trial. At the same time it was observed by his lawyers, that it might prove of dangerous consequence to the lieges in general, were such a precedent allowed of; and thereof, at the same time that the judgment of the Court was demanded upon this question, represented, That he was willing to waive the objection, provided the pannel was reimbursed of his expences in the former trial, to shew their lordships that the pannel wanted nothing more than to have his cause tried, and himself vindicate, by a full trial.

The Lord Advocate answered, That the counsel for the pannel had mentioned no law whereupon to found their objection; that the practice of the Court has been, time out of mind, to desert diets, and allow of new prosecutions; that there was no difference of deserting a diet before or after the relevancy was determined. If indeed the pannel had tholed* an assize, then he might have had ground to object against a trial, and to complain that it was oppressive. That the deserting the diet formerly, was owing to the pannel himself, who took hold of a trivial objection, against citing a witness when the first diet of comparison was elapsed. And both this point, and the costs acclaimed by the pannel, were submitted to their lordships. At the same time, he declined entering into any contract with the pannel upon that head, but depended wholly upon their lordships' determination.

"The Lords Commissioners of Justiciary having considered the foregoing debate, find the pannel, Archibald Stewart, must still answer, and plead Guilty or Not Guilty to the present libel, notwithstanding of the objection moved for him thereagainst, arising from what is alleged of the deserting the diet in the former libel, after pronouncing interlocutor on the relevancy thereof."

(Signed,) ALEX. FRASER, I. P. D.

Thereafter Mr. Stewart and the Lord Advocate both represented, That as the defences, and answers thereto, were fully pled, and contained in the informations upon the former libel, and were the same they had now to offer to the present, they agree to refer themselves to the

* An old Scots law-term, signifying a party's having stood trial, till the jurors did incline, or return their verdict. *Former Edition.*

said Informations, without giving the Court or themselves any further trouble.

Then the Court pronounced the same Interlocutor on the relevancy, as that pronounced the 6th August last on the first libel; and thereafter continued the diet till next day at eight o'clock in the morning; and ordained parties, witnesses, and assizers, then to attend, each under the pains of law.

CURIA JUSTICIARIE, S. D. N. Regis, tenta in novâ Sessionis Domo Burgi de Edin-burgh, vigesimo septimo die Mensis Octobris, 1747, per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areskine de Tinwald, et Hugonem Dalrymple de Drummore, Commissionarios Justiciarum dict. S. D. N. Regis.—
(Lord Strichen Præses.)

Curia legitime affirmata.

Intran'

Archibald Stewart of the city of Edinburgh, merchant, and late Lord Provost of the said city, pannel, indicted and accused as in the former sederunt.

Follows a List of the Persons' Names and Designations who were cited to pass upon the Pannel's Assize:

Sir Charles Gilmour, of Craigmillar.
Sir Alexander Nisbet, of Dean.
William Baird, of Newbyth.
Sir John Inglis, of Cramond.
Sir Robert Myreton, of Gogar.
William Keir, portioner of Drumsbough.
John Watson, of Muirhouse.
John Nisbet, portioner of water of Leith.
John Cochran, of Alderston.
James Dewar, of Vogrie.
John Preston, of Gortod.
George Warrender, of Bruntfield.
John Sivright, of Meggatland.
Archibald Brown, of Blackford.
James Falconer, of Monkton.
Thomas Wood, of Wariston.
James Davidson, of Haltree.
Patrick Crichton, of Woodhouslie.
Robert Fisher, of Newhall.
Thomas Trotter, merchant in Edinburgh.
Thomas Dundas, merchant, and late bailie there.
John Paton, bookseller there.
William Hogg, merchant there.
William Ormston, coppersmith there.
James Farquhar, merchant there.
Alexander Grant, merchant there.
John Brand, merchant there.
Hugh Clerk, junior, merchant there.
Alexander Peter, wright there.
David Clerk, wigmaker there.
John Osborn, merchant, and late provost of Edinburgh.
William Wright, baxter there.
Alexander Campbell, brewer there.

William Sands, bookseller there.
John Home, coachmaker there.
Neil Macvicar, merchant there.
William Tod, senior, merchant there.
James Mitchelson, jeweller there.
Archibald Angus, merchant in Edinburgh.
Robert Fleming, printer there.
James Heriot, wright there.
James Stirling, merchant there.
Henry Antonius, wright there.
James Hunter, wright there.
Edward Lothian, goldsmith there.

ARGYLL.
AND. FLETCHER.
P. GRANT.
CH. ARESKINE.

"The Lords Commissioners of Justiciary fine and amerciate sir John Inglis of Cramond, William Keir portioner of Drumsbough, John Watson of Muirhouse, George Warrender of Bruntfield, James Davidson of Haltree, Thomas Dundas, merchant and late bailie of Edinburgh, William Hogg, merchant in Edinburgh, Alexander Grant, merchant there, and William Tod, senior, merchant there, and each of them, in the sum of one hundred merks Scots, for not appearing this day and place, to pass upon the assize of the said Archibald Stewart, pannel, as they who were lawfully cited for that effect, and three several times called from the bar, and at the door of the court house, by a macer of court, as use is."

(Signed,) ALEX. FRASER, I. P. D.

"Mr. Archibald Stewart, pannel, judicially passed from any objection competent to him on account of there not being a majority of landed men named to pass upon his jury."

(Signed,) ARCH. STEWART.

The Lords then named the following fifteen persons to pass upon Mr. Stewart's assize, viz.

ASSIZE.

Sir Alexander Nisbet, of Dean.
John Nisbet, portioner of water of Leith.
James Dewar, of Vogrie.
John Sivright, of Meggatland.
James Falconer, of Monkton.
Thomas Wood, of Wariston.
Patrick Crichton, of Woodhouslie.
Thomas Trotter, merchant in Edinburgh.
Hugh Clerk, junior, merchant in Edinburgh.
William Wright, baxter there.
Alexander Campbell, brewer there.
Robert Fleming, printer there.
James Stirling, merchant there.
James Hunter, wright there.
Edward Lothian, jeweller there.

And no objections being made to any of them, they were all lawfully sworn.

Follows a List of the Writings referred to in the Libel.

1. Letter from the Pretender's son, bearing date from his camp, 16th September, 1745, addressed, "To the lord provost, magistrates, and council of Edinburgh."

2. Answer from the Pretender's son to the first deputation sent by the magistrates and council to his camp.

3. Answer from ditto, to the second deputation from ditto.

4. Representation by the ministers of Edinburgh, to the lord provost, magistrates, and council thereof, of date 6th September, 1745, in favour of the design of putting the city in a proper posture of defence.

5. Petition and Address to the lord provost and magistrates of Edinburgh, of certain burghesses and inhabitants of the city, offering to serve as volunteers in defence of the city against the rebels, with two Opinions of his majesty's advocate and solicitor thereto annexed, of date 7th September, 1745.

6. Application from the lord provost of Edinburgh, and his majesty's advocate and solicitor to general Guest, on the 16th September, 1745, for a party of dragoons to assist in defence of the city.

7. Representation of the committee of volunteers, to Archibald Stewart lord provost, without a date, and unsigned, but found in the custody of Archibald Stewart when he was apprehended.

8. Representation to the lord provost, magistrates, and council of Edinburgh, of certain inhabitants of the city thereto subscribing, which bears no date, but will be proved to have been presented to the Provost on the 16th September, 1745, and was found in his pocket when he was apprehended.

9. Journal of what passed relating to the defence of Edinburgh, from Monday September 2, till Monday, September 16th, in the handwriting of the now deceased Mr. Colin MacLaurin, professor of mathematics in the college of Edinburgh, and found amongst his papers after his death.

10. Examination of Archibald Stewart, esq. the 7th December 1745, before a committee of the lords of his majesty's most honourable privy council.

His majesty's advocate, and Mr. Alexander Lockhart as counsel for the pannel, did admit and agree, that the several matters and facts contained in the records of the town-council, and minutes of the committee, both produced in process, do contain the facts therein stated as they truly happened; and therefore agreed to hold the said records and minutes as probative of the facts therein contained.

N. B. The matters and facts referred to, and here admitted, are ingrossed in the two Informations.

Mr. Lockhart did further admit, that the Articles No. 1, 2, 3, 5, and 6, in the list of writings annexed to the Libel, as produced for proving the said Libel, are the writings referred to in the Libel itself upon the several Articles, and are genuine; but did not thereby mean to admit any facts stated in the Libel, or Information for the prosecutor, with relation to these writings.

N. B. These writings so admitted, are all ingrossed, and taken notice of in the Informations.

Follows a List of the Witnesses Names and Designations cited to bear Evidence against the Pannel.

N. B. All those who were examined are marked thus §.

§ George Drummond, esq. present lord provost of Edinburgh.

§ Archibald Macaulay, esq. late lord provost there.

§ John Wilson, merchant, late one of the bailies there.

§ Gavin Hamilton, merchant, late one of the bailies there.

§ James Stewart, merchant, late one of the bailies there.

Alexander Blackwood, merchant, late one of the bailies there.

§ James Nimmo, esq. late one of the bailies of Edinburgh.

§ Hugh Hathorn, late dean of guild there.

§ Robert Baillie, merchant, late one of the bailies there.

§ James Grant, merchant, and present town-treasurer there.

§ Sir Robert Dickson, bart.

§ Sir George Preston, of Valleyfield.

§ James Millar, late servant to the deceased Alexander Bruce, of Kennet.

§ The honourable Mr. James Leslie, advocate, one of the commissaries of Edinburgh.

§ Archibald Stevenson, writer in Edinburgh.

Andrew Bonar, merchant there.

Andrew Currie, late deacon of the weavers there.

Nathan Porteous, late deacon of the skinners there.

§ Patrick Lindsay, depute-secretary to the forces in North Britain.

§ Eusign William Robertson, of Edinburgh castle.

§ Robert Griffith, one of the gunners of the castle of Edinburgh.

§ Joseph Mead, one of the sergeants of the castle of Edinburgh.

§ John Hislop, storekeeper of the city of Edinburgh.

§ Alexander Dryburgh, servant to the said John Hislop.

§ John Dalgleish, watchmaker in Edinburgh.

George Cunningham, surgeon there.

§ Baillie Bryden, lieutenant of the royal regiment of artillery.

§ Mr. Lewis Douglas, advocate.

§ Mr. John Tait, doctor of medicine in Dalkeith.

§ Richard Lindsay, late bailie of Musselburgh.

Andrew Alves, writer to the signet.

§ Alexander Scott, merchant in Edinburgh.

§ Thomas Dalryell, one of the captains of the city-guard of Edinburgh.

§ Alexander Cossar, one of the soldiers of the city-guard there.

§ James Tait, goldsmith in Edinburgh.

§ James Gilleapy, servant to the said James Tait.

§ Mr. William Wishart, principal of the University of Edinburgh.

§ Mr. George Logan, § Mr. John Glen, § Mr. Alexander Webster, all ministers of the gospel at Edinburgh.

Mr. William Robertson, minister of the gospel at Gladsmuir.

William Forbes, one of the principal clerks of the city of Edinburgh.

§ William Henderson, writer there.

§ James Murray, esq. receiver-general of the customs of Scotland.

James Paterson, tide-surveyor of the customs at the port of Leith.

§ Mr. Robert Craigie, of Glendoick, advocate.

§ Mr. Robert Dundas, younger, of Arniston, advocate.

§ Walter Grosset, late collector of the customs at Alloa, now one of the general inspectors of the customs of Scotland.

Alexander Macmillan, writer to the signet.

Anne Stewart, relict of Mr. Colin Maclaurin, professor of mathematics in the college of Edinburgh.

§ George Dunbar, merchant, late one of the bailies of Edinburgh.

§ Mr. Joseph Williamson, advocate, one of the principal town-clerks of Edinburgh.

§ Robert Tennent, merchant in Edinburgh.

James Rattray, servant to Robert Fleming, printer in Edinburgh.

John Paxton, clerk to Archibald Stewart, esq. late Lord Provost of Edinburgh.

Robert Johnston, one of the soldiers of the city-guard there.

§ David Lindsay, writer in Edinburgh.

John Coult, esq. late Lord Provost of Edinburgh.

§ Mr. Charles Erskine, of Edinshead, advocate.

Dougal Ged, goldsmith in Edinburgh.

William Polson, vintner there.

§ Charles Fraser, merchant there.

§ Donald Mackay, cadie there.

Walter Orrock, late deacon of the shoemakers there.

James Norrie, painter there.

John Yetts, merchant, and sometime one of the bailies there.

John Steven, merchant there.

David Inglis, merchant, and sometime one of the bailies there.

§ Edward Inglis, druggist there.

Robert Boyd, merchant there.

Alexander Crawford, baxter there.

Archibald Eagle, seed-merchant there.

Edward Caithness, merchant there.

Francis Jaffray, wigmaker there.

§ Mark Sandilands, merchant, late one of the bailies there.

§ Alexander Hepburn, merchant there.

VOL. XVIII.

§ Robert Brown, taylor there.

William Wightman, shoremaster at Leith.

Charles Leslie, late collector of the newspaper, entitled, *The Edinburgh Evening Courant*. [N. B. This witness was not cited.]

William Smith, merchant in Edinburgh.

Then the Lord Advocate adduced the following witnesses for proving the libel against the pannel:

I. *George Drummond*, esq. present Lord Provost of Edinburgh, solemnly sworn, purged of malice and partial counsel,* examined and interrogate, depones, That, upon Sunday the 8th of September 1745, he was sent by the then Lord Advocate to Provost Stewart the pannel, to acquaint him, that his majesty's sign-manual was come down for raising the Edinburgh regiment of a thousand men; and, upon that occasion, he spoke to the pannel about the burghers associating themselves as volunteers: but the pannel doubted of the legality of such an association, and desired to have the Lord Advocate and Solicitor's opinion thereupon; which was afterwards procured: but who procured it, or brought it to the pannel, the deponent knows not; but remembers, that he had a conversation with the pannel upon the subject of that opinion, after it came to his hand: and at that time the pannel excepted to it, in regard the opinion did not expressly mention, that it was not treasonable; upon which an addition to the former opinion was obtained from the Advocate and Solicitor, bearing that the association was not treasonable: and which opinion and addition being shewn to the deponent, depones, that they are the same which he has above deponed upon. Depones, that after it was resolved to accept of the volunteers, the volunteers agreed among themselves to have a paragraph inserted in the news-papers; and which paragraph was accordingly by them drawn up, and bore, that, upon the receipt of his majesty's sign-manual, authorising the Provost and magistrates to raise a thousand men, and the enlisting the volunteers, upon the king's lawyers giving it as their opinion, that this last might be warrantably done, the Provost cheerfully set about it: and the deponent was sent from that meeting, to shew this paper to the Lord Provost; and he ordered the deponent to strike out the words, "cheerfully set about it," and, in place thereof, insert, "acquiesced in it:" and it was accordingly so put in the news-papers. Depones, that, the night preceding the meeting in the New Church Isle,

* Partial Counsel, by the law of Scotland, is, the instigating the prosecution, or offering the party to depone in his favours; or being present with lawyers at the consultation, where it might be shewn what was necessary to be proved.—And every witness, by that law, is obliged upon oath to swear, that he did neither of these particulars, which is called *Purged of Partial Counsel*. *Former Edition*.

3 Q

being the 9th of September, the pannel came to a tavern where the deponent and several other volunteers were; and, after they had told him what they had been doing that day, and what success they had in carrying forward the subscription, in order to associate the volunteers together, it was told the pannel, that they had judged it proper to put on a badge, or wear a cockade, as a mark of distinction of their loyalty to his majesty's government: but this proposal the pannel heard with a sneer; and told them, he wished they might not expose themselves to the ridicule of others: to which one of the volunteers, who was the deponent, made answer, When we put on that badge, we'll take care no man shall dare to insult us, be his character what it will. Depones, that upon September 10, at a meeting of the volunteers in the New Church Isle, the pannel came there, and a pretty large list was given him by the volunteers, out of whom they desired to have their officers named; and that, next day, the pannel delivered back the list, he having named six captains out of it; and desired the volunteers to name their own subalterns: That, at the meeting in the New Church Isle, the pannel, by several expressions, signified his approbation and satisfaction with the zeal which the volunteers then shewed; but, at the same time, and upon other occasions also, during that week, several things past, which denoted a coldness in the pannel as to the measures which were then carrying forward. And, being interrogate by the pannel, depones, he does not remember where it was, or who were in company with the pannel and him when that conversation past betwixt them, concerning the crown-lawyers' signed opinion; but thinks it was on the morning of Sunday the 8th. As to the third Article, depones, that the deponent had several conversations with the other volunteers concerning the city-walls; which was occasioned by Mr. Macclaurin's remonstrances to them, that the work was not carried on fast enough, he being employed by the town-council in directing the putting these walls in a posture of defence: That the deponent went several times, and viewed the works as they were carrying on; and, in his opinion, they were carried on in a slovenly and careless manner, there being few hands employed: And he remembers, that Mr. Joseph Williamson advocate, was sent by the volunteers to the Provost and magistrates, as he thinks, with a remonstrance, and to desire that some things might be forwarded, as contained in a note relative to these works; whereof Mr. Williamson reported that several were granted, and at the same time told the Provost's treatment of him was a little rough. Depones, that, upon Sunday night, the 15th September, the pannel, capt. James Murray, general receiver of the customs, and the deponent, being together in Mrs. Clarke's, vintner, Mr. Macclaurin came to get orders from the Provost to load the cannon, in order to try them: That Mr. Macclaurin

waited some time, the pannel being then in a good deal of hurry; but when he was going out, he told Mr. Macclaurin, that Mr. Drummond the deponent would give him the proper orders. As to Article fourth, depones, that it was several times talked of to the pannel in the deponent's hearing, to lay aside the trained-bands; and for these two reasons; first, that several of the trained-bands were believed to be disaffected; and, next, it was not convenient for the volunteers to do double duty, both in the trained-bands, and in their own companies: That the pannel disapproved of this proposal, because the trained-bands were the old companies of the town; and besides, he thought it was imprudent to put a mark of distinction betwixt the different inhabitants: That the deponent remembers, that the trained bands of the city were laid aside in the year 1715, upon the occasion of the then rebellion; and the care of the city given to a body of volunteers, who had associate themselves much in the same manner as those did upon occasion of the last rebellion. Depones, that he remembers a proposal made among the volunteers, for employing a number of able-bodied lads, upon the reward of a guinea to be given to each of them, in order to fill up the Edinburgh regiment; but knows not whether this proposal was made to the Provost or not. And, being interrogate for the pannel, depones, that he knows not whether that proposal for laying aside the trained-bands, was ever laid before the council. As to Article fifth, depones, that he remembers, that, upon Sunday the 15th September, there was come to the town of Edinburgh, of volunteers, 42 from Dalkeith, 100 from Musselburgh, 180 seceders, and 70 excise-officers; which, conjoined with above 400 volunteers in the town of Edinburgh, 200 of the Edinburgh regiment, and 126 of the town-guard, made in all 1118 men in the town of Edinburgh, besides the trained-bands. As to the seventh Article, depones, that, upon Monday the 16th of September, he heard from lord Home, there was a petition, such as is mentioned in the said Article, going forward; but he did not see it that day: That, about four o'clock of that afternoon, the fire-bell rung, which was the signal for the volunteers to repair to their respective posts; and which the deponent accordingly did, by repairing to his post in the Lawn-market. As to Article eighth, depones, that, previous to the ringing of the fire-bell above-mentioned, the deponent came into a meeting of the magistrates and council in Goldsmiths-hall, where Mr. Grosset was, who had come there to make offer of a body of dragoons being sent into the town, in case they were required: That, upon his coming in, he found the council deliberating what was proper to be done upon that occasion: That the pannel called to the deponent, to give his opinion concerning the giving up or defending the town; the deponent made answer, That there was no occasion to ask his opinion upon that point, as he had given it formerly, and by his

actions testified his inclination to defend the town. That thereafter provost Coult came into the meeting, and falling into conversation with the deponent, he frequently pressed the deponent to speak: At last the deponent carried him to a corner, and said to him, "Why should I speak, considering the lord Home told me, that he heard you say, on Saturday last, as you was coming up the New Bank close, and when he was looking out of the lord justice-clerk's dining-room window, that all the bustle and work they were now making about defending the town of Edinburgh, was idle, and nonsense; for that the Provost had in his pocket, three days ago, the terms settled in writing upon which the town was to be given up." And provost Coult seemed concerned, and did not flatly deny it, but avoided owning it. Depones, that a little time after he left this meeting, he heard the fire-bell ring; which made him go to his post in the Lawn-market, as above deponed upon; and, after remaining with the volunteers for about three quarters of an hour under arms, and getting no orders, the officers amongst themselves thought proper to advise what was to be done; and at last came to this resolution, as they saw they could be of no use to the town, to return their arms to the government, from whom they had them; which was accordingly execute by the volunteers, the country militia, the seceders, and excisemen; who all marched up to the castle, and delivered up their arms, except two companies of volunteers, who remained upon guard at the Netherbow port; and when they returned from the castle, it was about half an hour after sunset. Depones, that, after coming from the castle, he went to some place in the town, where he expected to get horses brought him; and, while he was there, word came to him, that Mr. Groset was come from the country, with an account, that sir John Cope was landed at Dunbar; and that he was gone to inform the magistrates of it: And upon this the defendant went to the council-chamber, where he met with the Provost, and council, and Mr. Groset. That Mr. Groset, upon his coming in, put into the deponent's hand Lord Advocate's letter, with one directed to the Provost, as the deponent thinks, and another from Mr. Fall in Dunbar, directed to Lord Advocate, telling of sir John Cope's arrival off Dunbar. That, upon this, the deponent told the pannel, that he hoped he would now think of defending the town, and ring the fire-bell, to bring the people to their different posts: To which the pannel made answer, That we must be tender of the blood of our inhabitants; that they had sent out some of their magistrates to treat; and, should the rebels hear the noise of the fire-bell, they might hang them up. Then the deponent proposed, that a drum should be beat through the town; but the Provost made answer, That the volunteers, and others, had delivered up their arms, and the military had left them; and they could not defend the town by themselves. The deponent likewise told

him, it was proper, since the town could not be defended, that the cannon which were mounted upon the walls, and the arms which the inhabitants had, might be so secured, as that they should not fall into the hands of the rebels. Upon this the pannel handed over to the deponent the letter given in with the libel, Number 1, and, upon reading it, the deponent told the pannel, that he did not know, but if they gave up the town to the rebels to-morrow, that the next day the king's troops might think they had a right to use it as a town taken from the rebels. As to the eleventh Article, depones, besides what is already said, that the number of firelocks and bayonets which were in the town-magazine in the years 1726 and 1727, when the deponent was Provost, were about 1200; and that the deponent believes the trained-bands used to be supplied out of that magazine. And the representation given out with the libel, Number 7, being shewn to the deponent; and he being interrogate whether he knows any thing of the said representation? depones, he remembers it to have been drawn up at one of the meetings of the volunteers where he was present; that it was read over to them, and afterwards sent to the pannel by Mr. Williamson, one of their number. And, being read to the deponent, depones, that it is the remonstrance before-mentioned in his oath. And being interrogate by the pannel, whether or not the deponent knows that orders were given for all these particulars by the Provost? depones, that the representation contains four articles, viz. the first, concerning the guards of the town, of which the deponent never heard afterwards any complaint; the second, concerning ladders; and the third, concerning the inbringing of meal; both which he believes were complied with, and immediately done; the fourth concerned the wrights and masons being set to work; as to which, the deponent knows, that bailie Robert Baillie had the town-council's orders, and their full power vested in him, to see to the execution of these things relating to the city walls: And the deponent does not doubt but these orders were given, though in fact very few more workmen were employed, and set to work. *Causa scientie patet.* And this is truth, as he shall answer to God.

II. Mr. James Leslie advocate, and one of the commissaries of Edinburgh, depones, That, upon Monday the 16th of September, 1745, about ten o'clock forenoon, the deponent having some business with Mr. Gordon merchant, and not meeting with him, and seeing the pannel, he desired the pannel to go into Loch's coffee-house, and have it ended with him; and as they were going in, Andrew Alves, writer to the signet, followed them, and went in with them; who told them, that he had been out at Linlithgow the day before, where he saw the rebel or Highland army, and several of his acquaintances, particularly the person then called duke of Perth; who asked him, what

they were doing in the town of Edinburgh? That they had need to be careful; for, if they stood to their defence, he would not answer for the consequences: and, that Mr. Alves was afterwards carried up to the Pretender's son, who told him much to the same purpose: that, upon this, the deponent said, This was a very odd message; but does not remember, that the pannel said any thing.

III. Mr. Robert Craigie of Glendoick, advocate, depones, That, in the last week of August 1745, he was present at a meeting of several of the friends of the government, and inhabitants of Edinburgh, in the lord justice-clerk's house, where was present also provost Stewart, now pannel; where the proposal for levying a regiment of a thousand men for defence of the city of Edinburgh was talked of: that the persons present severally gave their opinions; as did likewise the pannel; at least spoke of the subject; but the deponent did not take notice of any thing as remarkable in what the pannel said: that the deponent understood the purpose of that meeting was, in order to advise the magistrates of Edinburgh concerning the lawfulness of that measure: that the meeting generally agreed, that it was proper to apply for his majesty's warrant for that purpose; and the deponent, being then his majesty's advocate, undertook to write for it, which he did that very night; and received his majesty's sign-manual, by express, on Sunday the 8th September. Depones, that there were present at that meeting, so far as the deponent remembers, the lord justice-clerk, lord Tinwald, provost Macaulay, William Alexander, merchant, and several others. Depones, that provost Macaulay and Mr. Alexander followed the deponent from that meeting, who assured him, that no scruple needed to be made for fear of want of money to support that regiment; for that they would undertake to find subscriptions enough to support it: and the deponent accordingly wrote to one of his majesty's secretaries of state. Depones, that, upon Friday the 6th of September 1745, a gentleman who had been a magistrate of Edinburgh, brought to the deponent a petition, proposed to be signed by several of the burgesses, to be presented to the Provost and magistrates, and desired the deponent's opinion, whether the petition contained any thing illegal or improper? And that the deponent gave his opinion that it did not: that next day, the 7th September, one of the magistrates came to the deponent's house, and told him, that the Provost, and some of the magistrates, wanted to wait of him for his opinion, and desired to know his time: that he said, the magistrates might come when they pleased; that accordingly, very soon after, the Provost, and three or four of the magistrates, came, and laid before the deponent the petition now produced in court; and which was a copy of the same petition he had seen the day before: that Provost Stewart, the pannel, suggested,

that it was unlawful, and, as he was informed, treasonable, to comply with the petition: that the deponent said, that whatever might be the case in some circumstances, yet at present, when there was a rebellion in the country, it was not only lawful, but the duty of every subject to take arms in support of the government. That the magistrates desired the deponent, and Mr. Robert Dundas, then his majesty's solicitor, their opinion in writing: that the deponent thereupon sent to Mr. Dundas, who immediately came; and, after talking with him, did, in his presence, dictate to his clerk their opinion, which he took down in writing, that it was lawful, in the then present juncture, for the magistrates to authorize the petitioners, and others, to take up arms in defence of the city, and of the government; and that the deponent and Mr. Dundas signed the opinion, and sent it with the petition to the magistrates. That, soon after, one of the magistrates brought back the opinion to the deponent's house; and told him, that the opinion did not satisfy the Provost, meaning the pannel; and that he declined to proceed upon the petition, unless the deponent and the solicitor would give their opinion, that the taking up arms was not treasonable: that the deponent testified some surprize at the scruple; however, in order to satisfy it, the deponent and Mr. Dundas signed a second opinion, that it was not treasonable for the magistrates to grant the desire of the petition. Depones, that, on Monday the 16th September, 1745, Mr. Dundas came to the deponent's room, about mid-day, and brought along with him Andrew Alves, writer to the signet, and told the deponent, he found him delivering a message from the Pretender to the people in the street; and that he had brought him to the deponent to be examined. The deponent does not remember whether Mr. Dundas brought any guard along with him. That the deponent accordingly examined Mr. Alves; who told the deponent, that he had fallen in with the Highland army on this side of Linlithgow that morning, and that he had been some time with them: that the person called the duke of Perth spoke to Mr. Alves, and desired him to deliver a message to the provost of Edinburgh, importing, that he expected to be received into the city without any opposition or resistance; in which case the city might expect his protection; but, if he met with any opposition, the city might expect treatment that neither he nor they would wish: that the person whom they called the prince, was near by when this message was delivered by the duke of Perth, and assented to the message: that Mr. Alves came into Edinburgh, and, having met with the Provost, the pannel, he delivered this message to the Provost; and that he had repeated the same thing to several people he met with on the streets. That the deponent remonstrated to Mr. Alves, that it was treasonable in him to carry such a message from the rebels; and the deponent, as he thought it

might be attended with bad consequences, to raise sedition and dissention in the town, by spreading this message, he resolved to commit Mr. Alves to prison; and accordingly caused his clerk to make out a warrant for that purpose. That, in the mean time, the lord justice-clerk had come to the deponent's house, and was in the room with general Guest: that the deponent having come in to them, told them what had happened, and his resolution to commit Mr. Alves: that they approved; only, Lord Justice-Clerk suggested, that it would be proper to send to the Provost; and, if the fact of delivering the message to the Provost, was such as Mr. Alves represented, that it would be proper that the commitment should be by the Provost. That accordingly the deponent sent his clerk with a message to the Provost, in the name of the Lord Justice-Clerk, Mr. Guest, and his own, desiring he would come to them: that the Provost came very soon after; and the deponent understood it was in compliance with the message. That, upon the Provost's coming in, my Lord Justice-Clerk told him what Mr. Alves had said with respect to his delivering the message to him. And the Provost acknowledged the message had been so delivered; that the Provost had repeated it to one of the magistrates, the deponent thinks he said it was to dean of guild Hathorn; and that he asked his opinion, whether it was proper to mention it to any of the rest of the council? That the dean of guild said, it was by no means proper. That the Lord Justice-Clerk asked him, why he did not take notice of Mr. Alves? Why he did not commit him? That it was a treasonable practice. That the Provost made some excuse; that he did not know, or did not think it was treason. That he was told by the Lord Justice-Clerk, that he ought still to commit him; and in this opinion the deponent concurred with him. That the Provost desired directions in what manner: that thereupon the deponent gave him the warrant that he had made out. That thereupon the Provost went away; and, soon after, one from the Provost brought to the deponent a warrant of commitment; but the deponent desired the messenger to get proper officers to execute the warrant; and soon after Mr. Alves was carried off prisoner from the deponent's house; and the deponent believes he was committed to prison. Depones, that, upon the said Monday, the 16th September, while general Guest was in the deponent's house, it was suggested to the deponent, that some confusion seemed to arise upon the streets: that it occurred to the deponent, and to general Guest, and others, who were coming and going to the deponent's house, that it might be of use to suppress disorderly people, and to encourage those who were in arms for the government in the city, that a hundred dragoons should be brought into the town; and that this might, at the same time, be no loss to the service of the dragoons, if so many were chosen out of colonel Gardiner's regiment,

whose horses were rendered unserviceable by their great fatigues. That the resolution was accordingly taken; and sir John Inglis, with the assistance of some other justices of peace, provided a quantity of hay for the subsistence of the dragoons. That colonel Clayton, who, as the deponent understood, acted as aid de camp to brigadier Fowkes, came several times that forenoon to general Guest for orders; and that, at one of these times, general Guest gave orders to send in the hundred dragoons, by a verbal message to the brigadier. That general Guest went to the castle before two o'clock. That, before three, colonel Clayton came to the deponent's house, and told the deponent, that brigadier Fowkes declined to obey the verbal message touching the sending in the dragoons; and that he desired a written order from Mr. Guest: that, upon this, Mr. Dundas the solicitor, and the deponent, went along with colonel Clayton to the castle, and stated the case to Mr. Guest: that Mr. Guest agreed to give the written order, but desired as a condition, that the Provost of Edinburgh, Mr. Dundas, and the deponent, should give to him their opinion in writing, that it was for the service of the government that the dragoons should be sent into the town: that, as the Provost was not present, the expedient proposed and agreed to, was, that the general should sign the order for the dragoons, and should put it in the hands of Mr. Lindsay, the secretary at war, who wrote the order; that the deponent should procure the Provost's subscription to the opinion, and his own and Mr. Dundas's; and, upon delivering this opinion to Mr. Lindsay, Mr. Lindsay should deliver the order to colonel Clayton. That the general accordingly signed the order, and delivered it to Mr. Lindsay; and the opinion desired was wrote out by Mr. Lindsay. That colonel Clayton, Mr. Dundas, Mr. Lindsay, and the deponent, came down from the castle, and called for the Provost at his house, and missed him; but met him in the Lawn-market, opposite to the entry to Fisher's land: that the deponent told the Provost what had passed; and that it was proper he should sign the opinion, in order to procure the dragoons. That the Provost appeared in some confusion, and said, he was hastening to the Westport to shut it; that the Highlanders would be there before him. That the deponent suggested, that the measure might be of use against the Highlanders; and that it would be no losing of time. The Provost agreed to step up to the deponent's house; and the Provost, in the deponent's consulting-room, signed the opinion, and after him it was signed by the deponent and Mr. Dundas; and the deponent having delivered the signed opinion to Mr. Lindsay, Mr. Lindsay delivered the order by Mr. Guest to colonel Clayton, in order to be carried to brigadier Fowkes. Depones, that colonel Clayton, upon his coming to the deponent's house, did inform the deponent that the rebels were on their march, and were come the length of Kirkliston water. And when the deponent was in the castle, he

observed the dragoons marching eastward by the long dykes; and this determined the deponent to follow them down to Leith, where he supposed they were marching to solicit the execution of Mr. Guest's order. That he believes this might have been about four o'clock at night. That he met Mr. Walter Grosset, then collector at Alloa, between the Watergate and the Abbey-hill: That Mr. Grosset told the deponent he was coming with a message from the Lord Justice-Clerk to the Provost, offering him the assistance of the two regiments of dragoons, or such a number of them as the Provost should desire, in defence of the town: that the deponent told Mr. Grosset, that the Provost had agreed to demand, and obtained an order to bring in a hundred dragoons; but he might proceed with his message. That Mr. Grosset did not say, nor did the deponent understand, that he had any written message from the Lord Justice Clerk. That the deponent found the dragoons had not gone to Leith, but were in their road to Fisher-row: and he understood from colonel Clayton, that Mr. Fowkes did not incline to divide his dragoons. However, before the deponent had come up with Mr. Fowkes, Mr. Stark, commander of the Custom-house sloop, delivered a letter to the deponent from the provost of Dunbar, acquainting him, that the fleet on board of which sir John Cope's troops were, was seen within the May about two o'clock; and that they would be at Leith with the next tide, which would happen in the night time. That as the deponent read his letter aloud, it was soon known through the whole two regiments, and to Mr. Fowkes. That Mr. Fowkes thereupon alighted, and went into Mr. Forbes's house; and, as the deponent understood, he there wrote letters to sir John Cope, acquainting him of the situation of matters: and the deponent found Mr. Fowkes not at all disposed to divide his regiments, or to comply with Mr. Guest's order. While the deponent was in Mr. Forbes's house, and Mr. Fowkes was writing his letters aforesaid, Mr. Grosset returned from Edinburgh, and delivered to the deponent a letter from the pannel, addressed to the deponent and Lord Justice-Clerk, which he now produces, and is marked by him and the Lord Examiner; wherein he desires a new opinion from the deponent and the Lord Justice-Clerk, before he would receive any dragoons. That this was a disappointment to the deponent, and made him not think it proper to press the sending the dragoons, as it persuaded him that matters were changed from the time he had left Edinburgh. However Mr. Grosset was sent back to Edinburgh, with the accounts of sir John Cope's arrival; and the deponent delivered him his letter, with a certificate that the letter and account were genuine. And depones, That he heard Mr. Fowkes mention what he had wrote to sir John Cope; and that he had advised him rather to land his troops at Preston-Pans or North-Berwick than at Leith, as he would

be nearer the assistance of the dragoons, who were to be quartered that night at Preston-Pans, or thereabouts; and being interrogate for the pannel, what he thinks was intended by the councils mentioned in the Provost's letter above deponed upon? Depones, That he apprehends the councils therein mentioned is what past at a meeting in the Lord Justice-Clerk's, in Edinburgh, on Sunday evening the 15th, when general Guest, brigadier Fowkes, Lord Justice-Clerk, the pannel, the deponent, and several others were present: that the deponent understood, that it was then agreed upon, that the dragoons should incamp that night on this side the Colt bridge; that some time after a question was stated, whether the town of Edinburgh might not be a proper quarter for the dragoons, to wait there the landing of sir John Cope? and, whether they could not at pleasure join him, whatever situation the rebels might be in? That the deponent remembers that captain Murray, the receiver of the customs, answered, That he thought it would not be a proper quarter; for that if the rebels were possessed of the suburbs, and should set fire to the Potter-row and Bristow ports, the dragoons could not possibly march out. That this was all the deliberation that the deponent and the Provost together were witnesses to concerning the dragoons coming into Edinburgh; and, to the best of his memory, these were the very expressions. Whether there was any other concert upon that subject the said Sunday evening, the deponent cannot say; as the deponent went to another room to examine prisoners, after the resolution was taken touching the incampment that night; and when the deponent returned to the company, he heard captain Murray's opinion at last deponed upon; and very soon thereafter the company parted. And depones, That the petition by the burgesses to the magistrates and council, and the two opinions thereon, now produced in court, and signed by Mr. Dundas and the deponent, are the petition and opinions referred to in the above deposition.

N. B. The letter referred to in this oath, and produced by Mr. Craigie, is fully ingrossed in the Information for the prosecutor, p. 875, except a postscript, in these words: 'I am determined by your orders.'

IV. Mr. Robert Dundas younger of Arniston, advocate, depones, That the deponent went for a few days out of town about the end of August 1745. That, on his return, he understood, that there had been a meeting concerning the raising a regiment for the defence of the city, and likewise concerning a proposal by some of the burghers and inhabitants, to serve as volunteers in that service: That some of those concerned in the proposal came to the deponent's house, to ask his opinion concerning the lawfulness of it; and told him, that some difficulties were made about it, particularly by some lawyers. That the deponent said, He had no difficulty of its being lawful

In consequence whereof a message was there-after sent by the town-council to get the opinion of Mr. Craigie, then lord advocate, and the deponent's; which they accordingly gave in writing, and subscribed. But, as the deponent was going away out of town, some hours after that, he met Robert Baillie, then one of the bailies of Edinburgh, and another member of the town council, whose name the deponent cannot recollect; who told him, That the Provost was not satisfied with the opinion; that he excepted to the manner in which it was expressed; because, though they had said it was lawful, they had not said it was not treason: And that thereupon Mr. Craigie had already subjoined an additional opinion; but that still provost Stewart was not pleased, unless he got the deponent's subscription. And the deponent accordingly signed that additional opinion also: And that the opinion, and additional opinion, in the clerk's hands, shewn to him, are the same that were signed by him. Depones, That upon Monday the 16th September 1745, the deponent came down to the street from Mr. Craigie's house about eleven o'clock in the forenoon: That he met sir John Inglis of Cramond at the end of the Luckenbooths; who told him that Andrew Alves writer to the signet was at the cross, telling to every body, That he had brought a message from the rebels at Linlithgow, That, if the town of Edinburgh was peaceably given up, there should no mischief be done to the inhabitants; but, if any resistance was made, the consequence might be fatal to them. That the deponent went immediately in search of Mr. Alves; and, having found him, asked, What tale he was thus spreading about; and how he came to carry a message from rebels? That Alves repeated the message, as above; and excused himself for bringing it, saying, That he accidentally had been taken prisoner by the rebels. That the deponent immediately carried Mr. Alves to Mr. Craigie's house, and there left him; and, returning some time after, he found together the lord justice clerk, Mr. Craigie, and the pannel, Mr. Alves being then in another room: That he was then told, Alves had delivered the message to the pannel about an hour before; and, as the deponent thinks, the lord justice-clerk said, that he and Mr. Craigie had sent for the pannel as the properest person to sign the warrant for committing Alves: That, in a very little, the pannel left the room; and, soon thereafter, a party of volunteers came with the pannel's warrant, and carried off Mr. Alves to prison. Depones, That, about four o'clock of Monday the said 16th September, major Clayton brought the account to Mr. Craigie's, where the deponent then was, that the rebel-army was advancing; and that it was thought proper for the dragoons to retire to the plain ground between Leith and Edinburgh. That thereupon Mr. Craigie and the deponent went to lieut. gen. Guest in the castle; who agreed to order 100 dragoons into the town of Edinburgh, if the demand was made in writing:

That Mr. Craigie and the deponent, returning from the castle, met with the pannel at the Bowhead well; whereupon the deponent told the pannel, That they were well met, for they were going just to send for him, to communicate to him something of importance: That the pannel answered, That it was not now time for consultation, but for execution, when the enemy was at their very gates: to which the deponent replied, That it was not for consultation, but execution that he was wanted; and then the pannel went up to Mr. Craigie's house: And upon his being told that he might have 100 dragoons into the town, if he thought proper; he answered, That it was certainly right, and that he was very desirous of it. Upon which a letter was wrote and sent to lieut. gen. Guest, signed by Mr. Craigie, the deponent, and the pannel, requesting the aforesaid number of dragoons to be sent into the town.

V. Mr. George Logan, one of the ministers of Edinburgh, depones, That, in the afternoon of Monday the 16th September, the deponent, and some others of his brethren ministers, being told in the coffee-house, that there was a meeting of a great many of the inhabitants in the New Church Isle, and that it was the opinion of the meeting, that the town could not be defended against the rebels; the deponent therefore went to the said meeting: That he found there the pannel acting as preses of the meeting: That the meeting was very numerous: That he could not say that they were composed of such as he thought the best affected to his majesty's government: That many of them he did not know; but of those he knew, severals were such as he always thought disaffected: That the deponent does not remember to have seen any of the volunteers there, except Mr. Glen the minister; but where they were, he knows not: That as the deponent, or at least his wife, had a considerable interest in the town, which he was very willing to risk for the service of the government; he proposed to the pannel, then preses of the meeting, that the dragoons should be brought into town, for the defence of it: But the pannel answered, The dragoons were gone too far to be brought back again.

VI. Dr. William Wishart, principal of the college of Edinburgh, depones, That in the month of September 1745, the deponent was present at a meeting of several of the ministers of Edinburgh, when it was concerted that a paper should be drawn, and signed by them, approving of the design of raising the Edinburgh regiment for the defence of the town, and engaging to contribute towards defraying the expence. That the paper was accordingly drawn and signed by the deponent, and several other ministers in the deponent's presence, of the date it bears, the 6th day of the said month of September; and that the writing signed by the ministers in the clerk's hands,

being No. 4, of the list of writings subjoined to the libel, is the same paper that was signed by the deponent. [Vide Lord Advocate's Information, p. 875.] Depones, That, in the afternoon of the 16th September, about four-afternoon, the deponent went to Goldsmiths-hall, where he found the pannel, then lord provost, several of the magistrates and councillors, and some others of the inhabitants of the town. That some of the meeting, but, as the deponent thinks, none of the council, said, 'That several of the inhabitants were in terror, both for their houses and persons, should any defence be made of the town against the rebels; and therefore were for delivering it up. That no answer was made to this suggestion: but, at that time, Walter Grosset, collector of the customs at Alloa, came into the meeting, with a message to the pannel from the lord advocate and lord justice-clerk, that there were a hundred dragoons in town, and the rest might be brought in, if his lordship desired it. That the pannel answered, 'That that was putting the thorn in his foot, but that he would return it; and appealed to provost Drummond, then present, whether, at a meeting that had been held the last or the other night, he had not heard it said, that, if he brought any of the king's troops into Edinburgh, it was bringing them into a poindfold to be caught by the rebels? and upon that account he would give no orders. That Grosset answered, 'That those who sent him were ready to give the orders, if his lordship desired it. That thereupon he gave Mr. Grosset a verbal answer to return to the lords advocate and justice-clerk, which Mr. Grosset seemed to understand as a refusal, and repeated it as such: That the pannel said he had mistaken him, and that he would give it him in writing; and called for one Henderson to write the answer, which the pannel began to dictate: but the deponent thinks the meeting broke up before it was finished. That the occasion of the meeting's breaking up, was, that more people came in pressing to give up the defence of the town. Upon which the pannel said, 'We cannot stay here; let us ring the bell, and go into the New Church Isle. Upon which the fire-bell was rung. And the deponent, having gone first home, returned immediately to the New Church Isle, where he found the pannel seated in the moderator's chair, and a pretty numerous meeting, most part of them not known to the deponent, not even by sight: such as he did know, several of them were such who frequented nonjuring meeting-houses; but others who attended the established Church. Depones, 'The first thing the deponent observed at that meeting was, the preceding witness, Mr. Logan, standing upon a form, and saying, 'That the sending out to treat with the rebels, was inviting them to town; and that he heard his majesty's troops were nigh at hand to assist the defence of the town: but that this was generally houted in the meeting, and a cry raised, 'They were gone, they were fled, they were gone to Haddington.'

Depones, 'That the deponent then spoke to the pannel, and put him in mind of the proposition that had been about half an hour before made to him by Mr. Grosset, as from lord advocate and lord justice-clerk, and desired to know what answer had been made. That the meeting raised the former cry, 'They were gone, they were fled.' But the pannel very civilly interposed, and said, 'The deponent's question deserved an answer; and then repeated in substance what he had before said in Goldsmiths-hall to provost Drummond. To which the deponent replied, 'That, by the message he had got, it would seem that the troops could not yet be so far off as was alledged at that meeting. Depones, 'That thereafter the deponent, directing his discourse to the preses, said, 'That he hoped no gentleman in that meeting would dare to propose the delivering up the town to the rebels, or words to that purpose. The pannel answered, 'Yes, it is proposed. Another gentleman replied, 'No, Sir, it is not proposed to deliver up the town to the rebels, but to send out to treat with them; and then they will go by the town. Upon which the deponent said to the preses, 'That before making a proposal of that kind, or, which the deponent thinks was his words, before putting a question of that kind to any meeting, he should have first purged the town of the known enemies to the government that were in it. Against which a hout was raised in the meeting; and one of them said to the deponent, 'Then you should be amongst the first that should be put out of it; which raised a great laugh. That, at the same meeting, bailie Hamilton said to the pannel, 'That, if it was proposed to deliver up the town to the rebels, his lordship should first send orders to the volunteers to deliver up the government's arms, that they might not be surprised by the rebels: but the deponent heard no answer made to it. Depones, 'That sir George Preston of Valleyfield, who had the command of a company of volunteers then planted at the Netherbow, came into the meeting, and desired to know from the pannel, 'What he was to do with his company? or what orders he was to give him? That the pannel answered, 'I cannot answer that yet; by-and-bye. That sir George said, 'That if they were proposing to deliver up the town to the rebels, it was time for him to know what he was to do, for he could not stay; and desired an answer. That no answer was given him, so far as the deponent heard. That then the pannel put the question to the meeting, 'Who are for defending or holding out the town? If any, let them speak. To which the deponent said, 'That he was, though he should be alone there? That sir George Preston said, 'And I; and that one or two more said the same: but the generality of the meeting were of another opinion. Depones, 'That the pannel then put the question, 'Shall we send any to treat with them? Upon which the deponent said, 'That he hoped not to have lived ever to have heard such a question put by a lord provost of

Edinburgh. But no reply was given. And then the pannel put the question, Whom shall we send to treat with them? Upon which the deponent and sir George Preston left the meeting: and, upon their coming out, the deponent saw some of the captains of the volunteers leading up their men to the castle to deliver up their arms. Depones, That, upon Saturday the 14th, the deponent was told, that the ringing of the fire-bell was appointed as a signal for the volunteers convening in the Lawn-market, there to receive their orders from the pannel: and the fire-bell having been rung in time of divine worship on Sunday the 15th, in the forenoon, the deponent was told, it was to convene the volunteers as above; and that they met accordingly: and as the deponent went from church, he saw some of them in the Lawn-market, and some of them that had marched down to the Grass-market. And being interrogate for the pannel, What answer provost Drummond made to the appeal that the pannel made to him in Goldsmiths-hall? depones, He does not remember he heard any answer made. And further depones, That the New Church Isle was pretty full at the above meeting, though the deponent has seen it more crowded: that they were all men, and no women; but the deponent cannot give any judgment what number they might have been.

VII. Mr. John Glen, minister of the gospel at Edinburgh, depones, That the Representation of the ministers of Edinburgh to the Lord Provost and Magistrates, marked N^o 4, in the list of writings produced against the pannel, now shewn to him, was signed by him; and that he saw others, whose names stand there, also sign the same: believes, that all of them did so whose subscriptions appear; but cannot be positive: but says, that whether this representation was given in to the Provost and Magistrates, does not consist with his proper knowledge; but that he advanced money in consequence of his subscription, as the same was demanded. Depones, That he was present at a meeting of the inhabitants in the New Church Isle, in the afternoon of Monday the 16th September 1745: that the pannel was then in the chair: that the deponent staid but a very little time there. And being interrogate, of what sort of persons he judged the meeting was composed? Saith, That the bulk of them appeared to him not of the best affected in the place; and that the reasons of this his opinion were, that he saw severals of them who, he was informed, had concurred in a petition to deliver up the town to the rebels; and several others who had not contributed money towards defending the town, as the other zealously well-affected subjects had done. That as the deponent staid but a very little time there, he cannot pretend to give any particular account of the transactions in that meeting: only, the pannel, while he was there, from the chair, told the assembly, that he had called them to-

VOL. XVIII.

gether, to take their opinion what was proper to be done in the present situation of affairs: but that the deponent left the meeting before any resolution was come to, by those who were there assembled. That the deponent observed very few of the volunteers at that meeting: that several of them were then in the Lawn-market, the deponent having come down that way to the church; and others of them at the Netherbow port, whom the deponent saw there when he went out at the port, in order to go to the country. Depones, That he was informed by the officers of the volunteers, or by his fellow-volunteers, he himself being one, that the signal for them to meet at their alarm-post in the Lawn-market was the tolling of the fire-bell. And being interrogate for the pannel, what the reason was why he who was a volunteer left his corps, and went away, in time of danger? Saith, That he had waited so long upon the street among the volunteers, without any orders or directions, not knowing what was to be done, that he began to believe the town was to be delivered up, and the volunteers, with their arms, put into the hands of the rebels; and therefore, though perhaps it was not very agreeable to military discipline, he thought it the safest and best for him, to retire: and also saith, That when he came to a resolution to go away, he applied to one of the officers of the volunteers, to have leave to put his gun into the hands of a castle-soldier who was there attending, and had been with him frequently before, in order to teach him somewhat of the military discipline: which the officer agreed to; and the gun was accordingly put into the soldier's hands, with sixpence for his trouble in carrying it to the castle.

VIII. James Stewart, merchant, and one of the bailies of Edinburgh, depones, That there was a proposition, in the end of August, or beginning of September 1745, for raising a regiment of 1,000 men, by subscription, for defence of the city against the rebels; but that the deponent can say nothing from his proper knowledge, by whom such proposal was made to the pannel, or how it was received by him, not having been present; nor does he know of any objections made by the pannel against it, otherwise than by hearsay from others. And further saith, That upon the 5th September 1745, which was a day of public fasting in the city of Edinburgh, the deponent, reflecting upon the present danger that threatened the city and the kingdom, began to think, that proper measures were neglected, which ought to have been taken: and therefore he applied himself to set down in writing what occurred to him as proper to be done on the occasion. And the result of this was, a memorandum he wrote, and carried with him to a meeting of a great many of the inhabitants, who commonly used to assemble themselves in an evening, to talk together of the present posture of affairs, and to consider what was proper to be offered for the defence of the city, and for opposing the

S R

progress of the rebels. That, upon reading and considering the foresaid memorandum, they came to a resolution, to form a petition and address to the Lord Provost and Magistrates. That some of the burghesses and inhabitants of the city, who offered to serve as volunteers, in defence of the city, against the rebels, might be properly disposed of; and commanded by officers to be appointed. And, for this end, a committee was appointed to draw up such a petition, and address; who accordingly did meet, and form the Petition and Address now shewn to the deponent, marked N° 5, in the List of Writings produced for proving the libel; which Petition and Address were wrote that night, and signed by the deponent, and several others, and next day by more persons; when a deputation from the meeting was sent with the said Petition to the pannel, then Lord Provost of Edinburgh. That the gentlemen who went to carry the Address to the pannel, returned again to the company, where the deponent remained; and the pannel came along with them; who, when he entered into the company, seemed to be out of humour, and complained that any such paper should have been concerted and drawn up without acquainting him; and addressed himself particularly to the deponent, telling him, he was greatly surprised, that he should have had any concern in it, without giving him any notice of it. That the deponent answered, It was late upon the 5th of the month before the paper was concerted and drawn up, or signed by any body: that next morning he was employed in getting subscriptions to it, that it might be presented to the pannel with greater weight. To which the pannel replied, That the matter of this Address was what he was to consider, and not the number of persons who subscribed it; and that, in his judgment, it was treasonable; and that he himself had taken the Oath of Abjuration, which obliged him to oppose every thing that was treasonable: and further added, with a sneer, that he knew of nothing to be treason, but what the law had made so. Upon which, some of the company and the pannel had some pretty high words, arguing about the nature of the paper, and whether it was treasonable or not. Thereupon the deponent said, He was afraid it would require some time and pains to convince the pannel of the reasonableness of it; but that he now had a paper put into his hands, signed by a number of gentlemen of character; and that the deponent hoped, that he would not reject it, without taking advice; which if he did, and considered it thoroughly, the deponent hoped he would alter his opinion. That the deponent, upon this, left the company, and went to Mr. Solicitor Dundas's house; where he found bailie Gavin Hamilton, and some other persons, with Mr. Dundas; to whom he related what had passed in the company, and what he has above said; and added, That he was persuaded Provost Stewart would not venture to reject the proposition made to him, without

calling for the advice of the crown-lawyers; and therefore he, the deponent, hoped Mr. Solicitor would be ready to give the proper answer, if the question was laid before him. Mr. Solicitor Dundas then said, He should early in the morning wait on Mr. Craigie, then Lord Advocate, and concert with him what was fit to be done. Depones, that, at this time, in Mr. Dundas's, it was concerted between the Solicitor, bailie Gavin Hamilton, and the deponent, that, in case the Provost should reject the petition, bailie Gavin Hamilton, being next magistrate, should call the council together, and lay the matter before them, and endeavour to get the advice of the crown-lawyers. Depones that upon Saturday, the 7th of September, the gentlemen who usually met together to consider what they could do for the defence of the place, thought it fit to publish a paragraph or an advertisement in the Edinburgh news-papers, in order to encourage people to associate themselves for the defence of the place. And such a paragraph having been drawn up, narrating, that an address having been made to the magistrates, they had taken the opinion of the crown-lawyers, who approved of it, and that it had likewise met with the Lord Provost's hearty approbation and concurrence, or words to that purpose; the paragraph was sent by two of their number, Provost Drummond, as the deponent thinks, and the deponent himself. Upon shewing it to the pannel, he caused dash out that part of it relating to his hearty approbation and concurrence; and insert in place of it, "which he heartily acquiesced in." That the deponent and the person who went along with him represented, that the reason of their using the words which were altered by the pannel was to encourage people to enter into the association. However, the pannel still continued of the opinion he had expressed. Depones, that, about the middle of the week which preceded the rebels entry to the city of Edinburgh, at a meeting of the inhabitants, who usually came together in the evening to consider of what was proper to be done for the defence of the city, the deceased Mr. Maclaurin and the deponent were present; when it was suggested, that several things were left undone that ought to be taken care of for the public safety; and that it was proper these matters should be laid before the Lord Provost. And it was proposed, the deponent should go from the meeting, and, in their name, lay them before the Lord Provost. That the deponent said he was willing to follow their directions in that matter, but did not care to trust to his memory; and therefore called for paper, pen, and ink, and took down in writing such particulars as Mr. Colin Maclaurin dictated to him, And, when that was done, as the deponent thinks, Mr. Mark Sandilands went along with him to find out the Provost, who was then in a tavern; and, as the deponent thinks, in Walker's house. That they went to another room in the house, where the Provost came to them; and they communicated to him

what was contained in their paper. Among other things, that the meeting they came from thought it was proper there should be a general search in the town for arms, lest there might be some concealed for the use of the rebels; as also, that the Lord Provost should concert with the Lord Advocate, or any proper person, that a search should be made in the places adjacent to the town, which were not within the royalty. That to this the pannel answered, That Edinburgh, and the adjacent parts, could with very great difficulty be searched so narrowly, as that concealed arms should be discovered; and that he did not see any good purpose it could serve to make a search, or words to that purpose: but, if they insisted upon it, orders should be directed for such a search. Depones, That the last of the particulars taken down in the paper was, a demand that the pannel by himself, or others of proper authority, should procure fifty, forty, or at least thirty sailors, out of his majesty's ships, who were most expert in managing of cannon, in order to be assisting in the defence of the city, by taking the direction of the artillery that were placed upon the walls, or in the town. Upon reading of which, the pannel fell into some heat of temper, and said, "By God, Sir, while I am Provost of Edinburgh, sailors shall not be admitted." And the deponent having represented to him, that there were none in town that knew how to manage cannon; and that application had been made at the castle, but no gunners could be spared from thence; and asked, What he would substitute in their place? he made no answer, but the former repeated, That, by God, while he was Provost of Edinburgh, no sailor should be admitted. And the deponent being greatly surprised, as some time before, when he the deponent had been insisting with him that cannon should be provided for the defence of the place; he objected against it, and said, He could not see they could be of any use, as we had nobody that knew how to manage them: the deponent therefore, raising his voice, demanded to know the reason of such an extraordinary piece of conduct. To which the pannel replied, with some heat, "My reason, Sir, is plain. If they should be admitted here, it would be, Damn your blood, Jack; fire away, and be damn'd; and so they would fire upon, and murder the inhabitants: and it is my duty to protect the lives of the inhabitants, as well as to defend the town against the rebels;" or words to that purpose. Whereupon the deponent left him.

IX. *James Grant*, merchant, and present town-treasurer of Edinburgh, depones, that, in the afternoon of Monday the 16th of September 1745, which was the day that immediately preceded that upon which the rebels entered the city, the deponent was in the Goldsmiths-hall, where the pannel, and a good many other people, were met together; and heard two or three of those who were present, whom the pannel publicly desired might give their opi-

nion, whether it was proper to defend the town or not, and who declined to explain themselves upon that matter, observe to him, that if the town was to be delivered up, proper measures ought to be taken for preserving the arms from falling into the hands of the rebels. And being interrogate for the pannel, whether it related to the government's arms, or to the arms of the city? depones, He does not remember any distinction was made; or further, than that the arms in general were mentioned. And further says, That this observation was made by major Thomas Cochran and captain James Murray, and, as the deponent thinks, by dean of guild Hathorn. And depones, That he does not remember, whether any thing was said further upon that subject. Depones, That when several of the persons present had declined to give their opinion as to defending the town, the Provost declared, That it was his opinion it ought to be defended; and that they might hope for better terms, in case the town were at last to be surrendered, with arms in their hands. That, betwixt three and four in the afternoon, while the deponent was at this meeting, Mr. Grosset came in, sent, as the deponent believes, from the lord justice clerk, or some other person; and made an offer to the pannel of an hundred dragoons, to assist in defending the city, if he would send an order for their entering the same. To which the pannel answered, He would sign no order; but if they came in, they should be made very welcome. And depones, That he left the meeting, and went home. And being interrogate, Why he left the meeting, when they were deliberating concerning the defence of the town? saith, That he went away in the belief that the town was to be surrendered; induced to think so from the dragoons marching eastward; and that he perceived the well-affected in the town had a jealousy of the Provost: and the deponent likewise perceived, that the removal of the dragoons had made people's spirits sink. Depones, That some few days before the rebels entered the town, the pannel spoke to the deponent in the Parliament-house, and told him, That, as the volunteers had made the proposal of bearing the charges of repairing the city-walls, he thought it was proper the money should be immediately advanced, because he doubted, if that was not done, it would in the end fall upon the town. To which the deponent answered, That it could not be expected they could advance the money at that time. Further says, That Mr. Alexander Webster joined them at this conversation; and the pannel made the same proposition to Mr. Webster that he had made to the deponent; who made the same return as the deponent had done. And being interrogate for the pannel, Whether this conversation related to the reparation of the walls, as to which orders had been given by the council to repair the same, and the reparation was going on; or as to some additional fortification, which had been proposed by the volunteers? depones, That he knows orders had

been given by the council for repairing the walls before that conversation happened; but that this conversation related to the expence of the work: but whether it was the expence of the reparation of the walls, or of some new projected piece of fortification, the deponent cannot be positive.

X. Mr. Joseph Williamson, advocate, one of the principal clerks of the city of Edinburgh, depones, That he was present at a meeting of several of the burghesses of the city of Edinburgh, upon the 5th September 1745; when it was agreed, that a petition should be presented to the Lord Provost, for leave to such of the citizens as should please to associate themselves as volunteers for the defence of the city. That accordingly such a petition was framed; and the deponent assisted in framing it. And the paper marked No. 5, in the List of Writings subjoined to the libel, being shewn to him, depones, It is the same framed as above; which was signed by all the company present that night. That he did not see this application offered to the pannel the next day; but had occasion to converse with him on the subject of it in the evening of that day; when he told the deponent, that he looked upon the paper as treasonable; and asked his opinion thereon. To which he answered, He did not think it treasonable, to take up arms in defence of the king and the country, though without warrant, there being a subsisting rebellion in the country. Depones, That, after the petition was approved of, he was present at making a draught of an advertisement to be inserted in the news-papers; in which there were words to this purpose, That the pannel heartily agreed or concurred with the desire of the said petition. That two of the company, when the draught was made, were sent to wait upon the pannel with it. That they went; and, when they returned, reported the draught with an amendment made by the pannel's order, by dashing out the words, 'heartily agree or concur;' and putting in place thereof, 'acquiesced in;' and that he heard the said report, and saw the said amendment. Depones, That he was present at a meeting in the New Church Isle, upon the 9th September foresaid, to which the pannel came, and named the six captains; and, as the deponent remembers, expressed his satisfaction with the zeal of the petitioners; but in what terms, he does not remember: nor did he himself observe any contrary or disrespectful behaviour of the pannel's on that occasion, though he heard others talk differently of it. Depones, That, upon Wednesday the 11th September foresaid, the deponent went round the city-wall, from the Bristow port to the West port; upon which he saw but four or five men working. That, on Friday thereafter, the 13th, he was desired by several of his brethren volunteers, to remonstrate to the Provost and council, that the reparation of the city-walls was carried on slowly; and to lay before them some proposals that were thought necessary for that purpose: some of

which the council agreed to, and some were disagreed to: but that he remembers only one article disagreed to, relating to a house at the Potterrow port, which was proposed to be taken down, or so built up as not to infest the walls at that port. That the deponent and the pannel had some warm words with respect to the works going on slowly; and he proposed to the pannel, that bailie Hamilton should be authorised to oversee these works; but the pannel replied, That that trust was already committed to bailie Robert Baillie. Depones, That he was not present when the proposal for putting arms only in the hands of such of the trained-bands as were well-affected to the government was first made: but some time after, he heard the same proposal renewed to the pannel; and his answer was, He could not think of distinguishing or discriminating one part of the trained-bands from another. That upon Wednesday the 11th of September, he and, he thinks, bailie Wilson carried a proposal to the pannel, to search for arms within and in the neighbourhood of the city; and he believes a former message had been carried to the pannel for that effect. That the pannel answered, He was willing a search should be made in the neighbourhood; but he could not agree to make it within the city, because it would create a great deal of confusion, as he said. Depones, That he was not at the general meeting held in the New Church Isle, upon the afternoon of the 16th of September; because just before it, the fire-bell was rung, which was the signal to the volunteers to repair to their several posts; and which he accordingly did: and that neither before his repairing thither, nor while he staid there, were there any orders sent by the pannel, to the volunteers how to dispose of themselves, so far as he knows: and that provost Drummond, then a captain of one of the companies of volunteers, having represented to the other officers, that no orders had come how they were to dispose of themselves, suggested, that he thought it was proper, since they got their arms from the government, and it seemed were not to use them, or were not at liberty to use them, or words to that purpose, that therefore it would be proper for them to return them to the castle. Upon which they immediately marched up to the castle, and delivered up their arms. And being interrogate, how long he thinks they might have been at the alarm-post, before they marched up and delivered the arms; and how the volunteers came to take upon them, without orders from the pannel, their colonel, or without knowing that they were to receive no order, to deliver them up? depones, That he cannot precisely tell how long the volunteers were upon the alarm-post; but that he went to captain (provost) Macaulay's house, whose lieutenant he was, desiring him to go to the College-yards to their company; that after going there, and finding the company was gone, they returned to the Lawn-market; but by the way, the deponent stepped into the Goldsmiths-hall, where he staid hardly so much as a quarter of an hour: that, when he came to the Lawn-market,

the company was there: and that there were two chests of arms in the College-yards, and the carts, carterers and horses, which had brought them, standing by, without so much as a centry; which Mr. Macaulay and he insisted they should carry back again; but which the carterers refused at first to do: and an officer, who came from the castle, also declined to have it done; because his orders were to leave them there: and what betwixt persuading the officer to allow them to be carried back, and threatening the carterers to yoke their horses to carry them, which at length was complied with, a good deal of time was spent: and when the arms were delivered into the castle, it began to be duskish. And to the latter part of the above interrogatory, depones, That about the time that, without command, the volunteers delivered up their arms, it was whispered by several among them, though he himself did not say so, that they were betrayed; and they would be cut in pieces, without doing any good service: but the public reason given as above was, that they had got no orders, and had no reason to expect any. Depones, that one part of the proposals made by the deponent to the pannel, was in relation to bringing in long ladders in the suburbs of the town; to which the pannel agreed, and said, he would issue orders accordingly. He does not know if such orders were given or not; but he, upon application, to the bailie of Potter-row, and by his warrant, seized, and brought into the town, several long ladders, about fourteen or sixteen, from the Potter-row, and thereabouts, upon the 16th September.

XI. Sir Robert Dickson, of Carberry, bart. depones, That in the evening of Sunday the 15th September 1755, he came to the city of Edinburgh upon the head of 150 volunteers from Inveresk, Musselburgh, and the neighbourhood, according to the report of Daniel Mathison, an old serjeant, who had drawn them up to number them. That he acquainted the pannel that night about ten o'clock, that he had marched these volunteers to assist in defence of the city under his command against the rebels; and desired that the pannel might furnish him and them with arms for that purpose. That the deponent met with a so and so reception; that is, not such as he expected: for that he did not thank him for bringing in the men, but carried him into a room in Mrs. Clarke's house, where there were several of his acquaintances. That the pannel said; it was too late to give out arms to them that night, but that they should have them next morning. That the pannel ordered a refreshment for the men; and they were quartered in the New Church Isle. That no arms were delivered to them next morning. That the deponent applied to the pannel on the Monday morning for arms; and he answered, they should have them by nine o'clock: but they were not then delivered; and the men staid in the town till about mid-day, Monday; and he believes went then home.

But that an hour after the deponent had been with the pannel that morning, he desired bailie Lindsay of Musselburgh to go to the pannel, and inquire for the arms; for he the deponent would not go near him again. That when the deponent talked with the pannel that morning, he the pannel proposed to the deponent, that his men he had brought to town should enlist in the Edinburgh regiment.

XII. Gavin Hamilton, bookseller, and late one of the bailies of Edinburgh, depones, That he was desired by some of the meeting which had formed and presented the petition to the pannel and council of Edinburgh, in relation to the association of volunteers, to meet with them, to talk on that subject, on the evening of the 6th of September 1745. That the pannel declined going, upon account of his being tired going round the walls of the city, with this deponent, the deceased Mr. Colin Mac-laurin, and several others. And the deponent replied, that the gentlemen of that meeting positively expected him there. To which the pannel made no reply; but he understood the pannel went to the meeting, though he the deponent was not there. Depones, that after the council of Edinburgh had ordered the city-walls to be repaired in September 1745, this deponent upon the 6th of September walked round the whole of them with the pannel. That on the 7th of September, he again went to visit the said work; and found but nine men working at that work, although he expected to have seen two or three hundred; and that meeting with deacon Mack, who had the charge of the workmen, he asked the deacon, how it came there were so few people employed in the said reparation? And he thinks the deacon answered him, that the pannel had told him, that unless he had a more special warrant for his work, he might get it for his payment. That that very day, this being complained of in council, that the work was carried on very slowly, the deacon obtained a more special warrant for making reparations of the walls, and obtained press-warrants against workmen. That the next day, being the 8th of September, he again made the round of the walls, and found only fourteen men at work. That several complaints were made of the slowness of the work to the deponent, and several others of the council. But the deponent knows not whether any such complaints were made to the pannel. Depones, that when the reparation of the walls was first proposed, the pannel objected to it, on account of the expence, and the lowness of the town's funds. But the deponent recovered, from bailie Hope, he thinks, the account of the like expence which was incurred in the year 1715, amounting to but about 200*l.* or 300*l.* That this objection was dropped, and the work begun. That he knows nothing of the proposal that was made to the pannel, for getting sailors expert in gunnery to serve the city-cannon; but some time after he heard of that proposal, he

saw upon the council-table a letter lying from the commander of the *Ursula*, one of his majesty's ships, addressed to the pannel, acquainting him, that he had no gunners to spare for the service of the city. And the deponent supposes that this was an answer to a letter wrote by the pannel demanding gunners. Depones, that he himself made a proposal to the pannel, for laying aside the trained-bands from the service of the city, because he believed there were too many disaffected to the government amongst them. That the pannel rejected it; and said, he would stand for the honour of the trained-bands. Depones, that some volunteers came from the neighbourhood of Musselburgh, Dalkeith, and other adjacent places, on the 15th of September; and that the deponent had occasion to meet with Dr. Tait, just as he parted with the pannel: That the doctor complained, that the pannel had used him roughly, and was in a passion at him, for no other reason, as he said, but for bringing in his men. Depones, that at a council-meeting upon the 16th September 1745, in the Goldsmiths-hall, he saw a petition signed by several of the inhabitants of Edinburgh, and particularly by some of his own acquaintances, (whom he chided for having signed it) desiring a general meeting to be called, to consider what was proper to be done. That he does not know how the said petition came in; nor does he remember whether it was read or not; nor can he say, that it was presented, or put in the hands of the pannel, though he saw it in his hand. And the paper, marked N^o. 8, in the List subjoined to the criminal letters, being exhibited to the deponent, depones, it is the same which he saw on the table in the Goldsmiths-hall, and in the pannel's hand. That the meeting in the Goldsmiths-hall soon broke up, and another was immediately held in the New-Church Isle; at both which the pannel presided. That in this last meeting, there was a great deal of confusion; the petition was again talked of; but he does not remember it was read. And it was under the consideration of that meeting, whether the town should be defended, or delivered up to the rebels? and the far greater number of the meeting were for the latter. It was also under consideration, if some dragoons should be brought into the town for the defence of the city, in consequence of offers to that purpose, severally made by Mr. Groset, and Mr. Lindsay, secretary at war; but the cry of the generality was, *No Dragoons, No Dragoons*: and he heard the pannel repeat these words, '*No Dragoons*'; but whether as his own opinion, or as the sense of the meeting, he cannot say: But the meeting rested in that opinion. That in the same meeting, the deponent proposed, that the arms of the city should be secured in the castle, since the meeting had resolved not to defend it; and the same proposal also comprehended the king's arms then in it: which proposal the pannel repeated to the meeting, as coming from the deponent; and it was agreed to. But

afterwards it being moved, and insisted on, that if the arms were delivered into the castle, they could expect no capitulation or terms, the resolution of delivering them into the castle was altered. After which, such of the members of the council as were in the meeting, went to the Goldsmiths-hall; where, and in the council-chamber, they remained all night. Depones, that at the meeting in the Goldsmiths-hall, before that in the New-Church Isle, and at the said meeting in the New-Church Isle, there was an offer of dragoons made to the pannel twice, once by Mr. Groset, and another time by Mr. Lindsay, secretary at war; to one of which (he thinks it was to Mr. Lindsay, in the New-Church Isle, who pressed the offer much upon the pannel) he answered, if the commanding officer would send in dragoons, he might do it; but he, the pannel, would give no orders for that purpose. The other offer by Mr. Groset, which he also pressed much, and which the deponent thinks was the first, being made in the Goldsmiths-hall, the pannel refused to accept of. Depones, that at the meeting in the New-Church Isle, there was a letter from the Pretender's son brought in, in what manner he knows not, further than it was said to be handed in from the door: And the first time he saw it, was in the hands of deacon Orrock; who broke it open, and looked at the subscription, and was going to read it; but a cry being made against reading it, the members of the council insisted it should not be read; and the pannel forbid it to be read. And it was not read at that time; but it was read in the Goldsmiths-hall, to which, as said is, the pannel and the council retired. That, upon reading this letter, it was proposed what kind of answer should be made to it: And it was moved, that the advice of the assessors should be taken upon it. That they were accordingly sent for; but none of them were in town, except Mr. Patrick Haldane; who came down to them a little, but declined to give any advice. And, in explication of what he has already said, depones, that the motion for sending for the assessors, arose upon a proposal which had been made, that the city should capitulate or surrender upon terms; and that the pannel having asked at several of the council, if they would go and capitulate, which they declined to do; it was then, or about that time, that the motion for taking the advice of the assessors was made. That Mr. Haldane was sent for, and came; and then one of these two things was proposed to Mr. Haldane to give his advice upon, either what was proper to be done in the present juncture in general, or what should be done in relation to answering the said letter, he does not remember which: to which he thinks Mr. Haldane said, 'These things are too difficult for me to give any opinion of; and thereupon rose from his seat, and walked off; but does not remember if the letter was read or shewn to Mr. Haldane. That afterwards the pannel changed the terms of his proposals; and sug-

gested, that it might be proper to send out some of their number, to gain time: and a committee of the council of four, was appointed to go, whereof the deponent was one; and their instructions were, to call only for such of the gentlemen in the rebel army as they were acquainted with; and to propose to them, if they would send some of their number into the city, to tell what they proposed to have done; and to assure, upon the part of the pannel, such as should be sent in, that they should be allowed to return safely. That the said deputation accordingly went out; and the paper, marked N^o 2. signed and sealed by John Murray, the Pretender's son's secretary, now exhibit and shewn to the deponent, was given to him, as the answer to the first deputation; which he refers to as part of his deposition. That the deponent having given in this paper, as the report of the said deputation, it was objected to it, that it could not be agreed to by the council; and John Coutts, then one of the councillors, and late provost of the city, said, that it was impossible to agree to it; and that they must send back again another deputation, to see and get better terms. Depones, that, when he returned, he was told by some members of the council, that sir John Cope, with the fleet in which the troops under his command were, were arrived at Dunbar. That then it was proposed, that a fresh deputation might be sent to obtain better terms; which was agreed to. The deponent was proposed to be one of the deputies; but refused it, and very soon thereafter left the council: but he understood, that a deputation of four did go, and was told so by one of the deputies; and saw the paper marked N^o 3, mentioned in the List of Writings; which was the result of that second deputation. Depones, that of the city-arms there were between 1,300 and 1,400 firelocks and bayonets; about a hundred of which number were in bad condition. Depones, that after the pannel, and the deponent, with the other members of council, retired out of the New Church Isle to Goldsmiths-hall, or Laigh council-house, he was deputed by the pannel, and the other councillors, to wait of the Lord Justice-Clerk, that he might give his advice, either to the council, or to as many of them as should wait upon him, what it was proper for them, at that juncture, to do; and others at the same time were appointed to carry the same message to the Lord Advocate and Solicitor for the time. The deponent went, in obedience to this order; but before he had gone a little way from the Goldsmiths-hall, he received certain information, that the Lord Justice-Clerk had left the city; which he reported to the pannel, and the council, in the Goldsmiths-hall. And depones, that the same answer with respect to the then Lord Advocate and Solicitor, was returned in the deponent's hearing, that they had left the town.

XIII. *John Wilson*, merchant, and late one of the bailies of Edinburgh, depones, That,

upon a Saturday towards the end of August, the deponent was pressed by several of the burghers to go to the Provost, and complain, that nothing was a-doing for the defence of the city, notwithstanding that it was then certain that the Pretender's son was landed in the north, and on his march southwards. That the deponent accordingly went the same day; and for the above reasons proposed, that the Provost should forthwith call a meeting of the old and substantial burghesses of the town. That the Provost at first received the proposal with a little laugh; but, after reflection, agreed to it. That the deponent proposed that the meeting should be called that same night; but the pannel said, the burghers would be gone to their diversions, and would not be got together. To which the deponent answered, that no time was to be lost; and, if the meeting was not called that night, it should be early Monday morning. That the deponent at the same time, told the pannel, that, during the rebellion in the year 1715, the town of Glasgow had raised a regiment of 500 men, and he was sure that the city of Edinburgh could raise 1,000; but the pannel seemed to laugh at the proposal, believing that money could not be got to pay them; and said to the deponent, You remember, John, that upon a certain occasion, we could not raise a small sum for a particular purpose; and how do you imagine we should be able to maintain 1,000 men? He added further, That they could not raise such a body of men, without being guilty of treason, unless they had the king's sign-manual. To which the deponent answered, That he knew that very well; but, if that were applied for, it might be got. Depones, that the meeting of the inhabitants was not called till the Tuesday; and then it was held in one of the church isles, where two or three hundred burghesses were present, and the same proposal was again made of raising a regiment of 1,000 men; and several other proposals were made for putting the city into a posture of defence. That the pannel did not seem to oppose any of these proposals. That it was agreed by the meeting, to apply to the crown-lawyers to procure his majesty's sign-manual for raising the regiment; and also, to take their opinion concerning certain volunteers who offered their service. Depones, that, in that meeting, the pannel, who presided in it, directing his discourse to the deponent, said, in a jocular way, John, this is your meeting. To which the deponent answered, My lord, I am not ashamed of it. Depones, That, after the said meeting, a petition was drawn up, to be signed by such of the inhabitants as were so disposed; praying the magistrates and council's allowance to associate themselves as volunteers in defence of the city; and several different copies of the same petition were left in the New Church Isle to be signed, from time to time, by such of the inhabitants as inclined: and the petition in the clerk's hands, now shewn to the deponent, being the 5th in the List of Writings sub-

joined to the criminal letters, is the petition that was signed by this deponent. That, when they had got about 200 subscriptions, a committee of four or five of them were sent to the pannel, to desire he would be pleased to name their officers: that the deponent and bailie Nimmo were two of those who were sent: that they thought the pannel was very dilatory in naming their officers. That the deponent himself applied two or three different times to him for that purpose; and several days intervened betwixt the first application, and his naming any of them; and, at last, he named the captains, and allowed them to name their subalterns: but it was then but about ten days before the rebels got possession of the town. And, being interrogate for the pannel, depones, that they had several meetings in the New Church Isle with the pannel; and he doubts not but the pannel may have named the captains on Saturday the 7th of September, though the deponent cannot be certain of the day of the week or month; but is sure, that a list had been given to the pannel, out of which he might name these captains, five or six days before he named them. And, being further interrogate for the pannel, depones, that it was understood, that the field-officers were to be named, not from among the volunteers themselves, but proper persons to be found who were more skilled in military affairs. Depones, that there were many complaints, that the reparation of the town-walls went on very slowly; and particularly remembers, that that part of the wall which seemed most dangerous, to wit, at the College Kirk, and from the New Port to Leith Wynd, was not repaired or barricaded till Monday the 16th of September, the very day before the rebels entered the town: and the deponent, on that Monday, went to the council himself, and complained, and got proper warrants to press workmen; one whereof was signed by bailie Robert Baillie, and another of the volunteers got a warrant, signed by bailie Mansfield. That bailie Robert Baillie was the second bailie that year; and the second bailie is called The Bailie of the Public Works; because, by his office, he has the oversight of these works. That the deponent had several times complained to the pannel, and others of the magistrates, that these works went on very slowly; and particularly remembers, that he once complained to the pannel himself on that account; and the pannel answered, that he had given orders to bailie Baillie about the works, and power to press workmen. But depones, that about that time the election of the deacons was going on, which happened upon a Saturday; and then the work went much slower on than at other times; and the trades-people were so taken up about their elections, that the deponent believes it was hardly in the power of the pannel or magistrates to get the tradesmen to work. And being further interrogate for the pannel, whether that part of the wall above deponed upon, at the College Kirk, and from

the New Port to Leith Wynd, was not so far repaired before the 16th of September, that the breaches were made up, and the parapet built, so that nothing was wanting, but the barricading the ports? Depones, That it was another person, and not the deponent, who was employed to see that part of the repairs made on the 16th; and therefore the deponent cannot with certainty answer the question: but knows, that these ports had not been barricaded as some of the other parts of the town had been (which was all the deponent meant in the former part of his oath on this article); and knows that a great many hands were got, and a great deal of work done that day; and the tradesmen themselves said, that they had done more that day than for some days before. Depones, That the deponent was present at a meeting, that several of the burghers in town had with the pannel in the house of Mr. Wilson taverner in Edinburgh; and which meeting was held in consequence of a request made by some of these burghers, that the pannel should meet with them. And there were present at the meeting a good number, the deponent cannot be positive how many; but there were, he thinks, twenty, or thirty, or forty of them. And that meeting desired of the pannel, that he would discriminate the trained bands one from another, and put arms only in the hands of such as were known, by the old burghers, to be well-affected to the government: but the pannel said, That that was too delicate a point for him to meddle with. And being interrogate for the pannel, depones, He knows nothing of that proposal's being made to the council. Depones, That he knows there came in several volunteers from Musselburgh and Inveresk along with sir Robert Dickson; and another body of volunteers from Dalkeith, under the command of Mr. Lewis Douglas advocate, and Dr. Tait. That the deponent knows nothing of their reception by the pannel, further than that the body that came from Dalkeith, on Saturday the 14th, were lodged in the high school, and ordered to keep guard at the high school yards; but were not joined to any other body of troops till Monday at 2 o'clock afternoon, that the deponent went to the pannel's house, and proposed that they should be joined to some other company: and the pannel desired him to join them to any corps that he thought proper; and the deponent accordingly joined them to that company of volunteers where he himself served, and which was commanded by sir George Preston. Depones, that in the afternoon of Monday the 16th of September, as the deponent was keeping guard at the Netherbow port, he was informed, that there was to be a meeting of the inhabitants in the New Church Isle; and it was reported that the town was to be delivered up: upon which the deponent asked leave of his captain, sir George Preston, to go to see what was doing. That the deponent came, and found the pannel, and most of the magistrates, with several of the inhabitants, in Goldsmiths-hall. That the de-

ponent said to the pannel, What are you a-going to give up the town, when we have 1,300 men in arms, that are ready and willing to defend it to the utmost? To which it was answered, either by Mr. Lander the surgeon, or by Mr. Orrock, Your champion Mr. Williamson has given up the defence of the town; and do you pretend to hold it out? The deponent replied, that he would not believe that, unless he had it from Mr. Williamson's own mouth; for none but a coward, or a Jacobite, would give it up. Upon which Mr. Williamson appeared; and said, He was willing to hold it out to the utmost, if his men would stand by him; but that he had not above ten or twelve men that appeared where they should have been. And the deponent says, Mr. Williamson was lieutenant to a company of Edinburgh volunteers. That he knows not what the number of that company was; but that he believes it was fifty, sixty, or seventy men. That the deponent then asked the pannel, What he was resolved to do? And he said, That he would take the advice of his brother-burgesses. That, about this time, Mr. Grosset came into the meeting with a message from some of the crown-lawyers, offering the dragoons for the defence of the city, if the Provost would order them: And the pannel answered, That he would give no orders; but that, if they were sent in, he would receive them. Depones, That Mr. Laurence Dundas, being in the meeting, insisted, that the pannel, as provost, should give the orders for bringing them in: That the pannel repeated his former answer; and Mr. Dundas, or some one of the meeting, said, That, if he refused, he behaved to answer for it, if the town was given up. Depones, That the deponent was ordered by the pannel to his post at the Netherbow; and that instant, or in a very little time, the fire-bell rung; so that the deponent was not present at the meeting in the New Church Isle. Depones, That, upon the deponent's return to the Netherbow, he acquainted sir George Preston of what had passed; who thereupon immediately left him, to go to the meeting; and did not return for half an hour, or an hour; during which time the deponent knew nothing of what was doing. That, upon sir George's return, he ordered the deponent, and the rest of the company, and another company also upon guard there, to march to the alarm-post, which was in the Lawn-market. That, when they came to the Cross, they got notice, that the other companies of volunteers had gone to the castle, and delivered up their arms; and, when they came to the alarm-post, finding none of the volunteers there, they also marched up to the castle, and delivered up their arms; and thinks it was then about sun-setting. Depones, That the 1,300 armed men that he mentioned to the Provost, as above deponed, were composed of the city-guard, the Edinburgh regiment, the Edinburgh volunteers, the seceders, the Inveresk, Musselburgh and Dalkeith volunteers. That the deponent cannot,

VOL. XVIII.

from his memory, now specify the particular number of each corps: But he is sure, that, at that time, he did count them, and they did amount to the foresaid number; and were all well armed with guns, swords, and bayonets. Depones, That, by counting, the deponent means no more than adding the numbers of the several corps as reported by their officers.

XIV. *Walter Grosset*, late collector of the customs at Alloa, now one of the general inspectors of the customs of Scotland, depones, That, upon Monday afternoon the 16th of September 1745, as the deponent was coming to town in company with Lord Justice Clerk, they met several people coming full speed out of town; who informed them, that the rebels were by that time at the West port. That thereupon Lord Justice Clerk sent the deponent with a message to the pannel, then lord provost of the city, while at the same time the Lord Justice Clerk himself rode to meet the dragoons, who were then a mile north-east of the city of Edinburgh: That the message to the pannel was, to know whether he was resolved to defend the city of Edinburgh; to press his defending it; and to assure him, if he was to defend it, he should have 100 dragoons, or as many as he pleased to desire; and to get the pannel's answer. That the deponent in his way to the town met the then Lord Advocate to whom he reported the message he was sent with; who approved of it, and pressed him to haste to deliver it. That the deponent found the pannel in the Goldsmiths-hall, with severals of the magistrates and council, and other persons, it being then betwixt three and four afternoon; and the deponent delivered his message to the pannel in the above terms, as from both the lord justice-clerk and lord advocate. That the pannel shifted to give a direct answer to the message: And, being pressed to it by severals of the meeting, he at last made a speech; in which he said, He would do nothing unworthy of the station which he was in: He urged the uncertainty of sir John Cope's coming to their relief, and the danger of the lives and properties of the inhabitants; and concluded, That he was against defending the town; but said he would be advised by his council. And being interrogate for the pannel, What were the expressions that imported his being against the defence of the town? depones, That he cannot remember the particular words; but the whole purport of his speech tended that way. Depones, That, as there were several altercations betwixt the deponent, as well as other persons present, and the pannel, the deponent desired an answer in writing: Which the pannel declined to give, saying, That the deponent was very capable to return a verbal answer. That the deponent still insisted for an answer in writing; and the pannel repeated the same answer. Then the deponent said, He could make nothing else of the pannel's answer, but that he refused to defend the town,

and admit the dragoons. And, upon that, the pannel agreed to give him a written answer; and believes might have said, That the deponent mistook him. That the pannel accordingly gave the deponent an answer in writing, directed to the lord advocate and lord justice-clerk. And being shewn the letter in the clerk's hands, produced in this trial by Mr. Craigie, a preceding witness, depones, That that letter is the answer he then got from the pannel. Depones, That, upon receiving that open letter, and reading it, he said to the pannel, That he had already assured him from lord advocate and lord justice-clerk, that it was their opinion that he should defend the town; and that he should have a hundred, or as many dragoons as he should desire, to assist in the defence of it; and that he must answer for the consequence of that unnecessary delay. Upon which the pannel left the meeting, and the deponent came off with the written answer. Depones, That, at the above meeting, in answer to what the pannel had said of the uncertainty of sir John Cope's coming in time, the deponent said, That as they had certain advice, that sir John Cope and the troops were at Aberdeen, and were to embark for Leith, they had reason every hour to look for their landing. Depones, That, at the same meeting, some of the company, and, the deponent thinks, capt. James Murray, said, That, if the town was not to be defended, it was necessary that care should be taken of the arms in it, so as they should not fall into the hands of the rebels: And, as the deponent understood it, that speech was directed to the pannel, as was every thing else spoke out in that meeting, in which he presided; but the pannel made no answer to it. Depones, That the deponent returned from that meeting to the lord justice clerk's at Brunstaine, and shewed him the aforesaid written answer. That the lord justice-clerk sent him immediately with it to the lord advocate, and brigadier Fowkes, then at Musselburgh. That the deponent delivered the said written answer to lord advocate. That by that time lord advocate had got advice by two letters from Dunbar, of the arrival of sir John Cope with the transports, and troops under his command, off that place; and lord advocate insisted, that the deponent should immediately return to Edinburgh, and shew the pannel those advices he had got; and at the same time wrote a letter, certifying, that these letters carried by the deponent were the original letters carrying the account of sir John Cope's arrival. That the deponent forthwith set out from Musselburgh, it beginning then to grow dark, and came with all the speed he could make to Edinburgh; and found the pannel, with his council, in the council-chamber, and put into his hands the lord advocate's letter, with the aforesaid letters of advice. That the pannel, upon reading them, said, They were come too late; for they had agreed to capitulate, and had sent some of their number to treat about the terms; and at the same time reached to the deponent a

letter, which, upon opening it, the deponent found to be signed, Charles, P. R. and is the same letter mentioned in the first article of the list of writings subjoined to the criminal letters; the same being now shewn to the deponent. Depones, That the deponent then proposed, that as probably the people sent out to the rebel-camp could not by that time be got the length of the camp, a messenger should be immediately sent to bring them back; which the pannel agreed to; and it was done accordingly. That, about that time, provost Drummond came into the council-house, and he and provost Macaulay insisted, that they should then resume the defence of the town; that, for that end, the fire-bell should be rung, that being the signal for convening the inhabitants, or bringing them to their posts. That the pannel answered, That they must be tender of the blood of their fellow-burghers: That, should they ring the alarm-bell, the rebels might hear it; and should those of their number, who were sent out to treat with them, be arrived at the camp, they might hang them, or use them ill; or words to that purpose. That some others in the meeting said the same thing; particularly dean of guild Hathorn, as the deponent thinks, but cannot be positive. Depones, That some of the company, the deponent thinks provost Drummond, answered, That the city ought not to lay down their arms till the treaty was concluded; and the preparing for their defence, was the best way for obtaining good terms: And, at the same time, proposed, that, if they did not incline to ring the fire-bell, a bank might be sent through the town (by which the deponent understood beating a drum,) or any other method for bringing the inhabitants together. To which the pannel answered, That that was a matter of too great importance for him to take upon him by himself, for he would be determined by his council. That provost Drummond said to the pannel, That he was the person that must give the orders, and must answer for them; and the council had nothing to do in it. Depones, That the council, at least several of them whom he knew, were present in the meeting, but none of them spoke. That then the pannel was going to leave the chair; but some of the council insisted that he should keep it; which he did accordingly. Depones, That thereafter the pannel, and some others of the council, particularly, as the deponent remembers, Mark Sandilands, urged, that the town was not defensible. To which the deponent answered, That he well knew the situation of the town, and likewise knew the condition of those who were to come against it, who had no cannon, and were very ill armed; and that he would undertake to be one of fifty to defend the weakest part of the town: And some of the council joined the deponent, particularly one Mr. Currie, who offered to make one of the fifty, and to find the rest of them within the town. That thereupon the pannel seemed to come to a resolution to defend

the town, provided general Guest would give them what arms were necessary. That the deponent offered to go to general Guest; and that the pannel might be satisfied, that he did not mistake or misrepresent his message, desired that one of the council, who the pannel could confide in, might be sent alongst with him; and accordingly provost Coutts was sent. That, upon delivering the message to general Guest, he expressed his satisfaction with the resolution of defending the town; assured them they should want no assistance that was in his power to give them; and that how soon they should distribute the arms properly belonging to the city, they should have what more arms they had use for: That he had already given orders to spike up the cannon on the city-walls, and beat off the trunnions; but that now he would countermand these orders. And being interrogate for the pannel, depones, that no part of the message, sent by the pannel to general Guest by his hands, was touching the dragoons; neither did the deponent make any proposition to the general relating to them. Depones, that, upon provost Coutts and the deponent's return from the castle to the council-chamber, the pannel told the deponent, that, as the messenger they had sent after their deputies had not overtaken them, the council were come to a resolution not to defend the town: And the council, at least severals of them known to the deponent, were present at the time. Depones, that thereupon it was proposed, and, as the deponent thinks, by provost Drummond, that, if the town was not to be defended, care at least should be taken to secure the arms, that they should not fall into the rebels' hands. Upon which the pannel reached to provost Drummond the before-mentioned letter, signed Charles, P. R.; by which, he said, Mr. Drummond would see, that if the arms were put out of the way, the Highlanders would plunder the town. To which provost Drummond answered, That if the town should furnish the rebels with arms to fight against the king's troops, had they not reason to expect, that when the town should be retaken by the king's troops, they would look upon the town as enemies, and use them as such? That thereupon the deponent insisted to have the pannel's answer in writing to the message he had brought him from Lord Advocate. To which the pannel answered, That he had already put too much in writing that day, and he would write no more upon the subject. And thereupon provost Drummond and the deponent came away. And being interrogate, whether at this time, when he left the pannel in council, he did not say, he was going to bring in the dragoons? depones, that he was so far from saying so, or intending it, that had he met the dragoons coming in, he would have turned them back, in respect of what had passed in his last conversation with the pannel.

XV. Mr. Lewis Douglas, advocate, depones, that betwixt two and three o'clock afternoon of

Sunday the 15th September 1745, the deponent, and one Mr. Tait, a physician in Dalkeith, came with 47 men, being, as the deponent thinks, all inhabitants of Dalkeith, to offer their service to provost Stewart, to assist in the defence of the city of Edinburgh, against the rebels. That, in their way to Edinburgh, Mr. Tait left the deponent with the men, in order to find out the pannel, to get arms for them. But about six o'clock Mr. Tait returned to the deponent, and told him, that the pannel said he had no arms to give them; and that upon this Mr. Tait had applied to the then Lord Advocate; who told him, that it would be necessary for him to draw a petition, addressed to him the Lord Advocate: Which Mr. Tait accordingly did; and the Lord Advocate subjoined a recommendation on the foot of the petition, directed to general Guest. Which petition and recommendation being presented by Mr. Tait to general Guest, general Guest granted a warrant upon Mr. Lyon storemaster, to deliver to the deponent, and the men that came along with him, fifty stand of arms, a barrel of ball, and a barrel of powder: And that about six or seven o'clock they were accordingly received. Depones, that Mr. Tait informed the deponent, that when he Mr. Tait conversed at first with the pannel, and was told, as above, by the pannel, that he had no arms to give the men who were coming from Dalkeith: Mr. Tait, upon that, asking, if the men might notwithstanding come into the town of Edinburgh? the pannel said, They should be very welcome. That, upon their return from the castle, the deponent, with the men that came along with him, went to the Parliament-cloze, where they remained until that Mr. Tait, who had gone in search of the pannel, should receive orders from him, both as to their quarters, and the place of the town which they were to defend. That it was some time before Mr. Tait returned; and when he returned, he told the deponent, that the pannel declined for some time to give any orders; but at last, by the intercession of provost Drummond, the quarters which were allotted for them was the high-school; and the place of the town they were to defend, was from the Cowgate port to the back of the Infirmary. That they remained there, and kept guard all night: But in the high-school, where their quarters were allotted them, they had neither meat, coal, or candle. Depones, that betwixt one and two o'clock, as the deponent thinks, the pannel made his grand round: And that then the deponent, with his men, turned out their whole guard to him. That he is positive the pannel did not speak to him; and, so far as he remembers, he did not speak to any of the men: And that Mr. Tait, with a party of sixteen men, escorted him from their guard to the next guard. Depones, that a message coming to Mr. Tait about twelve o'clock on Monday the 16th of September, giving an account that his wife was dangerously ill, and who accordingly died that day, Mr. Tait was obliged

to leave the town, and the command of the men wholly upon the deponent: And the deponent having gone to wait on the pannel, to acquaint him of what had happened to Mr. Tait, and to desire that the pannel might appoint some proper person to command the men who came along with the deponent in conjunction with himself; the pannel made answer, That your men were in so good order last night, that I do not think you stand in need of any assistance; but if you know of any proper person, you may name him, and I will appoint him. Upon this bailie Wilson came in, and told he was very glad to see the deponent with the pannel; for it was upon the same errand he was come to speak to him, to know how these men were to be quartered. The Provost's answer was, that he had so many things in his head, and was so much hurried, that he desired the bailie might give orders thereanent himself. Depones, That betwixt ten and eleven of the Sunday night, bailie Wilson's wife sent to the deponent and Mr. Tait, desiring that they might come and eat something with her. They accordingly went; and, when in her house, she said she was sorry they had been so little taken notice of. That the deponent and Mr. Tait were a good deal surprised, that none of the magistracy, or those who had the direction of the affairs of the town of Edinburgh, came near them; considering the place which they were sent to guard, and which, in the deponent's apprehension, was of very great importance to the town of Edinburgh. This made the deponent believe, and say to Mr. Tait, That the defence of the town was altogether a joke; and that he would return next morning back to Dalkeith. Mr. Tait, in answer to this, said, That he was wrong in thinking in that manner; for such a piece of conduct would appear foolish, if they should come the one day and return the other; and, besides, if they acted a part becoming themselves, they were not answerable for the conduct of others. And being interrogate for the pannel, How they were provided in meat, drink, coal, and candle, the time they remained in the town of Edinburgh, and when it was they left it? depones, The whole time they remained in Edinburgh they were obliged to provide for themselves. And, upon hearing the fire-bell ring upon Monday afternoon, he immediately sent up to know what was the matter; and the person he sent, meeting with James Carmichael, writer to the signet, Mr. Carmichael sent the deponent word, that it was his business to march up his men forthwith to the Lawn-market. And the deponent upon this imagined, they were immediately going out to fight the rebels; and therefore marched up his men, without loss of time, to the Lawn-market. And when he came there, he found the volunteers all coming down from the castle, after having delivered up their arms. Upon which the deponent marched up his men to the castle, and delivered in his arms also. And, upon this, the men got ladders, scaled the walls, and went to Dalkeith that

night; but he himself staid in the town all that night.

XVI. Mr. John Tait, doctor of medicine in Dalkeith, depones conform to the preceding witness, in so far as concerns the facts which happened while the deponent was in the town of Edinburgh; with this variation, that he does not remember that he used the word 'declined' to Mr. Douglas, when he was giving him an account of the orders he then received from the pannel with respect to the men's quarters who came along with him, and the place of the town they were to guard; but he told Mr. Douglas, that the pannel delayed giving orders for some time. Neither does he remember, that he used that expression to Mr. Douglas, That it was by the intercession of provost Drummond that the orders were then procured; but told him these orders were wrote by provost Drummond, and signed by the pannel. Nor does the deponent remember the expression which Mrs. Wilson had to Mr. Douglas and the deponent upon their not being so much taken notice of as they ought to be; but remembers there was then some such expression by some of the company.

XVII. Archibald Macaulay, esq. late Lord Provost of Edinburgh, depones, That he resided in the town of Edinburgh in the months of August and September 1745, when accounts were brought that the Pretender's son was landed in the western islands, and that he was marching with a body of rebels southward. That the deponent being in the town of Edinburgh in the year 1715, observed then a zeal and warmness in the inhabitants, which proceeded from that disposition appearing first in the magistracy, and which soon spread itself among the other ranks of people. That the method taken at that time for the defence of the city, was by parish-guards, there being 400 volunteers, who had associated themselves together besides, and who were very well disciplined before the rebels came then near to the town. That the trained-bands were laid aside, as being a promiscuous set of people, whereof many were disaffected; and the care of the town was given, in place of them, to the parish and city-guards, in whose hands arms were put, as being known to be people well-affected to the government. That, upon the late rebellion, the deponent did not observe in the town of Edinburgh, such a keenness and zeal for the support of his majesty's government; and at this time nothing but coldness [i. e. lukewarmness.] But hearing that the rebels intended to come to the town of Edinburgh, although at first it was reported they intended to pass another way, the deponent met with some other well-affected people of the town, and expressing his concern for the welfare of it, they proposed the raising of a regiment of 1,000 men, and to get some people to associate themselves into companies of volunteers, as was done in the year 1715. The pannel about

this time did call a meeting of the principal inhabitants of the town of Edinburgh, to consult what was proper to be done then: and at that meeting it was agreed, That a committee of the town-council, in conjunction with some other of the citizens, should wait upon the Lord Advocate, Justice Clerk, and other people about the town of distinction, and consult with them, both as to the legality and expediency of raising the regiment of 1,000 men, and associating some companies of volunteers. That, in this meeting, there were several difficulties started, and even among the lawyers; but they all agreed in this, that they could not set about the levying of the regiment of 1,000 men, without procuring first from the regents a warrant for that effect. Upon this several of the meeting pressed, that an express should be immediately dispatched, in order to procure it: but the then Lord Advocate suggested, they would appear ridiculous, if they should obtain any such licence, when, at the same time, they were not ascertained of the money that was sufficient to pay the regiment. Upon this it was proposed at that meeting, that the Provost should make a trial how the money should be raised: and the Provost suggested, that the proper method for doing this would be, by recommending it to the ministers and kirk-sessions. Against which proposal no objection then was made. That the meeting upon this broke up. And the magistrates and council accordingly recommended it to the ministers and kirk-sessions to make a trial how the money could be raised: but the ministers, upon receiving the warrants for so doing, objected to the warrants, as not being properly signed by the town clerks. But the deponent, and some others of the inhabitants, hearing that the ministers made this scruple; met together, and called for their stent-books, and made out a list of such people as they thought would willingly contribute for the support and maintenance of the regiment: and, upon considering the said list, they were of opinion, there would be no difficulty of raising a sum sufficient for that purpose. That next day the deponent coming to the street, he met with the pannel, who, it would appear, had by that time got notice that the deponent, and some others, had been making out the above list; and told the deponent, That he found some people were taking a good deal upon them; that, as he was Provost of Edinburgh, he would maintain it; and although he had a great regard for the constitution of his country, he had also a regard for the honour of the magistrates, and liberties of the town of Edinburgh; and that nobody should wrest the dignity of Provost out of his hands. And this he seemed to say in a passion. To this the deponent made answer, That there were three of his own magistrates in company: and they only proposed to do that in a more expeditious manner, which he himself wanted to have done. That the forenoon of that day, as the deponent thinks, he met Mr. William Alexander merchant; and talking of

the payment of the regiment of the thousand men, how it was to be ascertained, Mr. Alexander said, "Why should there be any occasion of delay on that account? I am willing to give my bond for three thousand pounds, if any body will join with me;" and the deponent made answer, That he was not a very rich man, but he would join with him. Upon this they both agreed to go up to the then Lord Advocate, and tell him so much; which, after they had done, the Advocate told them, That he could only transact with the magistrates; but he was very glad to hear of their proposal, and he would immediately write about it: as he was then just sending off an express, and had wrote his letter, he then added a postscript to it; which in substance was, telling the offer that had been made by two citizens of the town, which he thought were good for three thousand pounds, and desired therefore, that the warrant or order for levying the regiment might be forthwith sent down. Depones, That two or three days before the rebels came to the town of Edinburgh, the deponent remembers to have heard some proposals made to the pannel, for searching the inhabitants' houses for arms: and upon these occasions he heard the Provost always say, That there ought to be no distinction made, but all houses searched without respect of persons; but the deponent does not remember to have heard of such an order granted. Depones, That he happened to be with some others, in Mrs. Clarke's house; where the Provost and Mr. Maclaurin were present; and it was then proposed, that the city walls should be put in some tolerable posture of defence: and Mr. Maclaurin, at that meeting, produced a scheme of what was necessary for that purpose. To which the pannel agreed; but made some difficulty with regard to the expences that were necessary for doing such a work. The deponent thinks that the Provost might in this have acted a prudent part for the town of Edinburgh; but the deponent thought this ought at that time to have occasioned no delay; and Mr. Maclaurin said so too. Depones, That he heard the reverend Mr. Alexander Webster once and again make a proposal to the pannel in the council house, where there were a good many of the council present, and a great many other inhabitants, of raising, upon his own credit, five hundred guineas, to be distributed to five hundred of the ablest-bodied journeymen of the several incorporated trades in the town; who, as they were very bold and hardy in the extinguishing of fire, he believed would willingly undertake to mount the city-walls, and assist in the defence of them, in case they should be attacked by the rebels, and judged them much more proper for that purpose than the volunteers were. That the answer which the deponent heard the Lord Provost make was, That, if Mr. Webster would undertake to raise the money, he would be caution that Mr. Webster would perform it. Depones, That he was present, both when Mr. Lindsay depute

secretary at war, and Mr. Grosset collector of the customs at Alloa, made a proposal to the pannel, for bringing into the town a hundred dragoons for the town's defence; and Mr. Grosset added, if he desired, even the whole two regiments, provided that the Provost would desire it in writing. The pannel's answer was to both these gentlemen, That if the dragoons would come into the town, they should be welcome; but he would sign no such desire. Depones, That he was present in the council-house on Monday evening the 16th of September; when he heard it proposed, that there was a necessity for securing the town's arms, ammunition, and cannon on the walls, from falling into the hands of the rebels: but as there was very great confusion that night, the deponent does not remember any more of the matter. Depones, That the number of his company, to the best of his knowledge, consisted of sixty or seventy; and that Mr. Joseph Williamson was his lieutenant.

XVIII. *James Nimmo*, esq. late one of the bailies of Edinburgh, depones, That, upon Monday the 16th September 1745, as the deponent was upon guard at the Netherbow Port, with sir George Preston of Valleyfield, he received a message from the pannel, he thinks between four and five at night, to come and speak with him, and some of the town-council, then in the Goldsmiths-hall. That, when he came there, in obedience to the said message, he understood, the pannel, his council, and some of the inhabitants, were engaged in an argument, what answer should be returned to a letter which the pannel had received from the Lord Justice Clerk, or the then Lord Advocate; by which message an offer of a hundred dragoons was made to the pannel, or more if he pleased, to assist in the defence of the city. That, after some time spent in this debate, the pannel observed, that a thorn had been put in his foot; for that if he should accept of that offer, and the town should be taken, he might be charged with having ensnared so many of his majesty's troops; and, on the other hand, if he should refuse to accept of the offer, he might be blamed, if the town was taken, for having lost it by not receiving that succour. That, in answer to this, the deponent observed, that it was an easy matter for the pannel to put the thorn in their foot, by making an answer to this offer, That if the Lord Justice Clerk or Lord Advocate should think it fit, and for the service of the government, to send a hundred dragoons, or the whole of them for the purpose aforesaid, the pannel should be ready to receive them; which expedient the pannel, and severals of the gentlemen then present, seemed to approve of; and the pannel set about writing an answer, as the deponent imagined, to that purpose; but, when he heard the answer read, he did think it did not fully come up to his proposal. Upon which he left the meeting, and repaired to his post; and, about five o'clock, the alarm-bell rung, the signal for calling the volunteers to repair to

the Lawn-market: but, before the deponent left his post, he sent several messages to the pannel, to receive orders what to do; and to the third message, he thinks, for the first time, received an answer, to repair to the alarm-post; which accordingly he did: and that he was not present at the meeting in the New Church Isle, held much about this time, judging it more his duty to remain at his post, besides, he saw a great many people crowding into that meeting, whom the deponent did not look upon as proper persons to consult with in a juncture of that sort, when the rebels were reported to be at the distance of only about two miles from the city.

XIX. *Mr. Alexander Webster*, one of the ministers of Edinburgh, depones, That the week before the rebels got possession of the city of Edinburgh, he was present at a meeting in Mrs. Clarke's with the pannel, some officers of the army, and well-affected inhabitants of the city. That in it the deponent observed, that the reparation of the city-walls was carried on by much too slowly; and that the tradesmen should be called to give a reason why they were so slow in executing the respective parts of the works to them assigned. That the pannel observed, That, being about the election-time, and pretty late, it was very probable the tradesmen might have got a cup too much for business that night; and it would be better to defer that inquiry till next morning: and, at the same time, observed, that the care of these works had been appointed to a particular committee named by the council for that effect. At the same time some of the said officers who were present complained, that what they called the bastions of the town-wall were too weak; that is, the scaffolding upon which the cannon was placed, was not strong enough; the parapet round the wall, in some places, was too narrow; so that one man could not pass another; nor were the parapets sufficiently cleared. That the deponent knows there was a plan made by the deceased Mr. Colin Maclaurin of the city-walls, and bastions, and other works necessary to be made for the defence of the city; which was agreed to by the council, as the deponent was informed, and a committee named for bringing it to execution. That the deponent observed, upon the 9th of September, as he thinks, that a ditch near Wallace's Tower, which had been projected by Mr. Maclaurin to be made on the north-side of a wall there, was erroneously made on the south-side of the wall; whereby it became rather a security for, than a defence against the rebels; and which mistake, so far as the deponent remembers, was never corrected, but rather carried on, as the deponent observed, upon visiting the same upon Wednesday the 11th of September: but, as he did not mention this as any article of complaint in the foressaid meeting in Mrs. Clarke's, he does not know, that any part of this mistake could be charged against the pannel. Depones, That at the meeting in Mrs. Clarke's above-mentioned, the deponent remembers, that bailie

Robert Baillie came into the room: upon which the deponent renewed this complaint against the workmen for carrying on the works so slowly; which he did, because he was informed, that bailie Baillie was the chief of the committee above-mentioned. Upon which the bailie sent for one of the tradesmen, who made the following excuses: That they had made the bastions as sufficient as the timber they could find for that purpose would admit of; and that they had carried on the work as fast as they could find hands to do it. Depones, That some time of the said week, he casually met with the pannel in the Parliament-close, and again renewed his complaint to him about the slowness of carrying on the said works; which appeared to him should have been carried on without loss of time: and the pannel mentioned something about the expence of the work, and proposed, that the volunteers would advance the expence thereof according to their engagement. To which the deponent replied, That he did not doubt but the volunteers would fulfil their engagements, though he suspected it might be a difficulty for them at present to advance the money. Depones, That he was present at a meeting in Mr. Wilson's house, when a petition, signed by a considerable number of the well-affected inhabitants of the city, was presented to the pannel, for associating themselves as volunteers; which the pannel objected to as high treason; but added, that he should consult the crown lawyers about it: and that he expressed his dissatisfaction at the manner of promoting that petition, and in attaining so many subscriptions, without previously consulting with him. Depones, That it was observed, that those parts of the walls near Potter-row Port, and St. Mary and Leith Wynds, were commanded by the adjacent houses; and it was thought, that it was proper to build up the doors and windows of the said houses, to make the defence of those parts of the walls practicable; or to possess those houses with parties of the volunteers. It was also proposed, to possess the houses at the Potter-row Port with a party, and to make a communication by a bridge, by which they could retire to the walls in case of being dislodged. But nothing of this kind was executed; nor did the deponent make the non-execution of this any part of his complaint. Depones, That, some time in the week before the rebels entered Edinburgh, the deponent had occasion to meet with the pannel, and others, in the Exchequer-Chamber, and in Mrs. Clarke's; when he proposed to the pannel to find security, or, if it was thought necessary, even to advance 4 or 500 guineas, to be distributed among the able-bodied journeymen of the brewers, bakers, and other tradesmen of the city, to encourage them to join with the volunteers in defence of the city that night in which it should happen to be attacked by the rebels; which proposal the pannel seemed to approve of; and said, that the deponent needed no security for his advance, for he the pannel would become caution for

the deponent's paying it. That the deponent then proposed, that the masters of those journeymen, and others, should be sent for, to concert a plan for the execution of that proposal: but the pannel alleged, that it was too late for that then; and that some of them would readily be about their bottle; but next day he would do it. That, on Sunday the 15th, the deponent asked the pannel, if he had met with the masters of the said journeymen? &c. He answered, That, in the multiplicity of affairs, it had escaped his memory, but that he would do it; but does not know if it was done or not. Depones, That, in the afternoon of the 16th of September, he heard, that there was to be a meeting of the inhabitants in the New Church Isle, or that such a meeting was then met; and just about this time the alarm-bell rung, which was the signal for the volunteers to repair to their respective posts. That the deponent, being one of them, went to the post assigned to the company in which he served; so that he can give little account of what past at that meeting; but having stepped in to see what was going on, he thought it a very tumultuous assembly. That the deponent observed, very few of the well-affected inhabitants that he knew were in it: that there were several of the meeting, who, in his opinion, were not well affected to the government; and that the generality consisted of people, who, to the best of his remembrance, he had never before seen. That the few who spoke for defending the city, were treated with very scurrilous and opprobrious language; particularly the reverend Mr. George Logan, who was speaking to that purpose, seemed to him to have been pulled down from the form on which he was standing, by force. Upon which the deponent left the meeting, and repaired to his post. Depones, That on Monday the 16th he went round the walls of the city upon which the cannon was planted; and observed there were two of them, one at the Bristow port, and another at the south-east corner of the wall near Bedlam, upon which no centinels were then attending; and it was observed, these cannon could not be fired, without drawing the shot; because they might be unloaded, or the shot altered during the time the centinels were absent: but that, after the deponent staid a considerable time at the cannon on the south-east corner, as above, a centinel at last appeared, who said, he had been planted as centinel upon the said cannon. Depones, That, upon the evening of the said 16th September, he went along with the other volunteers, to deliver up his arms to the castle; and, in his return, met with ensign Robertson on the head of a party of men, sent by gen. Guest or gen. Preston, with orders, as the ensign told him, to spike up the cannon on the walls of the city; but that he was ordered, before entering the city, to apply to the pannel for his authority to do so. That he had dispatched Robert Griffith, a gunner, to acquaint the pannel thereof, and to ask his authority. That the deponent saw the said Robert Griffith return, who reported, that he had

waited upon the pannel, and that his answer was, that he would give him no authority; adding some words which he at present cannot recollect; but the impression they made upon him at the time, and which he still retains, was, that they imported a discouragement of the execution of the order; for that the ensign immediately said, being in conversation with the deponent, Should I force? or, I will force, my way into the town; or words to that purpose. But the deponent suggested to him, it would be more proper for him to make a report of what had happened, to one of the generals; which having been done by some one of the party sent for that purpose, they were recalled, and marched into the castle. And, being interrogate for the pannel, depones, That he gave it as his opinion, at 11 o'clock at night of Monday the 16th, in the Laigh council-house, that the town could not then be defended, without the assistance of the dragoons, in regard that the volunteers had lodged their arms in the castle; and that a great many of them were either gone into the castle, or had left the city, upon the resolution of delivering up the town; and that he thought it extremely odd, to propose now a defence of the city in their present circumstances, when, it seemed, it had been judged not tenable, even when the whole volunteers were in arms, and an offer made for the dragoons to come in to its defence: and therefore, upon the whole, was of opinion, that a message should be sent to the dragoons to return, and some proper methods taken, in the mean time, to gather together as many volunteers as possible. Depones, That the deponent either heard Mr. Drummond himself, or some other person, say, That he Mr. Drummond was going out to bring back the dragoons; and he did not return while the deponent was there. And depones, That he did not think the alarm-bell a proper signal for collecting the volunteers, while the dragoons were at so great a distance, and the rebels so nigh. That this he considered as an intimation to the rebels to make the attack on the city ere it was possible for the dragoons to come to its defence; and any intimation to the rebels, of a design of defending the city, would probably prove a hardship on the deputies that had been commissioned by the town-council to capitulate with them about the surrender of it, and who were at that time at the rebel camp.

XX. *Alexander Scott*, merchant in Edinburgh, depones, That in September 1745, he served as an officer of volunteers, for defence of the city of Edinburgh, in the company commanded by the present Lord Provost of Edinburgh. That some day of the second week of September, and, as he thinks, about the beginning of that week, the deponent was present in the New Church Isle; when he heard a question put to the pannel, whether

such of the volunteers as belonged to the trained-bands ought not to be excused, during their service as volunteers, from doing any duty with the trained-bands? To which the pannel answered, That, when both a company of trained-bands, and a company of volunteers, were upon duty at the same time, any person belonging to both these companies, might have his choice which of them to serve in at that time. And, upon a further question put to the pannel, he answered, that, when a company of trained-bands, and a company of volunteers, to both which one and the same person belonged, should happen to do duty on different days, such volunteer should do duty on both. That the deponent does not remember to have heard any objection made to these answers, or any thing further said on the subject in that meeting: but the deponent had occasion to converse with some of the volunteers, who thought it a hardship; and doubts not, but it may have discouraged others from engaging as volunteers. And, upon an interrogatory put by the pannel, depones, That he did converse with some of the trained-bands, to whom he proposed to enlist as volunteers; who answered, that would bring upon them double duty; that they were already bound to do duty in the trained-bands; and, should they engage as volunteers, they might be obliged to do duty also in that capacity, when the trained-bands were not upon duty; but, were it not for that hardship, they would have chosen rather to have served as volunteers, than with the trained-bands. And being desired to condescend upon any person who gave him such answer, depones, That he cannot, at this distance of time, charge his memory with the persons' names; but thinks that he talked on that subject once to a friend of his, William Scot, merchant, or in a company where he was; and that either William Scot, or some other in that company, gave the deponent that answer. Depones, That the company to which the deponent belonged were ordered to meet in the College-yards, in the afternoon of Monday the 16th of September. That the deponent, having been out of bed all the preceding night, and having gone only to bed at ten o'clock that day, it was about two after noon before he came to the place; and found some others of the company there before him. That they had got no orders what to do; and continued in the College-yards about an hour after the deponent came, and still received no orders. And at last they consulted together, and marched to the Lawn-market; but the deponent cannot charge his memory, what were the reasons that induced them to march thither, whether it was the ringing of the fire-bell, because he does not remember, whether that bell was rung before they marched, or if it was only rung after they marched; or if their reason was, to be near the proper place where they might receive orders, for the company was anxious or uneasy for orders: that there were other companies of volunteers in the College-

yards, who marched to the Lawn-market at the same time, and the deponent thinks for the same reason: that after coming to the Lawn-market, they waited there for a considerable time without receiving orders; till at last the deponent, at the desire of some other officers of the volunteers, went to the Goldsmiths-hall, to desire the pannel's orders for those companies of volunteers. That the deponent found a crowd in the Goldsmiths-hall, with some difficulty got to the upper end of it, and told the pannel, that he was sent by the officers of the volunteers, who were standing in the Lawn-market, to ask his lordship what orders he would please to give them: That the pannel answered, That he was at a loss to know what orders to give them; and thinks he further added, That they were then deliberating about that matter. That the deponent waited some little time, to see whether he would get orders; but getting none, he left the hall, and returned to his company in the Lawn-market, and acquainted the other officers of the volunteers what had passed. That, not long after the deponent's return, he saw the officers of the volunteers that were in the upper-end of the Lawn-market in a knot together, and, as he supposed, consulting what measure they should take; and the deponent was soon thereafter told, That they had resolved to deliver up their arms to the castle: And, upon the deponent's going up the Lawn-market, the officers informed him of their said resolution; and, agreeable thereto, the deponent went up to his company, which was the west-most in the Lawn-market; and the whole of them marched up to the castle. And the reason given the deponent for taking that resolution, was, because no orders were given them, and they were apprehensive that their arms might fall into the rebels' hands.

XXI. *Archibald Stevenson*, writer in Edinburgh, depones, That he was an officer of the volunteers, for defence of the city, in September 1745. That he was present at a meeting that the pannel had with some of the volunteers in Mrs. Clarke's; where Mr. Webster the minister was also present; and which, he thinks, was upon Saturday the 14th September. And depones, That he there heard Mr. Webster propose to the pannel, that a number of the servants and journeymen of the brewers and bakers in the town should be hired to assist in the defence of the city any night it should be attacked, at the premium of a guinea each in hand; and a further reward to be given them, according to their behaviour, when the matter was over. That Mr. Webster undertook to raise, by subscription, a sum of 500*l.* to defray the expence: and offered to give security for payment of the money. That the deponent did not hear what answer the pannel gave; but supposed that the proposal had not been gone into, because he heard no resolution taken upon it in that meeting, nor did he afterwards hear any more

VOL. XVIII.

of that matter. Depones, that, in the afternoon of Monday the 16th of September, and, as he thinks, about four o'clock, while the volunteers were drawn up in the Lawn-market, he was sent by them with a message to the pannel, to ask what orders he had to give to them? and likewise to ask, in case the town was not to be defended, where they were to deposit the king's arms? or words to that purpose; that he found the Lord Provost in Goldsmiths-hall: that to the first part of his message he received no answer, and got no orders for the volunteers, what they were to do: But to the second part of the message, the pannel answered, That he would give orders to receive the arms at the court of guard. Depones, That the deponent waited till the pannel left Goldsmiths-hall, and went to the New Church Isle; and, on the way thither, in the Parliament-close, the deponent saw Alexander Cunningham, surgeon, come up to the pannel, and deliver the following message: "That the dragoons found that the number of the rebels was so far superior to them, that they were obliged to retire;" but the deponent does not remember the place he named where the dragoons had gone to; and said, that the number of the rebels, so far as they could judge by appearance, could not be under 8,000 strong. Depones, That thereupon he heard the pannel say, If the troops were retired, then all was over. That he believes the occasion of Mr. Cunningham's being with the dragoons was, that he expected there was to be an action, and he attended them in the way of his business. And being further interrogate, depones, That he left the Provost as he was going into the New Church Isle, and returned to the Lawn-market, and reported to the officers of the volunteers the answer he had got to the message they had sent by him. That thereupon they consulted together; and some were for immediately delivering up their arms into the castle; but provost Drummond, who was one of their officers, insisted, that, before taking that step, they should send a second message. That a second message was accordingly sent; but by whom, the deponent does not remember; and the messenger returned without any answer: Whereupon the volunteers marched up to the castle, and delivered up their arms.

XXII. *Ensign William Robertson*, of Edinburgh castle, depones, That, in the evening of the 16th September, 1745, he being then an officer in the castle of Edinburgh, was sent by general Preston about six o'clock at night, after that the volunteers delivered up their arms in the castle, with a party, to bring up to the castle the cannon that were on the walls of the city, or otherwise to render them useless, by spiking them up, and knocking off the trunnions; and, for this purpose, he had carts and horses along with him, and proper instruments for spiking the cannon, and beating off the trunnions: but then, his orders were restricted, not to do this without licences and order from

3 T

the then Lord Provost of Edinburgh. Depones, that, with his party, he marched down to the reservoir; and then he first sent the serjeant of his party, and after that one Griffith, a gunner in the castle, with a message to the Provost, to know whether he might enter the town for the above purpose; and the answer which was returned to him from the pannel, by both the messengers, was, That he would give no orders concerning the cannon; but the deponent might do as he thought proper. Upon this he sent to general Guest, to know how he should behave; and orders were brought him to return to the castle. Depones, That Mr. Webster was with him, procured him a flambeau, some smiths, carts and horses; and that, without going further, the deponent returned to the castle.

[29th October, betwixt one and two o'clock in the morning.] It was now moved by some of the jury, that they might have leave to make a motion in court before any further procedure in the trial: which being allowed of by the lords, sir Alexander Nisbet of Dean, Patrick Crichton of Woudhouslie, John Nisbet portioner of water of Leith, and Edward Lothian jeweller in Edinburgh, four of the gentlemen upon the assize of the said Archibald Stewart pannel, humbly represented and moved in court, in their own, and in name of the whole other assizers, that the Court had now continued upon this trial, without any respite, since Tuesday morning at eight o'clock, being upwards of 40 hours: that, by this sederunt, several of the assizers were already greatly fatigued, and one or two of them altogether unable to hold it out any longer, without some relief: that the assize could not imagine it to be the intention, either of prosecutor or pannel, to kill or destroy them; which behoved to be the consequence, should they insist upon finishing the trial at one sederunt: that their lordships, as well as the pannel, and other members of court who had attended this trial, must be sensible, from what they had suffered themselves, of the hardships undergone by the assize, and consequently of the reasonableness of their demand: that, although other people's situation and strength might enable them to go on without relaxation, the said four gentlemen did, with great candour and ingenuity, assure the judges, that they were no longer able to go on in their duty upon this trial: and therefore begged leave to acquaint their lordships thereof; at the same time flattering themselves, that both the pannel, and his majesty's advocate, would concur and agree, that the trial might be put off, and continued for such a short space of time as the lords should please to appoint, that in the mean time the assize, and all concerned, might have a little rest. And, with the greatest submission, moved the Court, that they would please to take this their request into consideration, and grant the desire thereof accordingly.

"Upon hearing of which motion, Mr. Ar-

chibald Stewart pannel, and his counsel, in respect of the distress which the length of this trial has already brought upon several of the assize, and that it seems impracticable to finish the trial at one sederunt, consent to the granting the desire of the motion made as above by the assizers, in case the lords shall think proper so to do.

(Signed,)

"ARCH. STEWART.

"JAMES FERGUSON."

"Mr. William Grant, his majesty's advocate, does not oppose the granting the desire of the foresaid motion, agreed to by the pannel and his counsel; and hereby consents that the lords grant the same, in case they so think fit; and that in regard the jury have already attended forty hours; and that several of them are so valetudinary, that they are unable to stand out the trial, without some respite; and also that several of the prosecutor's witnesses have given him notice, that they are not able to attend longer without endangering their healths.

(Signed,)

"WILL. GRANT."

"The Lords Commissioners of Justiciary, having heard the motion of the assize, and the consent to granting the desire thereof, both of the pannel and his majesty's advocate, as above, and fully deliberated and argued thereon, they, in respect thereof, and of the necessity of the case, continue the diet, till eleven o'clock of the forenoon of this day; and ordain the pannel and witnesses to attend then; each under the pain of law; as also the hail fifteen assizers then also to attend, each of them under the penalty of 500*l.* sterling: and the said assizers, in token of their acquiescence, hereby become bound and enacted, each for themselves, their heirs and successors, that they shall appear and give attendance at the foresaid hour, in this place, each under the foresaid penalty of 500*l.*

(Signed,)" "ALEX. FRASER, I. P. D."

ALEX. NISBET,	HUGH CLERK, jun.
JO. NISBET,	WM. WIGHT,
JAMES DEWAR,	ALEX. CAMPBELL;
JOHN SIVRIGHT,	R. FLEMING,
JAMES FALCONER,	JAMES STIRLING,
THOMAS WOOD,	JAMES HUNTER,
PAT. CRICHTON,	EDW. LOTHIAN.
THO. TROTTER,	

CURIA JUSTICIARIE, S. D. N. Regis, tenta in novâ Sessionis Domo Burgi de Edinburgh, vigesimo nono Die Mensis Octobris, 1747, per honorabiles Viros Magistrus Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Arskine de Tinwald, et Hugonem Dalrymple de Drummorie, Commissionarios Justiciarum dict. S. D. N. Regis.—(Lord Strichen Præses.)

Curia legitimè affirmata.

Intran'

Archibald Stewart of the city of Edinburgh, merchant, and late provost of the said city,

panel, indicted and accused as in the former sederunt.

The hail fifteen assizers being called over, and answering to their names, his majesty's advocate proceeded to the remaining part of his proof, by adducing the following witnesses, viz.

XXIII. *Robert Griffith*, one of the gunners of the castle of Edinburgh, depones, That, about five or six of the clock in the afternoon of Monday the 16th of September, 1745, after that the volunteers had delivered their arms in the castle, it was thought proper, by the commanding officer of the castle, to give orders for bringing up the cannon, and other arms, such as pateraroes, that were on the city-walls, or otherwise to render them useless, that so they might not fall into the hands of the rebels. That a party was sent from the castle for this purpose, under the command of ensign Robertson; and the deponent was sent by general Guest to follow that party, to enquire if the said Mr. Robertson had provost Stewart's liberty to go on with the said work: that Mr. Robertson declared he had no such concurrence; but had sent his serjeant to the Provost for that effect. That the general ordered the deponent also to go forward, and demand the panel's licence or concurrence to effectuate the same. Accordingly the deponent waited on the panel, and demanded from him his licence or authority to go on, and bring to the castle, or demolish, these cannon, &c. which were then mounted on the town-walls, lest they should fall into the hands of the enemy. That the panel's answer was: he had no authority to give, as the dragoons were gone eastward, and his volunteers had laid down their arms. That he had lately received a letter from the enemy, which he desired the deponent to read. That the deponent told the panel, that his the deponent's duty was not to expostulate, or lose time with the panel, but in a positive manner to have his concurrence; which the panel positively refused; but added, "That we might do as we would, without his liberty." That when the deponent left the panel, he found ensign Robertson and his party standing in the Lawn-market street, with a couple of carts, and some blacksmith-boys, with fore-hammers in their hands, whom Mr. Robertson had impressed to facilitate his work. That the deponent went to general Guest, and acquainted him, that he could not procure the Provost's licence to bring in, or demolish the foresaid cannon: that the general was then in conversation with George Lauder, surgeon in Edinburgh, whom the panel informed the deponent, that he had sent to the general. That the general ordered the party to return to the castle; and, at the same time, told the deponent, that the proper time was over for effectuating the foresaid work, it being then dark. Depones, that, when he entered the door where the general and Mr. Lauder were in company, he heard

the general say, "I am sorry the Provost has not granted my request." And being interrogate for the panel, whether he reported to general Guest the last words of the panel's answer to him, particularly that they might do as they would, without his the panel's authority? Depones, he did. And the deponent further desired of general Guest to give the party his authority to go on with the foresaid work, without the panel's liberty. To which the general answered, The Provost had lost the proper opportunity; and, if the party remained any longer in town, they might fall into the hands of some flying party of the enemy. And, being further interrogate for the panel, depones, that the garrison of the castle of Edinburgh consisted then of the castle-company, which ought to be a hundred men; and two companies of colonel Lascelles's regiment, which ought to be seventy men each; but none of the above companies were complete. That the party sent for the cannon, consisted of an officer, two gunners, a serjeant and twenty men; and their falling into the hands of the rebels, would very much have weakened the garrison.

XXIV. *Joseph Mead*, one of the serjeants of the castle of Edinburgh, depones, That, upon the evening of the 16th of September 1745, he was desired, by ensign Robertson, to get ready a party of twenty men; which, after the deponent did, ensign Robertson ordered him and the party to follow him; which accordingly they did; and, after they were come a little way down the Castle-hill, ensign Robertson ordered the deponent to go to the panel, and acquaint him, that the ensign was come with a party, in order to render useless the cannon that were on the city-walls, and wanted the panel's commands thereanent. The deponent accordingly went to the panel, and delivered his message. To which the panel made answer, That ensign Robertson might do as he would. That, upon this, one Dr. Lauder, who was then in company with the panel, rose up, and desired liberty to go and speak to the general; and that the panel said he might go. And accordingly Mr. Lauder and the deponent left the provost, who was then in the council-house; and, when they came to the castle, they met major Robertson, who desired them to go to general Guest; which accordingly they did. And Mr. Lauder, addressing the general, told him, That there was a party come down to destroy and render useless the cannon that were upon the walls. To which the general made answer, Why not? The Provost has not done what he ought. To which Mr. Lauder replied, What could he do? or, What could we do, since the forces have left us? And the deponent telling the general the message he had been sent with by ensign Robertson to the panel, with the panel's answer, the general ordered ensign Robertson, with his party, to return to the castle; which message to the ensign was sent by Mr. Lauder;

and the deponent believes Mr. Lauder delivered that message to the ensign, because the deponent remained with the general till Mr. Lauder was gone, and then asked the general, what commands he had for his officer, ensign Robertson? To which the general made answer: You may go and tell him to withdraw his party to the castle. And the deponent having gone, found that the ensign and his party were already returned.

XXV. *Patrick Lindesay*, depute-secretary to the forces in North-Britain, depones, That, about two o'clock of Monday the 16th of September 1745, he being in company with general Guest, the then lord advocate and solicitor came into the room, and told the general, That it was thought proper that a hundred dragoons should be brought into the city of Edinburgh, to assist in the defence of it; and desired that he might give a warrant for bringing them into it. The general agreed to the proposal; but thought it was proper that a petition should be signed by the pannel, the lord advocate, and solicitor, requesting the thing from him; which petition the deponent wrote: And the lord advocate carried it down, as the deponent thinks, to have it signed by the pannel; and desired that the deponent might come in a quarter of an hour to his house to get the petition when signed. That, after this, the lord advocate and solicitor left the general, and colonel Clayton came into his room, who was going that day to brigadier Fowke. That the general told him what the lord advocate and solicitor had been with him about; and, at the same time, gave him orders, upon his seeing the foresaid petition signed and delivered to the deponent, to acquaint brigadier Fowke, that it was his orders that a hundred dragoons should be forthwith sent into the town of Edinburgh. The deponent and col. Clayton went from the castle to lord advocate's house in a very short time after this; and calling for the above petition, he received it, signed by the pannel, lord advocate, and solicitor, and shewed it to colonel Clayton; who immediately left the deponent, in order to go to brigadier Fowke. Depones, That, about an hour after this, the deponent, being with general Guest, and the general hearing that there was some design among the inhabitants for delivering up the town sent the deponent to the pannel, to know, whether he still desired that the hundred dragoons should come to town in terms of the above petition or request; because, if he did not, he would send contrary orders to brigadier Fowke. The deponent accordingly went, and delivered his message to the provost, whom he then found in a very numerous meeting of the inhabitants in the New Church Isle; but does not remember that he told the pannel the general's reason for sending this message. That the pannel demanded the opinion of the meeting, whether the dragoons should be brought in, or not? Whereupon a great number cried out, 'No dragoons.' And the pannel upon

this told the deponent, that he would neither bid nor forbid them, but that the general might do what he thought proper. The deponent upon this, having the petition or request in his custody, took it out of his pocket, and wrote upon the back of it, 'The generality of this meeting are not for receiving the dragoons.' This short note he presented to the pannel for him to sign; but this he refused, and said, Why will ye distress me about these dragoons? or words to that purpose. And depones, That at that time, or some time after, speaking to the pannel upon the subject of admitting the dragoons, the deponent asked him, since he had once signed a request for bringing in the dragoons, why he would not either continue the same request, or counter-order it? And the pannel's answer was, That he signed the request at the desire of the advocate or solicitor. Depones, That, when he wrote the above note, he did not tell the pannel that the paper upon which the note was wrote, was the request, which he, the advocate, and solicitor, had formerly signed; nor did he shew him any more than the back-side of the paper. And being interrogate by the pannel, What it is the deponent means, by his saying, that he had a conversation with the pannel, at that meeting, or some time after, about admitting the dragoons; whether he means that day or some day thereafter? depones, He cannot be positive as to the day. And depones, That, upon delivering general Guest's message to the pannel, he did it aloud; and is positive, that the meeting delivered such an opinion as he has already deponed upon; and thinks the provost put the question as he has already deponed; but as to this last particular he is not positive.

XXVI. *Donald Mackay*, cadie in Edinburgh, depones, That, on Monday afternoon, the 16th of September 1745, William Henderson gave the deponent a letter to be carried to Leith, to one William Ross a gunner; which the deponent was told was to bring him up from Leith to the pannel, then Lord Provost of Edinburgh. That, after the deponent had delivered his message, and returned, as he was walking about the Luckenbooths, a man dressed in black clothes came to the deponent, and asked him, If he knew him? The deponent answered, "I do not know you, Sir." The man replied, "What, do you not know me?" And the deponent said, "I believe I may have seen you once or twice; but I do not know your name." Then the man said, "Here is a letter to the Provost; you must find him out, and give it him; and here is three pence for your pains, and next time I see you I will give you a shilling." That the deponent went in quest of the Provost, and saw Mr. Charles Erskine advocate, Charles Fraser merchant, and the deceased Mr. Robertson minister, standing together. That the deponent came up to them, and asked them, if they knew where the Provost was; for here was a letter

he had to give him. Mr. Charles Erskine said, "Give me the letter, and I'll deliver it to him." And the deponent gave the letter to Mr. Erskine. Then Charles Fraser said, "I am lighter-footed than you; give me the letter, and I'll carry it to him." And Mr. Erskine gave him the letter, and Charles Fraser went off with it. And depones, that the deponent did not then know, nor does he yet know the contents of the letter, nor from what person it was. And depones, that after the rebels had got possession of the city of Edinburgh, he saw the same person who had given him the letter as above, who was then an officer in the service of the rebels, and craved him for his shilling that he had promised him; but did not get it.

XXVII. Mr. Charles Erskine of Edinshead, advocate, depones, That, upon the evening of Monday the 16th of September 1745, as he believes, though he cannot be positive of the day, the deponent, Charles Fraser merchant, and the now deceased Mr. Robertson minister, were standing together opposite to the Tolbooth; when a street-cadie came running up in some haste, and said, "Who is there? Where is the Provost?" And the deponent turning about his face to the cadie, said, "Why, what do you want the Provost for?" The cadie answered, "Here is a letter I have to give him." The deponent said, "From whom is the letter?" The cadie answered, "I do not know; a man in black clothes gave it me to give him." The deponent replied, "I believe the Provost is just now in the New-Church Isle." And then Charles Fraser said, "I believe the Provost is in the New-Church Isle; if you will give me the letter, I will carry it to him." And the deponent having before taken the letter out of the cadie's hand, he, at the cadie's desire, then gave it to Charles Fraser. That the deponent looked at the back of the letter, and saw that it was addressed to the Lord Provost; but cannot say, that, in the hurry they were then in, he observed what more was in the address, nor did he look at the seal. And being shewn the letter in the clerk's hands, which is the first in the list of writings subjoined to the criminal libel, depones, that he cannot say, whether it is the same with the letter above deponed upon, or not.

XXVIII. Charles Fraser, merchant in Edinburgh, depones, That, between five and six o'clock of the evening of the day before the rebels came into the city of Edinburgh, the deponent being standing on the street, with Mr. Erskine the preceding witness, a cadie came up to them, asking, where was the Lord Provost? Mr. Erskine answered, "What do you want with him?" The cadie said, "I have a letter to give him." Mr. Erskine said, "Let me see it." The cadie gave him the letter, and Mr. Erskine said, "The Provost is in the New-Church Isle; I'll go in with it to him." Then the deponent said to Mr. Erskine,

"Sir, don't trouble yourself; give it me, and I'll carry it to him." And the deponent got the letter, and went with it to the New-Church Isle; when the deponent found a great crowd of people there, and some difficulty to get at the pannel; and therefore gave the letter to Mr. Polson, a vintner in town, to hand it to the pannel; and the deponent saw it handed accordingly; and staid till it was broke open. That the deponent cannot say, he saw it in the pannel's hands, nor knows he by whom it was opened. And the first thing the deponent noticed in the reading, after they had read a line or two of the letter, was, that they said it was from Charles P. R. Upon which there arose in the meeting a great noise and murmuring, some calling out not to read it: And then the pannel, and the rest of the meeting, dismissed; and the magistrates, as the deponent thinks, went to the Goldsmiths-hall. And being shewn the letter, which is the first in the list of writings subjoined to the criminal libel, depones, he believes it may be the very same that he has deponed upon, though he did not then either observe the seal, or that it was addressed to the magistrates and town-council, as well as to the Lord Provost of Edinburgh.

XXIX. William Henderson, writer in Edinburgh, depones, That, upon Monday the 16th of September 1745, the deponent was in the New Church Isle; where he saw the pannel, and a number of other persons, met together; but remaining there for a very little space, he did not know what was transacted amongst them. That he went from that place towards the Castle-hill, and returned from thence to the Goldsmiths-hall about six o'clock at night; where he found the pannel, the other magistrates, and most of the council met. That he saw a letter lying upon the table; which, from curiosity, he took up, and looked at: and the letter marked N° 1, which is now shewn to him, he says, is the letter he so looked at; and which letter, he was told by some person in the hall (the deponent does not call to mind who that person was) had been brought to the meeting in the New Church Isle. That, very soon after the deponent came to this place, the pannel proposed the town's assessors should be sent for, for their advice: which was agreed to: and then the deponent went for the deceased Mr. James Graham, and Mr. Robert Pringle; but found none of them. That, after he returned, he reported, that Mr. Graham was not to be found, and that Mr. Pringle was out of town; and thereafter Mr. Solicitor Haldane, one of the town's assessors, who had been called upon by the Provost and magistrates, came in to the meeting; and the pannel then took the chair; and the deponent was ordered, he believes by the Provost, to read the letter; and having read the address, and the subscription, which is Charles P. R. and begun to read a line, Mr. Haldane withdrew, and said, That these were matters too high for him. Upon this the Provost said, "Good God! I am de-

serted by my arms, and by my assessors." That then there was a pause; and the pannel having demurred about reading the letter, one of the meeting said, He thought there could be no harm in having it read. Whereupon the deponent proceeded, and read the letter. That then a motion was made, to send a deputation to the rebels' camp, as the only means to save the town from the menaces contained in the letter. And being interrogate, who it was that made the motion? says, that several of the members of the meeting seemed to be of that opinion; but who it was that made the motion, the deponent cannot tell; but, as he remembers, there was a good deal of confusion among them. However, this motion was agreed to by the meeting. And at this time the deponent was called upon by dean of guild Allan, and by him desired to go to the parliament-close, where the Edinburgh regiment was, and tell the officer, without loss of time, to march his men up to the castle, and to deliver in their arms. That the deponent accordingly went, and found one Mr. Burns, who was adjutant to the regiment, and acquainted him with the message sent by dean of guild Allan. But he having asked of the deponent, whether the pannel had given orders for that purpose? and the deponent having received no commission, but from dean of guild Allan, Mr. Burns demurred to follow the advice given. That the deponent immediately returned, to acquaint the dean of guild of what Mr. Burns had said. Whereupon he immediately went down stairs to speak to Mr. Burns; whom they met coming up to the Goldsmiths-hall. What passed between them the deponent knows not; but, in a very little after, he saw the regiment march to the castle. Depones, That after he returned with his answer to dean of guild Allan, he was informed in the meeting that four persons had been named as deputies to go to the rebels' camp, namely, bailie Gavin Hamilton, bailie Yetts, conveneer Norrie, and deacon Orrock. Whether there were more named or not, the deponent knows not; nor does he know further as to any instructions given them, but that they were to find out upon what terms or conditions the rebels were to enter the town. That, in pursuance of this, the deputies went out; and returned again betwixt nine and ten o'clock at night, with a written answer, N^o 2, in the list of writings subjoined to the libel: which having been shewn to the deponent, he says, it is the answer the deputies brought in. After this answer was delivered by them to the meeting, which by the time the deputies had returned had gone from the Goldsmiths-hall to the Laigh council-house, it was observed, that it contained a limitation of time, namely, two o'clock in the next morning, within which a precise answer was to be given by the magistrates and council. And as, by this time, the magistrates had some information, that sir John Cope, and his majesty's forces, were off Dunbar, and that it was believed by that time they would be landed, the meeting came to a resolution to send a second

deputation, in order to try if they could prevail to have the time lengthened out till nine or ten o'clock next day. That the deponent does not know precisely who these second deputies were, nor did he see them set out or return; but that, a day or two after, a paper was put into his hands by provost Coutts, who was the only one of the second deputation whom the deponent knows of, or remembers, which, he said, was the answer returned upon the second deputation to the magistrates and town-council: and the writing marked N^o 3, in the list subjoined to the libel, now shewn to the deponent, he says, is the paper he received from provost Coutts, as above. And being interrogate, whether the pannel made the motion, or acquiesced or concurred in the deputations? says, He does not remember that he made the motion; but that he took it for granted that he concurred or acquiesced in it, either explicitly or tacitly; not being able to call to mind any thing he uttered or said concerning them, excepting that, when the instructions were given to the second deputies, he urged them to insist, that it was then late, and he could not have the sense of the inhabitants; and therefore it was reasonable they should be indulged till ten o'clock, that they might have an opportunity to see what the sentiments of the inhabitants were concerning that matter. And depones, That he, as under the town-clerks, always attends the magistrates when they meet together in the council as magistrates; but the deponent knows of no minute of record that was made of the transactions of that day. And depones, That, about four o'clock, or a little after, he had directions from the pannel to go to the Cross, and to desire that such inhabitants or burgesses as he there met with, should repair to the New Church Isle; which the deponent accordingly did. And says, That the aforesaid directions were given him by the pannel as he was proceeding from the Goldsmiths-hall to the New Church Isle. And further says, That the paper marked N^o 3, in the list of writings subjoined to the libel, he verily believes, is the paper which he saw in the pannel's hand about three or four o'clock, which of the two the deponent cannot be positive; but that it was that same afternoon before the meeting in the New Church Isle above-mentioned.

XXX. Sir George Preston, of Valleyfield, depones, That, in September 1745, the deponent was captain of a company of volunteers for defence of the city of Edinburgh; and, on Monday the 16th of that month, his station was to keep guard with his company at the Netherbow port, along with another company commanded by Mr. James Nimmo: And, when it was pretty far in the afternoon, the companies being drawn out upon the streets, the deponent went to the pannel to receive his orders what they were to do, and he found the pannel in the New Church Isle; who ordered the deponent to march the companies

to their alarm-post in the Lawn-market, and to remain there till further orders. That the deponent immediately marched up the companies to the Lawn-market; and there he met with several volunteers in their return from the castle of Edinburgh, who told the deponent, That they had marched up their companies to the castle, and delivered up their arms there; and it was high time for him to do so likewise. And the reason they gave the deponent for having taken that step, was, they said, that now the town was not to be defended; and that a resolution had been taken in the New-church Isle not to defend the town: that the deponent followed their advice, marched up with the two companies above-mentioned to the castle, and there delivered up their arms. Depones, that between three and four o'clock of the same afternoon, there came in at the Netherbow port 16 or 18 carts loaded with spades and shovels, which, it was said to the deponent, were carrying to the castle; and a town officer came to the deponent, with orders, as from the pannel, then provost, to let them pass; which he did accordingly: that thereafter, when the deponent went to the castle, he asked Mr. Lyon, the store-keeper of the castle, Whether these spades and shovels had been brought thither; who answered, That there came none there; for they had no use for them; and they had great abundance of their own.

XXXI. *James Millar*, late servant to the deceased Alexander Bruce of Kennet, depones, That upon the 16th of September 1745, the deponent was standing at the entry of the Tolbooth-church, in the afternoon, and saw several carts, how many he cannot now say, loaded with shovels, spades, and mattocks, brought towards the entry to the Laigh council-house, and taken into the door which enters in to the north-gavel of the Parliament-house; but where they were carried afterwards, the deponent knows not. And further says, That some town-officers told him, that these carts were brought thither by the order of the Lord Provost; at least one of the town-officers, whose name he knows not, but he is an old man, and he would know him if he saw him again, told him so. And upon an interrogatory put to him, further says, That whether that officer was waiting upon the carts, or attending the Provost, who, he believes, was in the Goldsmiths-hall, he does not know.

XXXII. *Baillie Bryden*, lieutenant of the royal regiment of artillery, depones, That he was in a tavern with the pannel some little time before the rebels entered the town, in the year 1745, when a gentleman was brought in to them, who said, He had carried along with him from Dalkeith about fifty men to assist in defending the city against the rebels: that the deponent did not observe the pannel say much to him; but he rose up from his seat, and thanked him. That the Provost seemed to be at a loss where

to quarter them; but at last the Provost gave directions to carry them to the high-school, as the properest place to quarter them. And further depones, That he was employed in placing the cannon on the walls of the city; and did not find any occasion of complaint to the Provost concerning any other matter, than what related to his own business; and it was chiefly concerning the making of the white-iron cases for the grape shot; in which he thought the tinman that was employed did not make such haste as he ought to have done: As to the other parts of the works carrying on, he thought that the people he happened to see working, went on pretty well. And further says, That he waited on the pannel, along with the deceased Mr. Mac Laurin, who was in a tavern (he thinks, but cannot be positive, that it was in the evening before the rebels entered the city); and desired orders in writing to load the cannon on the walls. That the pannel did not give orders in writing, but verbally ordered him to load them; and that provost Drummond was then present, and said he would give orders in writing; which accordingly he did. And upon a further interrogatory he recollects, that upon the Saturday a number of men were ordered by the Provost to assist him (as the deponent heard, though he cannot tell to a man, they were 24) to mount the cannon; which accordingly was done, as far as the deponent can recollect, from Bristow port to the Netherbow; and that it was upon the next day, being Sunday, he waited upon the pannel, with Mr. Mac Laurin, and received the verbal orders above mentioned. In consequence whereof, and of a written warrant from provost Drummond, the cannon were accordingly loaded; the deponent cannot say all of the cannon, because he came away about eleven o'clock at night, and left the town's people at work, at least he left them there upon the cannon when he came away; the gunners which he brought along with him having returned to the castle before he left the town's people: that a sailor from Leith, who was said to the deponent to have skill in loading artillery, was come to the place where the deponent was at work; and it was said to the deponent, the rest of the cannon were to be loaded. And being interrogate, Why the guns were not sooner loaded? depones, That the materials for loading them were not sooner ready. And being interrogate for the pannel, Whether or not the scaffolding, upon which the cannon were placed, was sufficient? depones, That he saw boards upon which the cannon were placed, to make them run upon; but no scaffolding whereupon they were placed; the swivels which were placed upon the Netherbow and Bristow ports, were to be fired by men who were to stand upon the scaffolds placed there for that purpose. And further depones, That upon a message delivered by bailie Baillie, and some other persons that came along, sent to gen. Guest, he sent the deponent, and some other artillery-men, to the town, to follow such directions as should be

given them by the pannel concerning the cannon: that, as the deponent thinks, there were two messages delivered to gen. Gnest concerning gunners to be sent down; but that he was sent down but once with the orders above set down, before the Saturday the transactions whereof are above set forth. That when they came down the first time to clean the guns, they had no orders from gen. Gnest to attend upon the walls, and to fire the guns, but only to assist in planting them upon the walls; nor does the deponent know of any gunners the town had, excepting the sailor above-named: but that he was present when Mr. Mac Larrin applied to one Jerment, the master of a vessel at Leith, to assist in managing the guns; but he declined it.

XXXIII. *Robert Brown*, taylor in Edinburgh, depones, That upon the 16th of September, in the year 1745, the deponent served in the trained-bands of Edinburgh, and was under the command of capt. Hepburn, and was placed at the West-Port, and continued there till three o'clock, or thereabouts, in the morning after. That their captain having gone up to wait upon the Provost and magistrates, as the deponent believes, to receive instructions from them how his company was to be disposed of, when he returned, he signified to those under his command, that his orders were, That every man should repair to his own house; and that thereupon they went off. And further says, That the deponent having asked his captain, what should be done with the arms of his company? he told them, his orders were to leave them in that place where they then were, which was a sort of guard-room; and told him, that his half-pike was to be left there also. Accordingly, when they dispersed as above, they left their arms there.

XXXIV. *Edward Inglis*, druggist in Edinburgh, depones, That upon the 16th of September 1745, he was a soldier in the trained-bands, in the company commanded by capt. Hepburn, which was stationed at the West-Port about eight of the clock in the morning of that day, and remained there till about half an hour after three next morning; when their captain told them, That he had orders from their colonel, that is, the pannel, to disperse, and leave their arms in the place where they kept their guard-room. In pursuance whereof, they accordingly dispersed, and left their arms in the foresaid place. And depones, That about five o'clock Monday evening before they dispersed, the deponent having heard from capt. Dalzell, one of the officers of the city-guard, that the town was to be delivered up, he applied to captain Hepburn, and said, That, since that was to be the case, he thought the best way for them was to go to the castle, and deliver in their arms, and every man to go to his own home; but the captain answered, That they could not desert their station, and behaved to wait orders from their superior officers,

XXXV. *Alexander Hepburn*, merchant in Edinburgh, depones, That upon the 16th of September, in the year 1745, he commanded a company of the trained-bands in the city of Edinburgh. That he and his company were planted as a guard upon the West-Port, about eight o'clock of that morning, and continued upon that station till about three next morning; when they dispersed, and left their arms in the room where they kept guard. And being interrogate, by whose orders they dispersed, and left their arms there? says, That he was sent for, to come to the Provost and magistrates, who were then in Mrs. Clarke's: he believes he received the message by a cadie. When he came to Mrs. Clarke's, where the magistrates were, Mr. Tennent, the captain commandant of the trained-bands, chid him for having lingered so long upon that station where he was; for that he had sent for him, by George Wemyss, some time before that; that he and his men should disperse, and leave their arms in the room where they kept guard. That the deponent answered, He had received no such message; but that he came now in obedience to a message from the council; and now he attended, and desired to know their pleasure; and that the commandant then, in the presence of the Provost and councillors, gave him orders forthwith to disperse his men, and to leave the arms in that room where they were keeping guard; and that John Hislop, the store-keeper of the town, was that morning to come and take away the arms. That all the while the deponent staid in the room, and while he was receiving the orders from the captain-commandant, the pannel's head was lying on his hand on the table, and, to the deponent's apprehension, he was asleep. That the deponent immediately left the council, and returned to his station at the West-Port; intimated those orders to his men, and dispersed them; who left their arms in the said room where they had kept guard. And being interrogate, Whether, when he communicated his orders to the company, he had told them, That it was by the Lord Provost's order that he had dispersed them? says, That he cannot be positive; that it is possible he might have said his orders were from the Provost, because the council were all present when the commandant gave the deponent his orders. And depones, That, as captain of the company stationed at the West-Port, he ordered the gates to be opened to the two several deputations that were sent by the magistrates, and to the first deputation when they were on their return; but that the guard was dismissed before the return of the second deputation. And further says, That he understood in general, that the deputies were sent out to make some treaty or capitulation; but, as to particulars, he learned nothing from them, or any body else. That he cannot charge his memory at present, nor can he recollect, that the deputies told him any thing of their errand going out, or the answer of the first deputation; and is positive, that none of

the men under his command did that morning, or the day before, at any time, tell him of any surmise of the surrender of the city, or propose carrying their arms to the castle.

XXXVI. *Robert Tennent*, merchant in Edinburgh, depones, That, upon the foresaid 16th of September, he was captain-commandant of the trained-bands of Edinburgh; and that he knows captain Hepburn's company was placed at the West-port; and that they dispersed about three o'clock next morning. And being interrogate, by whose orders they dispersed, and left their arms in the guard-room? says, That, upon an alarm brought in from the street into the Laigh council-house, some time in the evening of the 16th, he cannot be positive as to the hour, that the Highlanders had entered the city at the Netherbow, and were chasing the dragoons before them; it was thought dangerous that the trained-bands should be found by the rebels with arms in their hands: and therefore he, the deponent, moved to the provost and council, that orders might be given to the men under the officers of the trained-bands, to lay down their arms, and disperse; and that, upon this motion, it was agreed by the provost and council, that such message should be sent. In pursuance whereof, the deponent sent capt. Wemyss to the three several companies; one whereof was posted at the Weigh-house, and two at the West-port, to signify to them the provost and council their pleasure to the foresaid effect. That, as it appeared afterwards, capt. Wemyss did not go to the companies at the West-Port, but had gone only to the company stationed at the Weigh-house; which in consequence of the order he transmitted to them, dispersed: but what they did with their arms, the deponent knows not. And the council being informed by bailie Mansfield, who had occasion to be at the West-port that morning, that capt. Hepburn and his company were still there, they sent for the captain, and upon his coming to Mrs. Clarke's, where the council then were, the deponent asked him, in their presence, why he had not dispersed his men sooner, upon the notice sent him by capt. Wemyss? he replied, He had never received any such message. And, upon an interrogatory, the deponent further says, that the message, as he understands it, sent to capt. Hepburn by the council was to dismiss his men, and come up to them; and that he had actually dismissed his company before the deponent saw him, as he the deponent supposes; and that he does not know what orders were given to capt. Hepburn anent the disposal of the arms. And further depones, That, when capt. Hepburn came to the magistrates, the deponent does not remember, and cannot be positive, whether the pannel was present among them or not; he having about that time been pressed to go to bed, and take a little rest: for he was fatigued, and faint. And, being further interrogate, whether, when he the deponent represented to the council the report that was heard at the

door, that the Highlanders had burst in at the Netherbow port, and were chasing the dragoons up the street, any particular orders were given as to the disposal of the arms? depones, That he cannot be positive, further than that they were to lay down their arms; and he supposed they were to leave them in the place they kept guard. And also says, That, after it was found that the alarm upon which the orders were sent to the companies to disperse was false, the deponent did not think of sending a second order, for he thought the first order was executed: and as for the arms, the deponent does not know that any second orders were sent concerning the disposal of them. And depones, That there are in all sixteen companies of trained-bands: and that before Sunday there were never so many as three companies on duty, as far as the deponent can recollect; but that then the three companies were ordered upon duty; and that three companies continued to do duty, till they were dismissed, as above: and that the deponent does not know, or remember, of any orders given to John Hislop to gather up the arms; nor that any mention of Hislop was made in his hearing when capt. Hepburn attended the council. And, upon a further interrogatory, depones, That, after it was agreed upon in the Goldsmiths-hall to have a meeting in the New Church Isle, the pannel recommended it to all who were present to attend; and to desire such burghesses as they met with to come there also; as also, to such as were at the head of any corporation or society, to take the opinion of the members of the same, whether it was proper to stand out and defend the town? That thereupon the deponent assembled the officers under his command in John Ross's tavern; and the captains were in one room and the subalterns in another. That he asked the captains first, what their opinion was concerning the defending of the town? And they were all of opinion, that, since the dragoons had fled eastward, and that some of the volunteers had begun to separate, it was not practicable to defend the town: and that, upon advising among the subalterns concerning the same proposition, they were unanimously of the same opinion; as it was reported to the deponent by Mr. Auchinleck, who was his lieutenant, from the lieutenants; and by Mr. Hutton, his ensign, from the ensigns: and that he and his officers, at least a great many of them, attended the meeting in the New Church Isle. And further says, That the deponent had received the key of the wicket of the Netherbow port; but that, upon Monday night, in presence of the pannel and council, the said key was by him delivered to capt. Hamilton, to whom, at the same time, the great key of the gate was also delivered, in order to let out the dragoons' baggage; some of whom were left to take care of it, and made a very great noise for it at the time.

XXXVII. *John Dalgleish*, watchmaker in Edinburgh, depones, That he was a captain of the trained-bands, on duty upon the evening

of Monday the 16th of September 1745; and, between seven and eight o'clock at night, he received a message by one of the town-officers, containing orders to him to cause his company to lay down their arms, and to dismiss them: which he did not incline, on that message, to do; but sent his ensign, William Sibbald, tailor, with orders to find out the Provost wherever he was, and to acquaint him; and, if he could not be found, the captain-commandant; that he, the deponent, had received the above message as from the pannel, or some of the council; and to enquire at one, or either of them, if such a message was sent; and what he should do in relation to the subject thereof? That his ensign accordingly went, and returned to him between eight and nine o'clock, with orders, as from the pannel, to dismiss his guard, and lay down their arms: and the deponent being then standing at the door of the Weigh-house, which was his post, and where he had planted two centries, his men rushed out upon him, leaving their arms behind them. And depones, That he received no direction from any person in what manner these arms should be disposed of, or secured. Depones, That he first mounted guard upon the evening of the fast-day, which was held two weeks before the rebels came to town; and mounted guard again, upon the 16th day of September, about seven o'clock in the morning; and, just before that, saw the pannel in the Goldsmiths'-hall, who acquainted the deponent, that he would get powder and ball, and cartridge-boxes, from John Hislop, the city store-keeper. That, about nine o'clock he sent to Mr. Hislop, desiring to have them; but he not being in the way, the said ammunition was not brought till about eleven o'clock, when as much as was thought would be useful was delivered to him for his company. Being interrogate for the pannel, depones, That, betwixt nine and ten of the Sunday morning the 15th, the officers of the trained-bands were called by the captain-commandant, by the pannel's orders, to the Crown-tavern, where he, and the rest of the captains, who were all in one room together, received orders from their commandant, to be ready to draw out their companies on a minute's warning, which each captain communicated to his subalterns; with orders, to such of them as were there, not to leave that tavern, without leaving word where they might be found. That, about three o'clock of the afternoon of this day, the captains got orders to repair to their respective bounds, and draw out their companies; which they accordingly did: and then the deponent's company had arms distributed among them; and, as far as he could observe, arms were delivered to the other companies: and that, before the companies were dismissed, they received orders to be ready to march at tuck of drum.

XXXVIII. *Mark Sandilands*, merchant, and late one of the bailies of Edinburgh, depones, That he was one of the associated vo-

lunteers, who, on the 7th of September, proposed to publish a paragraph in the Edinburgh Courant, on the Monday following, containing an account of the steps taken for defence of the city of Edinburgh against the rebels: That he shewed a copy of the paragraph, as concerted, to the pannel, some others of the volunteers being in company, which contained words to this purpose: "By the advice of the crown-lawyers, he cheerfully accepted of the offer of their service," (which referred to the volunteers;) and the pannel said, He could not agree to that draught, because it was not true: and it was amended by the pannel's direction; and after the words, "advice of the crown-lawyers," it was made to run, "he acquiesced in, and accepted of their service;" giving this for his reason, that he differed in opinion with the king's lawyers; for, as the law stood, he thought it was unlawful to take up arms, without the special warrant of his majesty. Depones, That he was present when bailie James Stewart proposed to send to the king's ships in the road, to desire to have some sailors, accustomed to fire cannon, for serving the cannon mounted on the city-walls; which the pannel did not relish; because, he said, they would be rash, and they would fire on friends, as well as foes. And, being interrogate, if, when the pannel did not approve of said proposal, he mentioned any other? Depones, He does not remember.

XXXIX. *George Dunbar*, merchant, and late bailie of Edinburgh, depones, That the paper, N^o 8, annexed to the criminal letters, was framed by the deponent, and some other citizens, betwixt one and two afternoon, of the 16th of September 1745; and that, while they were in the course of signing it, bailie Gavin Hamilton, and bailie Robert Baillie, sent George Lindsay for the deponent, to ask him, What sort of a paper it was to which he was procuring subscriptions? That the deponent went, and explained the substance of it; and said he would give them the scroll of it; which he sent for, and delivered to them; and, after reading it, they were well pleased with it; saying, they believed it to have been a paper of another nature. That the deponent went along with them to some more of the council assembled in the Goldsmiths'-hall, where the said scroll was delivered to dean of guild Hathorn. That, about three o'clock of this day, he met the pannel at the Stinking Style, and put the said paper, then signed by a great many of the inhabitants, in the pannel's hands; relating to him, at the same time, the substance of it; and he promised to lay it before the magistrates and council. The deponent attended him to the Goldsmiths'-hall; and, as they were entering the door, a crowd of the subscribers rushed in behind them; at which the pannel was vastly offended; and, turning about, said, What, gentlemen, think you to compel me to grant the desire of your petition by force? Upon which the deponent endeavoured to stop, and pacify them,

and went down stairs, the bulk of them following him to the Parliament-close; where he remained for some little time, and until he received a message from capt. Hepburn, who commanded the company of the trained-bands, in which the deponent, who was a private man, served, That his company was mutinying, because the volunteers were going to lay down their arms; that this was before the fire-bell rung. That when, in obedience to the captain's commands, he went to the West-port, he found a disorder among the men of the said company upon the account foresaid; to whom the deponent addressed himself much to this purpose: Let the volunteers do what they will; let us remain upon our duty, till we shall receive the lord provost our colonel's commands; and I will stand by you as long as I can carry a musket. That, about four o'clock, he saw that part of the town-guard, which had gone out to support the dragoons, standing in the Grass-market, some of them under arms, and the arms of others grounded; and this in his way to capt. Hepburn. Depones, That, betwixt four and five o'clock at night, the pannel, with some other of the magistrates, came to the West-port, attended by Mr. Maclaurin and John Scot, plumber, and gave orders to shut the ports; to let in any soldiers or dragoons that should come there, but no stragglers or strangers; to let in any forage that should come for the dragoons, or persons having messages to the magistrates; and to prime and make ready the cannon planted at the West-port: All which things that required immediate doing, were done. That the charge of the cannon was given to the captain of the trained-bands, and to the captain of the town-guard; but he observed no gunners there; and Scot, who, in conjunction with Mr. Maclaurin, had primed the cannon, staid by them for some time; he does not know how long. And, being interrogate for the pannel, depones, That, by capt. Hepburn's order, as from the pannel, he the deponent, and three more of the guard, mounted the town-wall by a ladder, to observe if they could see any of the dragoons coming; where they remained two hours; but none came in but one. That the deponent staid on guard till about two o'clock in the morning; when he went up to Mrs. Clarke's, where the magistrates and council were, to acquaint them, that they would do well to send some of the soldiers of the city-guard to take care of the cannon, which were primed, and people with flambeaux going near them; and he received for answer from the magistrates, That they would be taken care of. That the pannel was not then in the same room with the other magistrates and council, but in another room, as he was told, sleeping. That he did not return to the guard again, but remained a considerable time with the magistrates. That the deponent, before he left the guard, saw the gentlemen of the first deputation from the magistrates and town-council to the rebels go out, and return; and saw the gentlemen of the

second deputation go out in a hackney-coach; but those of the first went out on foot.

XL. *Richard Lindsay*, late one of the bailies of Musselburgh, depones, That he did assist in getting together betwixt 140 and 150 men in the town and neighbourhood of Musselburgh, to be employed in the defence of the city of Edinburgh; and, upon Sunday the 15th Sept. marched them near to Christal's; where sir Robert Dickson, a former witness, received them, and marched them that night into town. The deponent returned to Musselburgh, and next morning came into Edinburgh; and, about nine o'clock in the morning, waited on the pannel, and acquainted him, then in the Goldsmiths-hall, that the said men, who were quartered in the New Church Isle the preceding night, were turned very impatient to be properly employed for the defence of the city, for which end they had come; and that he wanted to have them delivered off his hands. That the pannel thanked him very much, and told him, he would send one to receive them immediately. That the deponent returned to the New Church Isle to keep his men together, where he remained about the space of half an hour; and, at their desire, he again waited upon the pannel at the Goldsmiths-hall, and acquainted him, that the men had grown still more impatient, and desired they should be taken off his hand: which the pannel said should be done immediately; and sent for a man that could not be found: Whereupon the pannel desired him to return, and keep his men together, and he would send one immediately to receive them. That he accordingly did return; and, after staying about a quarter of an hour with the men, who begun to blame him for bringing them to town, he waited a third time upon the pannel, representing, as above; and the pannel seeming to be very much surprised that nobody had come near him, desired the deponent to return to his men, and that what he insisted for should forthwith be done. That, soon thereafter, one of the bailies, Yetts, he thinks, and a serjeant of the city-guard, came; that they cast some of the men, and swore the rest to be faithful to his majesty; which last were delivered over to the care of the said serjeant, and a good many of the former listed with the Edinburgh regiment, as they themselves told him. That he knows nothing of their having received any arms; and that the bulk of them returned that night home.

XLI. *Robert Baillie*, merchant, and late one of the bailies of Edinburgh, depones, That, upon the 16th of September, there was a motion made in council, where the pannel was present, that the city-arms should be secured, by sending them up to the castle. That the members of it were divided in their opinion, and the majority of them thought that no orders should be made for that purpose; and that the pannel seemed to be of the opinion of the majority; and that it appeared to him, that

there was an evident majority for the foresaid opinion, though no vote was put; and it was from what the pannel said, that the deponent took him to be of the opinion of the majority: And that the pannel, according to his usual custom, asked the opinion of severals before he spoke on the subject himself: And that it is the common practice of the provost of Edinburgh in council, when any proposition is made, to ask the opinion of five or six, or sometimes more, of the council; who, if they give it all one way, he usually declares it to be the sense of the council, unless a vote is demanded. That, in the present case, though there was a difference in opinion, yet no vote was insisted for; and, as the majority had given the opinion above-mentioned, in consequence thereof he refused to give the order.

XI.II. *Hugh Hathorn*, late dean of guild of Edinburgh, depones, That he does not remember, that the pannel told him the message that was delivered him by Andrew Alves from the rebel-army; and thinks he did not hear of it till about the time, or a little before Andrew Alves was committed prisoner. And depones, That he was present in the Goldsmiths hall, both before the meeting in the New Church Islo, and afterwards in the Council-house; in both which places, the Goldsmiths-hall and Council-house, there was a great many of the council present; that there was also a great many other people who did not belong to the council; and in neither of these meetings does the deponent remember any proposal to have been made for securing the city-arms in the castle of Edinburgh: but remembers to have heard a message sent, as the deponent thinks, from some of the out-guards about the ports or the walls, to know what they should do with their arms? And the reason why this message was sent, the deponent believes to have been, That it was publicly talked, that the volunteers, before this time, had delivered up their arms; and the answer made to this message was, That they should secure them the best way they could; and the deponent thinks this answer fell to be made by the pannel, as he was in the chair. And, being interrogate for the pannel, whether this answer was given as being agreeable to the mind of the council? depones, He did not hear the opinion of any of the council asked, nor did hear any of the council contradict it. And depones, That the provost of Edinburgh cannot of himself, as he thinks, give out any of the town's arms to be used by the inhabitants, without a previous consent of council; and he knows that the fact is, when any of the arms are given out, it is always done by an order of council.

XLI.III. *James Murray*, esq. receiver-general of the customs of Scotland, depones, That, upon Saturday the 14th of September 1745, he received a letter from Mr. Drummond, now lord provost of Edinburgh, desiring him to come forthwith to the city of Edinburgh; and

that at the request of the pannel: And the deponent accordingly that night came. That the deponent met the pannel in the street, and asked his commands. He desired the deponent to go to the lord justice clerk's; where he instantly went, and was followed in two minutes by the pannel. That there the deponent was told, whether by the pannel, or the lord justice-clerk, he cannot tell, being both present, that the rebels were within two days easy march of the town; and, as it was proposed to defend it, they desired that the deponent would give his advice and assistance. To which he answered, That it was his duty and inclination to do every thing in his power for the king's service. After this provost Stewart and the deponent went to the street; and the pannel told him, there were several town's gentlemen met in a tavern, and desired he would go there. That accordingly they went together; and Mr. Drummond, now lord provost of Edinburgh, who was there, told the deponent, they had sent to him for his assistance in the defence of the town; and, as they were ignorant of military matters, and convinced that the deponent understood more of them than they did, hoped he would give them proper directions how to dispose of the men they had in arms, in the best manner for the defence of the town: Then they told the deponent their numbers, which, so far as he remembers, they said, might be about eleven or twelve hundred; but cannot be positive. That the deponent dictated to them the method of disposing their guards; and some rules of discipline they were in that hurry to observe; guards to be immediately placed, alarm-posts assigned, and, besides, continual patrols. There were several rounds appointed for that night; and the pannel was to go the grand round after midnight. That orders were instantly given for disposing every thing according to those directions. That the next morning the deponent went with Mr. Colin Maclaurin to visit the walls, and stations of the guards; and ordered barricadoes at the gates. That, about mid-day, he, the deponent, coming to the streets, met the pannel, who told him, he had gone the grand round, and was sorry to tell the deponent, that, notwithstanding the strict orders given, he neither found the guards nor centries alert; but that they were huddled together, under the shelter of the wall. That the barricadoes were immediately set about, and, by night, pretty far advanced. That next day, being Monday, the dragoons, and city-guard, marched out of town westward; but about four, or a little before four in the afternoon, they returned in some hurry, and the dragoons retired towards Leith, and the city-guard retired in good order to the town. That the deponent observed this threw a damp on the spirits of the inhabitants, who, till then, had shewn a good countenance. That the pannel, with many other gentlemen, assembled in the Goldsmiths-hall, sent for the deponent. That the deponent went immediately; and the pannel made him some compliments, and then

asked him, if he thought the town tenable? The deponent told him, they had hands enough; but that the pannel, and the other gentlemen present, were best judges of their hearts: But that, if they entertained any thoughts of delivering up the town, they were not to add to their reproach, the crime of delivering the king's arms to the rebels. And, being interrogate, whether any mention was made by himself, or others in the company, concerning the city-arms? depones, That he did not at that time know, that the city had any arms properly belonging to itself, other than what served the city-guard. And that, after he left the Goldsmiths-hall, having still some confidence that the town was to be defended, he went to his house, loaded his pistols, put them in his pockets, and came to the street; where, observing a party of armed men marching up the street, he asked them, where they were going? They answered, To the castle, to deliver their arms. Upon which the deponent went to the Goldsmiths-hall, and, with great difficulty, got access, and desired of the pannel, that he would order the Netherbow port to be opened to let the deponent out of town; that he being an officer of the revenue, it was unsafe for him to stay any longer; which the pannel ordered accordingly. And, being interrogate for the pannel, if the deponent heard him express his opinion anywise for defending the city? depones, That the first time he came to the Goldsmiths-hall, he heard the pannel say, That, if the town was to be defended, he would do his duty, if he was to leave his bones on the walls: And he appeared to the deponent to be very warm for the defence of the town; but that there was such a confusion, he could not hear all that the pannel said.

XLIV. *David Lindsay*, writer in Edinburgh, depones, That he served as lieutenant in Mr. Drummond, now lord provost of Edinburgh, his company of volunteers; and, being in the Lawn-market with the said company after the resolution was taken by the different officers of the volunteers, the deponent was sent by Mr. Drummond, as he thinks, to general Guest, to acquaint him, that the volunteers were immediately to come up to the castle, and deliver up their arms, for that no good could be done by keeping them; for that the town was to be delivered up. That, upon his coming to the castle, he met with major Robertson at the castle-gate, who asked the deponent, where he was going? To which he made answer, that he was going to general Guest. The major then said, May I ask you what may be your business? To which the deponent made answer, that he was come, at the desire of Mr. Drummond, to deliver the above message. To which Mr. Robertson answered, That the general knew all that already; and he expected them, without loss of time; and desired him to go back directly, and tell Mr. Drummond so much; which the deponent accordingly did; and thereafter the volunteers marched up, and delivered in their arms.

XLV. *John Hislop*, store-keeper of the city of Edinburgh, depones, That, in the month of September, 1745, the deponent was keeper of the town of Edinburgh's magazine, where their arms and ammunition were laid. That, at that time, there was in the magazine 1250 firelocks, besides 200 that were insufficient; by which he means altogether useless; and of the 1250, there was a great many that the deponent would not give half-a-crown the piece for; and the most of these were very old, but could fire: and besides, there was in the magazine not quite 200 bayonets, and about 300 cartridge-boxes in bad case. That of ammunition, there was about two boxes, and a bag with some loose ball, and no gun-powder; but that, in the beginning of September, the deponent got from the powder-house four cwt. of powder. That, besides the above arms that belonged to the town of Edinburgh, there was the arms of the city-guard of Edinburgh, consisting of 75 firelocks, bayonets, and cartridge-boxes. That the powder and ball was made up into cartridges: and of the above arms, there was 100 sent to Leith, but returned again to the magazine, on Monday the 16th of September. That, by the pannel's orders, the deponent gave, upon Sunday the 15th, betwixt 50 and 60 firelocks to each company of the 16 companies of trained-bands, except the Canongate-Head company, who got but about 24; and that 39 firelocks were given to the 39 additional men of the city-guard. And, upon Monday the 16th, the deponent having got orders from sometimes the pannel, and sometimes the magistrates, being all his masters, gave accordingly cartridges to those who came for them; and, particularly, he gave 500 cartridges to each of the three companies of the trained-bands who that day kept guard; and a good deal to the seceders, who kept guard at the Infirmary. That, before the said 16th of September, all the powder which was in the powder-house was sent up to the castle by order of the pannel: and, by the pannel's orders, on the said 16th, the deponent got back from the castle 425 pound weight, for the use of the cannon that were planted on the city-walls, and for cartridges; and the deponent gave it out for charging the cannon, and he gave cartridges to such as called for them: and the whole ammunition was given out, except about a 50 pound barrel. That, with respect to the arms that were not given out, and the above quantity of powder, he received no orders from the Provost, or any body else; and the firelocks which he gave out, as above deponed upon, were never again returned to him. That upon the 16th, the deponent laid by the keys of the magazine, the armoury, and the wardrobe, in some secret place, which his servant Alexander Dryburgh knew. And, upon the 17th, after the rebels got possession of the city, he stepped aside, not thinking it proper to keep his own house; and the account which his said servant gave of the keys afterwards was, That the rebels threatened to break open the doors of the magazine, armoury, council-

house, and wardrobe; and therefore bailie Mansfield came to Alexander Dryburgh, and advised him to deliver up the keys of the above places; which he accordingly did: and the day thereafter the deponent saw the rebels carrying down arms on their shoulders along the streets, which he apprehended to be the arms belonging to the town of Edinburgh. And depones, he got no orders for securing, or bringing back the arms which he had given to three companies of the trained bands that were upon duty upon Monday night the 16th; and that he was so fatigued, by sitting up three nights before, that he was not able to sit up longer. And depones, that, after the rebels had carried off the arms, as above deposed upon, they delivered the deponent the keys of the magazine, which was about 14 or 20 days after they entered the city. And, upon the deponent's going into the said magazine, he found no arms there, except a few of the broken guns above-mentioned; and even these were afterwards carried off by them. And, being interrogate for the pannel concerning the spades and shovels that were brought to the magazine on Monday the 16th, depones, that on that day there were four carts of shovels and spades, belonging to William Miller, seedsman in the Abbey, sent up to the magazine; and the carter said to the deponent, that bailie Hamilton desired that he might take them under his care and custody; and the deponent accordingly did so; and that on Sunday, the 29th of September, the rebels came and carried them off down to the Abbey; but, upon the proprietor's making application for them, the deponent heard him say, that he afterwards got them back.

XLVI. *Alexander Dryburgh*, servant to John Hislop, the preceding witness, depones, That in the month of September, 1745, upon Monday the 16th day, in the evening, he knew, that his master, John Hislop, had secreted the keys of the town of Edinburgh's magazine and store-houses below a form in the council-house. And, upon the 17th, after the rebels had entered the city of Edinburgh, and wanting access to the council-house, they threatened to break open the door; and the deponent by accident meeting bailie Mansfield, who knew that he had the key of the council-house, desired the deponent to give the key to the rebels, rather than have the door broke open; which he accordingly did: and, after the rebels had got access to the council-house, they found out the keys of the magazine, armoury, and wardrobe, out of which they carried off all the arms that were then to be found there; the deponent having seen the very arms carried down the streets in carts, and on men's shoulders; and that, when the keys were again restored to his master, and the deponent had occasion to enter into the armoury, he saw no arms there.

XLVII. *Thomas Dalzell*, one of the cap-

tains of the city-guard of Edinburgh, depones, That, in September 1745, the deponent was one of the captains of the city-guard, which then consisted, including officers and soldiers, of 126 men. That, about ten o'clock of Monday the 16th of September, the deponent, by order of the pannel, marched out with the whole guard to the Colt bridge, leaving only a few of the men behind to make up cartridges. That they remained at the Colt bridge till about three o'clock afternoon, when, by order of the commanding officer of the dragoons, they marched back to town, and went to the court of guard: where they received orders from the pannel, which was brought them by Mr. Orrock, to march two squads of the guards to the Grass-market, and to leave the other squad at the court of guard. That the deponent accordingly marched with the two squads to the Grass-market, and received from the pannel the key of the wicket of the West-port, with orders to allow nobody to go out, or come in, but such as he could be answerable for. That the deponent, and his party, remained in the Grass-market till about eight o'clock at night; and, about seven o'clock, as the deponent thinks, he saw bailie Yetts, bailie Hamilton, and some others come from the town to the West-port, who, he was told, were a deputation sent to the rebel-camp; but, some time before that, the deponent had given the key of the wicket to one of the captains of the trained-bands, Alexander Hepburn, who then kept guard at the West-port. That, about eight at night, capt. Maitland, another of the captains of the town-guard, brought the deponent orders from the pannel to march his men to the court of guard; which the deponent did. And it being his turn to be upon guard that night, he then went to the pannel to receive his orders, what guard he desired to be kept that night; and the pannel ordered him to keep the ordinary guard, which is a squad, or a third part of the company, which then consisted of 126 men; but the deponent actually kept upon guard 50 men: and, by the pannel's orders, he sent a detachment of these to keep guard at the Netherbow port; the volunteers who had kept guard there formerly, having left it. That the detachment he sent first, consisted of 14 men; but, as he was afterwards informed, that these had got themselves drunk, he was forced to change them; and, at last, that guard was reduced to the number of six men; which was all that the deponent could find that were fit for doing duty. That the deponent received orders from the pannel, not to suffer any body to go out or come in at the port; but, upon recollection, says, That these orders were not given to the deponent, but were carried by one Henderson to the serjeant of the guard in the deponent's absence, and by him sent with the said detachment to the Netherbow. That the deponent went to his own house about four o'clock, and did not see the rebels come in at the port; but was told by his men at the port, that before

five o'clock, a coach having come down the street, and gone out at the port, the rebels took that opportunity of rushing in, and seized the centries, and took their arms from them; and then, marched up to the court of guard, and seized such of the men as they could lay hands on there, and took their arms from them. That the deponent soon after went in quest of the pannel, to report what had happened. That he found the pannel in a tavern in the Writers Court, he thinks Mrs. Clarke's; and in company with him, he found a rebel-officer, whom he afterwards knew to be Sullivan; and together with them, the deponent thinks bailie Yetts, and several others of the council; and the deponent reported to the pannel what had happened to his guard. Depones, That the guard soldiers had been greatly fatigued for several days before, and had been under arms by four o'clock in the morning of Monday the 16th; so that, when, at night, the deponent marched his men from the Grass-market to the court of guard, a great many of them were unfit for doing duty. And, being interrogate for the pannel, depones, That he had occasion to observe the town's arms belonging to their magazine, having picked out what he thought the best of them, in very bad condition, several of them not fit for use; many of them that would indeed fire, but of these, many that would not keep priming. Depones, That, upon Sunday the 15th, the deponent, with about 90 of the town-guard, and a detachment of about 50 of the Edinburgh regiment, marched out towards Corstorphin, to sustain the dragoons; and, after they had passed the Colt bridge in the way to Corstorphin, there came up to them first, one Mr. Lindsay, and afterwards one Ormiston, who is a copper-smith in the Westbow, and told them, that it was the Provost's orders that they should halt there: but thereafter Mr. Henderson, who writes in the council-chamber, brought them orders from the Provost to march forward to Corstorphin, and there to take their orders from col. Gardiner. And, being further interrogate for the pannel, depones, That, when the pannel, on Sunday morning the 15th of September, ordered the deponent to march to Corstorphin to sustain the dragoons, the deponent said, If he sent them there, he should provide them in better arms; for their arms were not fit for service. Upon which the pannel desired the deponent to go to the magazine, and pick out for them the best arms he could find. But the deponent answered, That there were no arms in the town's magazine that he could depend upon. Upon which the deponent got for his guard the arms that had been got for the Edinburgh regiment, which were new arms, and, as he supposes, had been got out of the castle; and these were the same arms that the town-guard had when the rebels entered the town, and were taken from them. And, upon a further interrogatory, depones, That he did not get the whole number of arms himself from the armoury; but, having got the pannel's allowance, he gave

orders to his men, that such of them as thought their arms not sufficient, should go to the armoury, and leave them there, and take others in place of them. That the whole of them did not change their arms, but the bulk of them; and he believes about four-fifths of them went to the armoury, and changed their arms, as he directed.

XLVIII. *James Tait*, goldsmith in Edinburgh, depones, That, in September 1745, both before and at the time the rebels entered the city of Edinburgh, the deponent was keeper, and had the keys of the Netherbow-port; but the night before the rebels entered, that is, the Monday's night, the deponent was obliged to go to bed at eleven o'clock at night, having been kept out of bed the two preceding nights with the volunteers; and that Monday's night he committed the charge of the port to his servant James Gillespie, whereby it happened that the deponent was a-bed on the Tuesday's morning when the rebels entered the port; and knew nothing of them till he was raised out of bed, and saw them in the town. That the deponent received no orders, either on the Monday night, or any preceding night, about the manner of keeping the port; it being the ordinary custom, to open the port as people called either going out or coming in; but upon the Monday's night, the deponent left at the port six of the town-guard soldiers, besides his above servant James Gillespie.

XLIX. *James Gillespie*, servant to James Tait, the preceding witness, depones, That, in September 1745, when the rebels entered the city of Edinburgh, the deponent was servant to the preceding witness Mr. Tait, and keeper of the port under him. That, upon Monday's night, the 16th of September, Mr. Tait left the charge of the port to the deponent, and gave him orders, whatever chairs or coaches were entering the town, or going out, to open the port, and let them pass. That the deponent attended the port that night, together with six centries of the town-guard soldiers; and, betwixt four and five in the morning, a coach came down the street, in order to go out at the port; and the deponent, agreeable to his orders, opened the port, and let it pass; and after the coach was past, the deponent shut one of the leaves of the port; but as he was shutting the other, the Highlanders rushed in upon him, and beat him back, and then possessed themselves of the port, and entered the town. Depones, That nobody offered to stop the coach from going out: that he knows not whether any of the centries spoke with the coachman; but he observed him to stop a little talking with one of the waiters at the port of his acquaintance. And depones, That he did not say to any of the soldiers that he had orders to let out that coach; nor could he, since he had no other orders but the general order above-mentioned; nor did any of the soldiers stop him from letting out the coach. And depones,

That the deponent had no particular orders from the panel, or any of the magistrates or council concerning the port.

L. *Alexander Corsar*, one of the soldiers of the city-guard of Edinburgh, depones, That, upon the night of Monday the 16th of September 1745, he was upon guard as one of the soldiers of the city-guard; and, at four o'clock on Tuesday's morning, was ordered, with five or seven more of his brother-soldiers, by the serjeant of the guard, to go to the Netherbow to guard it, and to relieve the like number of soldiers that were there before; and the serjeant of the guard ordered the deponent not to permit any person whatever to go out or come in at the port. And the deponent accordingly marched, and relieved the guard at the port: and in about half an hour thereafter, the deponent, observing a coach coming down the street, sent two men to meet, and stop it at the Fountain-well; but, as the coachman would be forward, the deponent went up and stopped it himself. That the coachman said, He behaved to get out at the port; but the deponent said, He should not get out, unless he had an order from provost Stewart. The coachman said, he had no order from provost Stewart; but that provost Coutts had ordered him to be let out. The deponent answered, provost Coutts had now no more power to give such order, than any other private gentleman; and he should not get out, without provost Stewart's orders. Upon which the under-keeper of the port, who was James Gillespie, the preceding witness, came up, and said, That he had an order to let out that coach; but did not say from whom he had it. Upon which the deponent answered, O, Sir, it is very well if you have an order to let it out; you have the keys of the port, you must answer for it, and I have nothing to say. And being further interrogate, depones, That the under-keeper had no discourse with either the coachman or the postilion, before he told the deponent that he had an order to let out the coach. Depones, That then the port was opened, and the coach drove out, and was not past the deponent two yards, when the Highlanders rushed in, and Lochiel gripped the deponent by the arm.

Then the Lord Advocate declared his Probation to be concluded.

Follows a List of the Witnesses Names and Designations cited for Mr. Stewart.

N. B. Only those marked thus § were examined on the pannel's exculpation; and such as are marked thus || were cited both by the prosecutor and the pannel.

Thomas Allan, esq. merchant, and dean of guild of Edinburgh.

John Aitken, bookseller there.

William Annan, sheriff-officer there.

Alexander Brown, merchant there.

Charles Butter, wright there.

Hary Barclay, of Collerny, esq.

§ David Baird, merchant in Edinburgh.

John Brown, servant to Archibald Inglis, pewterer there.

Charles Banks, stabler there.

§ Thomas Cochran, esq. one of the commissioners of excise in Scotland.

James Cleland, vintner in Edinburgh.

Mr. Patrick Cuming, minister of the gospel there.

Thomas Cuming, flesher there.

William Cramond, one of the city-officers there.

Ralph Dundas, merchant there.

Robert Dundas, merchant there.

Thomas Dundas, junior, merchant there.

John Douglas, armourer there.

Ronald Dunbar, writer to the signet.

Robert Davidson, tacksman of the meal-market of Edinburgh.

John Dunsmore, merchant in Edinburgh.

Charles Dickson, goldsmith there.

Michael Elphinston, late store-keeper to the castle of Edinburgh.

Alexander Erskine, carter in Edinburgh.

Simon Fraser, white-iron smith there.

Robert Forrester, merchant there.

John Forrest, merchant there.

John Ferguson, ship-master in Leith.

Mr. Francis Garden, advocate.

James Grierson, merchant in Edinburgh.

Alexander Gray, brewer, at the back of the Canongate, Edinburgh.

§ Walter Hamilton, one of the captains of the city-guard of Edinburgh.

Patrick Henderson, merchant in Edinburgh.

Charles Hope, merchant, and late bailie there.

John Hay, wig-maker there.

Archibald Hart, merchant there.

George Home, town-clerk of Leith.

John Haslie, gardener in Heriot's work, Edinburgh.

Paul Husband, merchant in Edinburgh.

Archibald Inglis, pewterer there.

David Jackson, saddler, now overseer of the scavengers there.

James Ker, esq. jeweller, present deacon-conveener of the trades of Edinburgh, and representative in parliament for the city.

§ Francis Kemptie, merchant in Edinburgh.

Dr. Thomas Dundas, physician, brother to Dundas of Mauch.

Capt. Francis Kinloch, son to the deceased Jacob Kinloch, of Stonyflat.

§ George Lindsay, depute town-clerk of Edinburgh.

George Langlands, surgeon there.

Deacon Patrick Lawson, weaver there.

§ George Lauder, surgeon there.

John Learmont, tanner there.

James Mansfield, merchant, and late bailie there.

Robert Montgomery, merchant, and late bailie of Edinburgh.

Charles Mack, mason there.

William Macvey, wright there.

James Macdougall, waulker there.

William Mercer, merchant there.
 Ebenezer Macculloch, merchant there.
 § William Macglhie, merchant there.
 Richard Mackenzie, vintner there.
 David Murray, stabler there.
 Thomas Moor, vintner there.
 Samuel Neilson, mason there.
 William Ormiston, copper-smith there.
 § Mr. Robert Pringle, advocate.
 Alexander Purves, merchant in Edinburgh.
 James Rob, merchant there.
 John Robertson, mason there.
 Willoughby Ramsay, merchant there.
 § Archibald Stewart, merchant, and late moderator of the constables there.
 James Scot, merchant there.
 Robert Smith, surgeon there.
 § Walter Scot, merchant, and bailie in Leith.
 Charles Sheriff, merchant there.
 Alexander Sheriff, merchant there.
 James Stedman, vintner in Edinburgh.
 David Simpson, one of the sheriff-officers there.
 Wm. Shiells, one of the sheriff-officers there.
 William Scot, one of the town-officers there.
 Richard Tod, merchant there.
 William Trotter, late surgeon to general Hamilton's dragoons.
 John Walker, merchant in Edinburgh.
 George Boswell, sadler there.
 William Straiton, brewer there.
 Mr. Patrick Haldane, advocate, one of his majesty's solicitors.
 § Charles Fraser, merchant in Edinburgh.
 § Archibald Macaulay, esq. late lord provost there.
 § John Wilson, merchant, late one of the bailies there.
 § Gavin Hamilton, merchant, late one of the bailies there.
 § James Stewart, merchant, late one of the bailies there.
 § James Nimmo, esq. late one of the bailies there.
 § Hugh Hathorn, late dean of guild there.
 § Robert Baillie, merchant, late one of the bailies there.
 § James Grant, merchant, and present town-treasurer there.
 § Sir Robert Dickson, bart.
 § The honourable Mr. James Leslie, advocate, one of the commissaries of Edinburgh.
 § Archibald Stevenson, writer in Edinburgh.
 § Nathan Porteous, late deacon of the skinners there.
 § Patrick Lindsay, depute-secretary to the forces in North-Britain.
 § Robert Griffith, one of the gunners of the castle of Edinburgh.
 § John Hislop, store-keeper of the city of Edinburgh.
 § John Dalgleish, watch-maker there.
 § Baillie Bryden, lieutenant of the royal regiment of artillery.
 § Andrew Alves, writer to the signet.
 § Thomas Dalryell, one of the captains of the city-guard, Edinburgh.

VOL. XVIII.

§ Alexander Corsar, one of the soldiers of the city-guard there.
 § Mr. John Glen, Mr. Alexander Webster, both ministers of the gospel there.
 § William Forbes, one of the principal clerks of the city of Edinburgh.
 § William Henderson, writer there.
 § James Murray, esq. receiver-general of the customs in Scotland.
 § James Paterson, tide-surveyor of the customs at the port of Leith.
 § Mr. George Craigie, of Glendoig, advocate.
 § Mr. Robert Dundas, younger, of Arnistoun, advocate.
 § George Dunbar, merchant, late one of the bailies of Edinburgh.
 § Mr. Joseph Williamson, advocate, one of the principal clerks of the city of Edinburgh.
 § Robert Tennent, merchant there.
 § David Lindsay, writer there.
 § John Coutts, esq. late Lord Provost there.
 § John Yetta, merchant, and sometime one of the bailies there.
 § John Stephen, merchant there.
 § David Inglis, merchant, and sometime one of the bailies there.
 § Mark Sandilands, merchant, and late one of the bailies there.
 Charles Hay, tide-waiter at Dundee.

Follows the Proof adduced for the pannel's Exculpation.

I. *John Coutts*, esq. late Lord Provost of Edinburgh, depones, That the minutes and orders of the town-council [admitted by the Lord Advocate, and Mr. Lockhart as counsel for the pannel] now shewn to him, were truly and really transacted, as therein entered, and signed by the pannel as the Lord Provost, in presence of the council; and that the minutes of the committee [in like manner admitted by the prosecutor and pannel] also shewn to him, contain the true proceedings thereof; and the deponent was one of that committee. Depones, That the resolutions of the council were reported to a meeting of the inhabitants, which was called about the latter end of August; which meeting unanimously approved thereof, and appointed a committee of their number to join with the magistrates to consult with the king's lawyers, and such judges as were in town, touching the legality of such measures as had been under consideration, for the defence of the town. In prosecution of which, there was a meeting of the committee, at least part of them, at the Lord Justice-Clerk's house; where his lordship and the crown-lawyers assisted. That several proposals for the defence of the city were under deliberation, and particularly the raising of a regiment of 1,000 men; which the said judges and lawyers thought would amount to high-treason, without the sovereign's authority was first given. There was some conversation how such a regiment could be maintained, if raised; and such of the com-

3 X

mittee of inhabitants and magistrates as were present, were desired to sound the inclinations of the citizens and inhabitants, how far they would contribute to the expence of it; and it was recommended to the Lord Advocate, to write to some of the king's ministers at London, to obtain his majesty's royal sign-manual for levying the said regiment. Depones, That he knows, that the pannel, and other magistrates of the city, received several proposals for putting the town in a posture of defence; most of all which were complied with; and he knows, that letters were wrote by the pannel to the ministers and magistrates of neighbouring burghs, to take particular notice of the motions of the rebels, and inform the magistrates of Edinburgh thereof. Depones, That, upon Sunday the 8th of September, in the evening, or at dinner, he heard that the king's sign-manual was come; and a council was held next day, the 9th, where it was produced; and a committee was appointed to carry it into execution, by levying the men, taking in subscriptions, and, in general, doing every other thing in relation to it. The first meeting of which was appointed at the rising of that council, and afterwards they were ordered to meet twice a-day. Depones, That he subscribed for the maintenance of the regiment some time after the rest of the council had subscribed; and he observed the pannel's subscription to be 30*l.* per month, which was higher than that of any other subscriber before the deponent. Depones, That there was a provision of meal, sufficient for the said regiment, before the rebels entered the city of Edinburgh, made by the direction of the pannel, and other magistrates; and arms were furnished to the regiment from the arsenal in the castle. Depones, That he heard Mr. Joseph Williamson complain to the pannel, that the public works went slowly on. To which the pannel answered, "I have given warrants to press workmen and carts; the execution of the work is committed to a committee, under the inspection of bailie Robert Baillie: what would you have me to do more?" And the deponent knows, that bailie Robert Baillie was at the head of a committee, who had orders to carry on all public works for the defence of the city with the greatest dispatch. Depones, That, upon the approach of the rebels, what cess was owing by the city, was paid upon Saturday the 14th, by the intervention of the pannel; at whose request the deponent went down to the royal bank, to wait till such time as it was paid in; and the deponent saw it paid; and he thinks, that the pannel signed the order for payment of the cess to the general-receiver of the land-tax, directed to the cashier of the royal bank, to be stated to the debit of the town's cash-account. That it consists with the deponent's knowledge, that the pannel readily embraced a proposal of the Lord Justice-Clerk's, of having meetings and consultations with several noblemen and gentlemen in and about the town, to concert what was proper to be done at that juncture; that he went to his

lordship, and told him, that he wanted advice much, and would be very glad of such assistance. Depones, That he knows no further of application made for gunners from the *Ursula* man of war, other than that, upon Monday the 16th of September, he saw a letter lying upon the table of the Goldsmiths-hall, which the deponent casually took up, and read, dated from Leith, signed by he does not remember whom, directed either to the pannel, or one of the city-clerks; and bearing, that the captain of the king's ship in the road could spare no gunners; and that he thinks, but cannot be positive, it was before dinner when he saw this letter. Depones, That, about eleven o'clock of the said 16th of September, the deponent went up to the Goldsmiths-hall, where the pannel and some of the members of the council were; or, rather, the deponent having gone up to the Goldsmiths-hall, the pannel came up to him. That the pannel took Hugh Hathorn and this deponent aside, perhaps more of them, but he does not remember, and told them of the message Andrew Alves had delivered to him, in presence of commissary Leslie, touching the strength of the rebel army, which Alves represented as great; and that the city would be subject to military execution, should they persist in the defence of it; and asked their opinion, if it would be proper to take notice publicly of that message? suggesting his apprehension, that it might intimidate the citizens and inhabitants. That Mr. Hathorn and the deponent gave it as their opinion, it was better to hush the thing, for the reason already given: and, at this time, the pannel being called to visit some part of the walls, he immediately went, and the deponent and Mr. Hathorn attended him, and they made a round of a considerable part of the wall, and ended at or near the West-port, and, when they came to the Grass-market, they were told of Mr. Alves's message; whereby they saw the same was made public. Whereupon the pannel declared his intention to go to the Lord Advocate's lodging, to talk with him in relation to that matter; but, meeting with some company, the pannel walked down with the deponent some way towards the Lucken-booths; and then parted with the deponent; and went backwards, as he believes, to execute his intention; nor did he observe any message delivered to the pannel during this period. He saw the pannel soon after this, who told him he had been with the Lord Advocate; and that he had already signed, or was to sign a warrant for committing Mr. Alves to prison. Depones, That, on Monday afternoon, about 3 o'clock, the pannel went from the Goldsmiths-hall, with intention to go to the West-port; and, about this time, he heard of the retreat of the dragoons with some precipitancy; and, before he left the Goldsmiths-hall, he mentioned to the deponent, that he had received a petition from several of the citizens and inhabitants, desiring that the town should not be defended, or; at least, not till a general meeting of the inhabitants was called to deliberate on its defence: and the pannel, in his way to the West-port,

stepped into the Lord Advocate's close-head, or went up to his house; he thinks it was only to the close-head, he staid so short time: the deponent waited his return; and in their way to the West port, he told the deponent he had signed a paper, desiring, or consenting, that some dragoons should be sent to the assistance of the city. That, after the pannel had given such orders at the West-port, which he judged the flight of the dragoons rendered necessary, he left it: and, in his return, was surrounded by a great crowd of people, whose general cry was, "Would he continue his design of defending the town, and have them all murdered, now that the dragoons were fled?" And the deponent observed among those who made this cry, Thomas Dundas younger of Lethem, who appeared to the deponent to be full warmer on that head than any of the rest, though his brother Lawrence declared, on the contrary side, for the defence of the town. To which the pannel replied, would they now be guilty of cowardice in giving up the town, after obtaining his majesty's sign-manual, and doing so much for its defence? and a great deal more to that purpose, in answer to their repeated cries. That, when the pannel returned from the West-port to the Goldsmiths-hall, where a good number of the council, and many of the inhabitants were assembled, it was proposed to, and agreed by him, forthwith to send deputies to the Lord Justice-Clerk, the Lord Advocate, and the Solicitor; and messengers were sent to each of them respectively, desiring them to come and assist the pannel with their advice: but, soon after, the several deputies returned, and reported, that all of them had left the town. Depones, That immediately after this, the pannel sent for the officers of the trained-bands and volunteers; and desired to have their opinion upon the defence of the city; and addressed himself to them in substance to the following purpose: That he hoped they would not now suffer cowardice to poison their councils; and that, after obtaining his majesty's royal sign-manual, and doing so much with spirit, they would not now think of giving up the defence of the city: that, for his own part, he would go to the city walls, and to the place of greatest danger: and, so long as he could find ten men to stand by him, he would persevere in the defence of it. That several of the said officers came, and were thus spoke to; but few of them seemed to be inclined to give their opinion, or speak; but one gentleman, Mr. Joseph Williamson, said to this purpose: Since he saw the pannel so firmly resolved upon the defence of the city, he would attend, and share fates with him; but he feared he should not be able to bring with him five, ten, or some such small number of the company wherein he served. That the deponent in particular remembers he pressed Mr. Drummond to give his opinion; which he declined; and, taking the deponent aside, said, "I am surprised, Sir, that you should insist on my giving my opinion. You know I am not so independent a man as you or

the pannel. I hold a place of the government, and it may be very inconvenient for me to deliver my opinion in this place." That the deponent desired the pannel to ask Mr. Drummond's opinion; who still declined to give it: And, as the deponent had begun to relate Mr. Drummond's apology for not giving his opinion, he interrupted the deponent, and again took him aside; and said, "I am surprised, Mr. Coutts, you should insist upon my giving my opinion, when you know that the Provost has the Articles of Capitulation of the city in his pocket some days ago;" adding, That he was told that day at dinner by the earl of Home, that as, upon Thursday preceding, he was shaving or dressing in the lord justice clerk's lodging, the window open, he overheard the deponent, coming up the Bank-close, saying, What need is there to keep all this powder or bustle about the defence of the city, when the Provost has in his pocket, articles of capitulation for surrendering it to the rebels? The deponent replied, That that tale carried very little credibility with it; for what a ridiculous thing was it, to imagine, that he, the deponent, in one of the most public closes in town, under the windows of an officer of state, should be roaring out a story of that kind. That he could himself give no credit to the story: for that, though of late there had been a dryness between the earl and him; yet he looked upon the earl as a man of honour, that could not be capable of saying such a thing without any foundation: so that certainly he, Mr. Drummond, must have mistaken his lordship. And the deponent added, Mr. Drummond, let us not now be talking of these things, till afterwards, that the earl, you and I have occasion to talk about it. That, after what passed between the pannel and the officers of the volunteers, captain James Murray and major Thomas Cochran came in to the meeting; and the pannel desired them to give their opinion, if, or not, the defence of the city should be continued? But both of them declined to give any, joining in sentiment, that the pannel, who best knew the inclinations of the citizens and the inhabitants, was by much fitter to determine that point than they; and that the decision of it must ultimately land upon him. That the pannel having again pressed Mr. Murray to give his opinion, and to figure himself in the pannel's stead, and declare what he would do if that were the case; Mr. Murray replied, "I do most heartily pity you, my Lord Provost. I cannot, nor can any man advise you; you must yourself decide it; and I am afraid you will get very little advice." Depones, That, much about this time, Walter Grosset, collector of the customs at Alloa, came in to the meeting with a message, whether in writing or verbal he cannot say, from the lord justice-clerk, or the lord advocate, or both, desiring the pannel to give an order for bringing some dragoons into the city. To which the pannel answered, that he had already given his consent or order for bringing in one hundred

dragoons, at the desire of the crown-lawyers ; and that he could not comprehend what the meaning was, why an order should be asked this day for bringing them in, after what past last night : but their lordships were best judges what was for the service of the government : if they should judge it for it, to send them in, they shall be received, but I will not now make an order ; because, if I should, and if they should come in, and the city and they fall into the hands of the rebels, I might be charged to have ensnared so many of his majesty's troops ; if I should refuse to admit them, I might be blamed for rejecting a succour which might have relieved the city : let their lordships therefore give their decision, which I shall obey. And, as Mr. Groset was departing, the pannel called him back, and said, to prevent mistakes, he would send a written answer ; which accordingly he did. And the answer referred to in Mr. Craigie's deposition being shewn to the deponent, depones, it is the answer then sent by the pannel. Depones, that while bailie David Baird was arguing in the Goldsmiths-hall against defending the town, because it was not tenable, principal Wishart and bailie John Wilson came in, and a great many others followed ; and the principal and bailie averred, that no man but a Jacobite would maintain such an opinion. Upon which such a hubbub arose, and so many people crowded into the room, that the deponent himself moved, that they should adjourn to some larger place, where those who had a mind to speak might be better heard ; and then the cry was, the New Kirk Isle ; to which the meeting adjourned. That, in the Parliament-close, they met a great many people in their way, insomuch that the deponent was carried off his feet by the crowd to the south-side of the statue ; and the cry of the people who surrounded him was, praying the deponent to prevail with the pannel not to draw destruction upon the city by a fruitless opposition. That the deponent followed the pannel and a multitude of the inhabitants to the New Kirk Isle ; where, at first, there was such a noise, that he could hear nothing that past ; but the pannel at length prevailed so far in quelling it, that the deponent could hear him say, that the purpose of that meeting was, to consult with them touching the defence of the city ; and made to them much the same expostulation as he made formerly to the captains of the volunteers, so far as the deponent could hear. That he heard principal Wishart move, that the meeting might be purged of Jacobites. To which the pannel, or somebody answered, It would not be easy to distinguish a Jacobite from a Whig by their countenance. That the reverend Mr. George Logan begun to speak for the defence of the city, but was soon interrupted by a great noise, and a cry, that that was impossible. Upon which he thinks the pannel said, " It is impossible to collect the voice of every one. Shall I put the question, whether the city shall be defended, or not ? " Upon which the cry of the generality

was, that the city could not be defended. And at this period a letter was brought into the meeting, he does not know how ; but he saw it first in the hands of deacon Walter Orrock, who, having broke it up, said it was signed Charles P. R. Upon hearing of which, the pannel forthwith said, " I cannot be witness to the reading of this letter," left the chair, and went out of the meeting to the Goldsmiths-hall ; whither several of the council and of the inhabitants followed him, and among the rest, the deponent. That the letter appeared again there, brought, as he believes, either by the said deacon, or William Henderson, one of the clerk's servants. And it being proposed by some that it should be read, it was urged by others, that to read it would be treason. Upon which it was moved and agreed to, that the opinion of the assessors should be taken ; who thereupon were sent for : but it was reported they had all left the town, except Mr. Patrick Haldane, who would be with them immediately. That, when he came, his opinion was asked, if it was proper to read the letter or not ? and the pannel, or some other person, he does not remember whom, told Mr. Haldane, it was a letter signed Charles P. R. ; upon which Mr. Haldane said, it was a matter too high for him to give his opinion in ; and immediately rose from his seat, and went out of the Goldsmiths-hall : the deponent followed him to the door, and pressed him to give his opinion ; but he still declined. And being interrogated upon the part of the pursuer, if the letter was begun to be read before Mr. Haldane left the hall ? depones, That said William Henderson, upon Mr. Haldane's coming in, took up and began to read the letter ; but he was immediately stopped, and ordered to desist, by some persons in the meeting, he does not know by whom ; but Mr. Haldane was one of those who stopped him, as the deponent thinks ; and he believes he might have been one of them himself. That, upon this, the pannel complained, that he was now also deserted by his assessors. Depones, That, after this, the letter was begun to be read ; and the deponent, being at a little distance, said, What is the meaning that this letter is begun to be read ? To which some one of the meeting answered, that it was necessary it should, that it might be known what threatenings it contained against the city. That, a little after reading this letter, it was proposed by some one in the meeting, whom he does not remember, that a deputation should be sent, to desire, that until they could make a proper answer to the letter, nothing should be done against the city ; the intention of which was, to gain time ; the purpose of the meeting being to call the burgesses and inhabitants to deliberate upon that affair. And accordingly, bailie Hamilton, bailie Inglis, bailie Yetts, and conveneer Norrie, were sent out with the said message, about eight o'clock. And the paper marked No. 2, mentioned in the list of writings annexed to the libel, being shewn to him, depones, That it was the return to the

first deputation. Depones, That the said paper being laid before the meeting, then in the Laigh council-house, the pannel immediately observed, that there was one condition in the paper that he would rather die as submit to, namely, the receiving the Pretender's son as Prince Regent of Scotland, as he was tied by oath to another master; which appeared to be the common opinion of the meeting: And therefore, after a long argument, a second deputation was agreed, and determined to be sent out about two o'clock in the morning; and five deputies were sent, whereof the deponent was one, with instructions, begging a delay till nine o'clock in the morning, to the end the meeting might have opportunity to converse with the citizens, who were then a bed; which also was calculated to gain time; which they shewed to do, because they had heard, before the return of the first deputation, that sir John Cope, with the troops under his command, were seen off Dunbar: And the paper marked No. 3, in the said list, now shewn to the deponent, was the fruit of the second deputation. That he remembers to have seen a serjeant of the castle, between seven and eight in the evening, come in to the meeting in Goldsmiths-hall, who delivered a message, which the deponent did not hear; but heard it related by some of the members of the meeting to be this, That general Guest sent him with orders, to desire of the pannel an order to spike up the cannon upon the walls of the city, and to knock off the trunnions; and that the deponent whispered to some of his neighbours that, considering the threatenings in the said letter, might it not do as well to make answer to the message, that the pannel could give no express order; but to acquaint the serjeant, that the general might send and render the cannon useless; which he should be at full liberty to do. And accordingly, the deponent, and the said William Henderson, desired the serjeant to spike up the cannon himself, or to do with them as he pleased. And the adjutant of the Edinburgh regiment having come in much about this time, to ask how he should dispose of their arms, he was also told that he was at liberty to dispose of these arms as he pleased, by the deponent, who left it to William Henderson to explain the reason thereof to the adjutant. Depones, That, being fatigued, he went to take a refreshment in Mrs. Clarke's; and during his short absence of a quarter of an hour, the said Mr. Groset came to the council, which was then more regularly met than formerly, with only a few inhabitants; and, upon his return, he found them in the Laigh council-house; and a letter, sent by express from Mr. Fall to the deponent, which had some how fallen into Mr. Groset's hands, had been just then laid before the council, and read before the deponent came in, as he is inclined to believe, because the letter gave notice of general Cope's arrival off the May; and he was told by some of the council, that baillie Mansfield had been sent out, if possible, to stop the depu-

ties of the first deputation from executing it. That the letter was again read after he came in, and delivered to him. That, upon this, they begun again to consider, if the defence of the city might not be resumed: And while some people were talking, that the volunteers should take arms again, and others, that the dragoons should be brought in; leaving these things to be determined by the meeting, the deponent, Mr. Groset, and Mr. Lindsay, secretary at war, were sent to general Guest, to know of him, whether, if the defence of the city should be resumed, he would deliver out arms to the volunteers, and recall the dragoons? To which he answered, That they might put the city-arms in the hands of such as were well-disposed; and, if the provost should write him, that there was a good spirit appearing in the people, and desire him to deliver out the volunteers arms, probably he might do it; and that he had sent orders for recalling the serjeant from rendering the cannon useless; but that he judged it absolutely necessary for his majesty's service, that the dragoons should be ordered to join general Cope, without whose assistance his small body of men could not act. That the deponent, Messrs. Groset and Lindsay, returned to the council. That, by the way, Mr. Groset and the deponent agreed, at Mr. Groset's request, that they should mention nothing of bringing in the dragoons to the town, because it was a clear point they could have none of them, and it might intimidate the inhabitants if they knew so much. However, the deponent judged it his duty to whisper the pannel, that for the reasons above assigned, he could not hope to have any of the dragoons brought in. They found the council still arguing upon the same subject they left them upon, some proposing one thing, some another, and some to ring the alarm-bell. That, soon after this, Mr. Webster said, It was impossible to think of defending the city, without the dragoons were brought in for its assistance. Upon which Mr. Groset rose up, and said, "Then I will go and fetch in the dragoons;" and going to the door, the deponent followed him, and said, "How can you impose so upon the meeting, when you know from general Guest that you can have none of them?" To which he replied, He could perhaps persuade brigadier Fowke to bring them in. Provost Drummond went along with Mr. Groset, and neither of them returned. That, immediately after this, Mr. Lindsay proposed to the pannel, to get out the arms for the volunteers. To which he answered, That it was proper for him first to know what disposition there was among the inhabitants to make use of them. That, as to the proposal of ringing the alarm-bell, it was observed, and agreed to, it would be doing great injustice to the deputies, to ring it till they should be returned: And dean of guild Hathorn observed, that if they did, they might expect to have the deputies hanged like rats, it being probable the rebels were within hearing of the bell. That the

deponent being one of the second deputation, he remembers, when they went out to the rebel-army, they met with the late lord George Murray, whom they applied to, and prevailed upon to second them in procuring the delay proposed. That the late lord George Murray went into the room in which the Pretender's son was; and the deponent could hear, though indistinctly, so much of the conversation, as convinced him, that the said lord George was endeavouring to persuade the Pretender's son to comply with it; and that he refused to do it; which the said lord George came out, and reported to the deputies: But, upon second conversation with them, they prevailed upon him once more, to try if he could obtain the proposed delay; which he accordingly attempted, but was refused; and the deponent could hear the Pretender's son say, "My lord Elcho, lord George has not spirit to put this order in execution; you must go and do it for him." Upon which the late lord Elcho came out of the room from the Pretender's son, and bid the deponent, and the rest of the deputies, to get them gone. That the said lord George Murray followed the deputies out, and whispered to the deponent, "I know your pinch; you want to have the consent of your principal inhabitants: Make haste to town; you will have an hour or two to obtain it." That the deputies made all the haste they could to return, and went directly to Mrs. Clarke's; where they understood the pannel and the council were. The pannel, who was asleep, was roused. The deputies reported their answer, and what lord George Murray had said. The principal inhabitants were ordered to be gathered together immediately. Some saw of them, and particularly Mr. James Ker, now member of parliament for the city, were come, when notice was brought, that the rebels had broke into the town, and made themselves masters of it: Which put an end to all further deliberation.

II. *William Forbes*, one of the principal clerks of the city of Edinburgh, depones, That, on Monday the 16th September 1745, he came to the Goldsmiths-hall about three o'clock in the afternoon; where he found the pannel, as he appeared to him, in a very great passion; some of the councillors were about him, and several other of the burghers and inhabitants of the town. The deponent went up to him, and asked him the occasion of the disorder he seemed to be in. The pannel answered, That he had got a paper into his hands, which he by no means relished, and thought it was somewhat seditious: For that the scope of it was, that the town should be surrendered; which he swore he would not consent to. That, at this time, the crowd that was in the room called aloud upon the pannel, to take the advice of the inhabitants; but he told them, that he would listen to no advice in a matter of this kind, till he had taken the opinion of abler and better counsellors. Upon which se-

veral persons were sent to all his majesty's officers who usually resided in Edinburgh, humbly to beg that they would meet with them, and give their opinion what was proper to be done in so critical a juncture. That the messengers sent, returned with a report that they were all gone out of town. The pannel therefore, finding, that he could not have the happiness of the counsel of the civil officers, was resolved to call for the assistance of such of the military officers as were in town, and the officers of the volunteers. That, upon messages sent, major Thomas Cochran and captain James Murray came to the hall, as also a great many of the officers of the volunteers. That, upon their coming in, the pannel opened to them the difficult circumstances that he and the city were under at that time, and prayed their advice. That such of the officers of the volunteers as were present, declined giving any advice, except Mr. Joseph Williamson; who said, That, from the beginning, he was determined to stand to the defence of the city to the last drop of his blood; but that he was sorry to say, that he found some alterations upon the spirits of the people: For that, in the company in which he was an officer, there was not above six or seven of the volunteers of that company could be found. That the pannel did, upon this occasion, warmly exhort the people that were about him, to stand to the defence of the city, representing the expence they had already laid out in order to the defence of the city; and that they had lately plighted their faith to his majesty, that they would, to the utmost, stand for the support of his person and government, and for the defence of the town. The pannel then addressed himself to major Cochran and captain Murray, who were the only two of the military that could be found; and told them, that their advice was necessary in a matter of this kind, because of their knowledge and experience in these matters. To which captain Murray replied, that he regretted extremely the unhappy situation of affairs in general, and the pannel's case in particular; that he pitied him, because he foresaw that the decision of this important question would chiefly lie upon him; and added, that if the trained-bands and volunteers did not stand to their arms in the defence of the town, it was a matter of the greatest consequence, that the arms delivered out by the government should not be suffered to fall into the hands of the rebels. And then, turning about to the deponent, said, with an oath, If they do, some people may come to hang for it. That bailie Baird offered his opinion; which was, that he thought the town not tenable; as did Mr. Thomas Dundas, and several others. But principal Wishart, and some few more, were of a different opinion. Whereupon the principal said, None but Jacobites would be for surrendering the town. Then ensued a loud cry from many, that the opinion of the inhabitants should be taken; and, for that end, it was proposed to adjourn to the New Church

Isle; where they accordingly went: But, in their way to the New Kirk Isle, there were loud cries from all corners, not to expose the city to the fury of the rebels. While the pannel was in the midst of the crowd, there came a gentleman on horseback, who said, He wanted to speak to the pannel; and accordingly spoke to him to this effect: "That lieutenant-colonel Whitney had sent him back to bring away the dragoons' baggage that was left in town; for that the dragoons were on their way to Haddington." That the deponent did not go in at that time to the New Church Isle, having gone to refresh himself with a little coffee; and, when afterwards he attempted to go in, he found the New Church Isle so chop-full of people, that he could not put in his head. He then went towards the Cross, where he met with bailie James Stewart, one of the officers of the volunteers, and several private volunteers along with them. That he had in his hands a key, or two keys; which made the deponent ask him, What he meant? And where he was going? Who replied, He was going to give up his charge with the keys of the Netherbow port; for he found that this thing would not do. That thereafter the deponent went to the Goldsmiths-hall, where, the meeting in the New Church Isle having been dissolved, he found the pannel, and a great many of the council and inhabitants of the town, who were in a dispute, whether a letter, that had been given in the New Church Isle, said to have been subscribed by the leader of the rebels, should be read, or not? The pannel argued, That the reading of such a letter was at least bordering very near upon treason; more especially if it produced an answer. Upon the other hand, some of the inhabitants urged, That it was proper the contents of it should be known, and they might afterwards consider what was proper to be done on it. That the pannel upon this said, It was improper for them to come to any resolution, until, at least, they had taken the opinion of their assessors; who were sent for; but none of them were found, excepting Mr. Patrick Haldane. To whom the pannel represented, they were under a difficulty with regard to a letter signed Charles P. R.; that they wanted to be advised, Whether it should be read? And, if read, Whether it should be answered? And what answer should be given? To which Mr. Haldane replied, It was a matter of too high a nature for him; and therefore he would give no advice upon it. And upon an interrogatory put to the deponent for the pursuer, Whether the first mention of the letter's being signed as aforesaid, was not on occasion of Mr. Haldane's putting a question to William Henderson (in whose hands the letter was), Who signed it? The deponent, on recollection, says, That he believes it was so. Depones, That, before the pannel went to the New Church Isle, Mr. Groset came to the Goldsmiths-hall, and represented, That he had a message from Lord Advocate, and Lord Justice-Clerk, to let

the pannel know, That, if he would give orders for 100 dragoons to enter the city, they should be forthwith sent. That the pannel to this replied, That he could give no orders, because he had no power over them: that he was a little surprised with the message, after what had happened in a council of war held the other night in Lord Justice-Clerk's house; where it was concluded not to be for his majesty's service that any of the dragoons should enter the city, or words to that purpose; but that, if they were of opinion, that it was for his majesty's service, and should order a hundred dragoons, or more, he would receive them, and make them very welcome, and give them all the assistance he could in defence of the city. That Mr. Groset insisted the answer should be taken down and given in writing; which was accordingly done; and the deponent thinks it was to the above purpose. Depones, That, while he was in the Goldsmiths-hall, after the meeting had come from the New Church Isle to that place, he thinks about the hour of six, or after it, a serjeant from the castle came in, and told the pannel, he was sent by gen. Guest, in order to nail up the cannon, if he would permit them so to do. To which the pannel answered, that all authority was wrested out of his hands; but that gen. Guest might do what he thought was best for his majesty's interest or service; and said, That the town-officers would shew them where the cannon were. Depones, That, after the meeting had left the Goldsmiths-hall, and gone to the Laigh council-house, the deponent went in to them; where he saw two ministers of the city, who were reasoning about the surrender of the town; and declared, that, as things now stood, the defence seemed impracticable: and, while this was the subject of their discourse, Mr. Groset came in, and produced to them one letter signed, but directed to nobody, and another letter also directed to nobody, and unsigned: the first of the letters importing, that the troops had that night landed at Dunbar; and the other, that the fleet had been seen off the May, and would land that night at Dunbar. Upon which the pannel expressed great satisfaction; and said, That, as long as there was any prospect for defending the town, he would not be for giving it up: but then it occurred to him, that the volunteers had delivered up their arms, and it would be difficult to get them again into their hands; and that there was no prospect of getting any dragoons. Upon which a deputation was made by the meeting to provost Coutts and Mr. Lindsey, to go along with Mr. Groset to the general, to try if he would give orders for bringing any dragoons into the town, and deliver arms to the volunteers. That, after they waited upon the general, the report made by Mr. Groset, was, That he would go and bring in the dragoons; and laying hold of provost Drummond, they both went out. Upon an interrogatory, the deponent recollects, that this offer of Mr. Groset's was immediately after the ministers had given

their opinion as above. However, Mr. Coutts reported to the meeting, that no dragoons could be spared to enter the city, since there was a prospect of sir John Cope with his troops landing; because they would be of much more service joined to the foot that was with sir John: and as to the arms, reported, That there was no reason to hope they would be delivered out, till it appeared that the volunteers were more stable in their resolution of defending the city. And depones, that when provost Drummond, as he thinks, had proposed to ring the fire-bell, to convocate the volunteers, it was opposed by dean of guild Hathorn, for this reason, that this signal might be understood by the enemy, and provoke them to use the deputies ill. Depones, That pretty late in the evening of that day, he was present in the Laigh council-house; when he heard some people in that meeting talking of a message to be sent to general Preston; and that Mr. Lauder was the man to be named for that purpose. What the message was he was to be sent on, the deponent did not then know; but heard them assign for a reason of the choice of Mr. Lauder to be sent to the castle, that he was a near relation of general Preston's. That the pannel, and some people about him, were the persons he observed busied about the sending of Mr. Lauder to the castle: and when the deponent was, from curiosity, asking, What the nature of the message was? He was answered, That it was improper at that time to communicate it to any person: but, when Mr. Lauder returned from the castle, upon the deponent's asking him what errand he went upon, he told him, That it was to prevail upon general Preston, to send down a party to bring up the city-arms; which he would not comply with. Depones, That upon Saturday the 14th of the foresaid month, the deponent, with provost Coutts, and Mr. Hathorn, accompanied the pannel while he went round the walls to visit the works that were carrying on. That, where he observed the workmen diligent, he encouraged them, and told them, they should be very well rewarded if they were diligent; and where he observed any of them that he suspected to trifle with their work, he chid and checked them; and told them, they should be paid accordingly. That, upon another occasion, when complaints were made, that materials were wanting for carrying on the work, (whether it was the same day the walls were visited as aforesaid, the deponent cannot be positive, nor what day it was, but that it was in the period of time when the city-walls and the town were to be put in a proper posture of defence against the rebels), he was present when the lord Somerville and the pannel joined as justices of the peace, in granting a press-warrant for procuring men and horses for carrying the materials, and forwarding the work. And, upon an interrogatory by the prosecutor, Whether the deponent had ever related to any person whatsoever this circumstance of the message sent by Mr. Lauder,

at any time since the year 1745, down to this day? And being at the same time desired to recollect himself, and name any one to whom he had told it; the deponent says, That he verily believes he had made mention of it to several persons; but until it came to be a subject to be spoken of in this prosecution, he could not with certainty say who the particular persons were: but he condescends on two different persons, Mr. Ninian Cuninghame, writer, and Mr. George Dunbar, merchant, to whom he mentioned this, particularly about a fortnight ago; neither does he call to mind the names of any of the persons who were whispering with the Provost, when the message was said to have been sent up by Mr. Lauder at this distance of time; but that the two ministers he refers to in the former part of his deposition, were, Mr. Alexander Webster and Mr. Patrick Cuming.

III. *William Macghie*, merchant in Edinburgh, depones, That he is one of those who signed the petition or representation which was given in to the pannel, marked N^o 8, of the List of writings subjoined to the criminal letters. That he was present when the said petition was delivered to the pannel, which was just at the door or entry to the Goldsmiths-hall: that he seemed to be in a very great passion about it; and, turning about in an angry manner, when he had got up to the said hall, said to those who presented it, "What do you mean? Do you think by numbers to force me to grant the desire of your petition?" And with that forced to the door, and turned the deponent down the stairs. And that this happened in the afternoon of the 16th September, 1745.

IV. *Francis Kemptie*, merchant in Edinburgh, depones, That he was present on the afternoon of the 16th September 1745, when the representation, marked N^o 8, of the List of Writings subjoined to the criminal letters, was presented to the pannel in the entry to the Goldsmiths-hall. That the pannel was very much offended with the said representation, and said, "What! do you think to cram your petition down my throat by numbers?"

V. *Thomas Cochran*, esq. one of the commissioners of excise, depones, That, upon the 15th of September, 1745, he was with brigadier Fowke, and several others, in the Lord Justice-Clerk's house, where the brigadier proposed bringing in his dragoons to the town of Edinburgh: but this the deponent argued against, as being a thing altogether improper, considering the narrow and long lanes that lead to all the parts of the town. That the brigadier still persisted in thinking, that the design was very right; and that he could force his way out at any one of the gates he pleased. However, there was no fixed resolution of bringing the dragoons to the town, so long as the deponent remained in Lord Justice-Clerk's house. Depones, that after the deponent went

from Lord Justice-Clerk's, he went to the meeting of some gentlemen in Mrs. Clarke's house, where captain James Murray, the pannel, and a great many others were; and there they made a disposition of the several corps of armed men, into the different parts of the town: and the deponent heard the pannel give his directions or orders agreeable to the dispositions then made. Depones, That, upon the afternoon of Monday the 16th September, the deponent meeting capt. Murray, he was told, That the pannel sent for them both to come to him to the Goldsmiths-hall; where they both accordingly went. And, upon their going in, the pannel desired, first, That capt. Murray would give his opinion, which he accordingly did: and afterwards desired the deponent might do the same, which he also did; and which was to this purpose, That it was the duty of every one to defend the city as long as they could; and if there was a necessity for their surrendering, then they ought to take care, that the king's arms should not fall into the hands of the rebels. And being interrogate, If he took any notice of the arms which belonged in property to the town? Depones, He did not, for this reason; that he knew, when the town-guard marched out that day, as he thinks, the officers would not accept of them to do duty with, as knowing them to be altogether insufficient; and, for that reason, they had a new set delivered to them. And further, he gave advice at the above meeting, that in case the town was pushed, and obliged to surrender, and those who had the king's arms had not time nor access to deliver them into the castle, that then they should break them, rather than let them fall into the hands of the rebels. And depones, That the pannel, upon hearing capt. Murray's and the deponent's opinion, said to the meeting, "I want, gentlemen, that you should also give me your opinion; for it is by your opinion I am to conduct myself: and if you come to a resolution of defending the town, I will go wherever the danger is greatest, and defend it to the last."

VI. *David Baird*, merchant, and late one of the bailies of Edinburgh, depones, That, upon the afternoon of Monday the 16th of September 1745, he was in the Goldsmiths'-hall with the pannel, and a great many other inhabitants of the town of Edinburgh. That while he was there, Mr. Groset came in with a message from the Lord Advocate and Lord Justice-Clerk, making offer of 40 or 50 dragoons to the pannel for the defence of the town, in case he thought fit to accept of them. The pannel's answer to this proposal was, That he would neither desire nor give orders for them; but, if they came, they should be welcome: for, if any accident happened to the king's troops, they, and not he, should be answerable for it. And the deponent, upon hearing of the small number that was proposed to be sent, said, What did 40 or 50 signify? If they sent the whole, it would be something; but the sending

such a small number, could be to no other purpose, than having their throats cut, and the houses and shops plundered. That Mr. Groset insisted for an answer in writing, which the pannel complied with, by giving him a letter to the Lord Advocate and Lord Justice-Clerk. Depones, That, while the deponent was in the Goldsmiths'-hall, he stood up, and spoke to the pannel, and told, That he appeared there, not only for himself, but for several hundreds of the inhabitants, whose all was at stake, and whose wives and children were in tears; and demanded, that the pannel would give the inhabitants a hearing before he came to any resolution for defending the town; which, after some little time, was agreed to; and that the inhabitants were to meet in the New Church Isle about six o'clock that night; and that the fire-bell should be rung for convocating the meeting. That the deponent having come to that meeting, the pannel said, That he was sorry for the occasion of calling the inhabitants together; but, as the rebels were then come near the town, he wanted to have their opinion how he should behave, he himself being willing to hazard his life and fortune in the defence of the town. To which several answered, That they would stand by his lordship: but that, as the dragoons had been seen running away, and the inhabitants altogether dispirited, they thought it more advisable to make the best terms they could; and all agreed, with an exception of one or two, not to defend the town. And, being interrogate, Whether the meeting in the New Church Isle consisted of people well-affected to the government, and of rank and substance in the town? Depones, That he thinks they were; and that Mr. Clarkson and Mr. Keir, baxters, Mr. Thomas Dundas, merchant, and several others, such as these, were there. And, while the deponent was there, he saw bailie Stewart come in, and deliver up the keys of the Netherbow-port; and he was desired by the pannel to stay; but he would not. That sir George Preston came there, and told, That he and his company had been delivering their arms into the castle; and that Mr. Glen, minister, came there, and said, He was obliged to go away; and that a fourth gentleman came there, and said, He was obliged to go and see to his own safety.

VII. *Walter Hamilton* of West-port, one of the captain-lieutenants of the city-guard of Edinburgh, depones, That, on Sunday the 15th September 1745, he marched out with the city-guard to sustain the two regiments of dragoons: and when the city-guard was marching betwixt Colt-bridge and Bruce-hill, he thinks, but is not positive, that there was some stop; but does not remember by whom. However, this, upon recollection, he remembers to have heard, That orders were given by the pannel to the city-guard to take their directions and orders from the commanding officer of his majesty's troops. Depones, That he had no particular access to examine the condition of

the city-arms; but he has heard, that they were of little value, and unfit for service: and this he has heard from the soldiers in the town-guard who are under the deponent's command. And further says, That when the rebels made themselves masters of the city-guard, the soldiers had been so harassed with extraordinary duty all the preceding week, and by being under arms for three days before, amongst and with the dragoons, that they were hardly fit to do any duty.

VIII. *George Lindsay*, depute-town-clerk of Edinburgh, depones, That he commonly attends the magistrates as a clerk. That he was present when application was made to the pannel and the magistrates for putting the town in a posture of defence; and was also present when particular directions were given by the pannel and the other magistrates for carrying into execution the general scheme for defending the town. And particularly knows, that directions were given by the pannel and the other magistrates, that the work should be carried on without intermission night and day, Sundays not excepted; and warrants were granted to impress labourers and carts: and when complaints were made, that the work was not going so speedily on as the nature of the case required, some of the tradesmen were sent for by the pannel, and challenged for not doing out the work they had undertaken; and some of them having complained, that they wanted labourers, fresh warrants were signed for impressing them. Depones, That about the latter end of August 1745, the pannel signed several letters to the neighbouring ministers and magistrates, and, as the deponent thinks, about 12 or 14 in number, desiring that they would send notice, by express on horseback, when they saw any body or company of armed men marching towards the city of Edinburgh. Depones, That the deponent came into the Goldsmiths'-hall on the forenoon of Sunday the 15th September 1745, where he saw Mr. Hope-Weir talking with the pannel. That the deponent understood, that Mr. Hope had come from general Guest, to acquaint the pannel, that a proposal had been made to him, that 250 of the volunteers were to go to the Colt-bridge to support the dragoons; and to desire the pannel, that 50 of the town-guard should go along with them. Depones, That the pannel, at first hearing of this, doubted how far he could send the guard out of the city; and said, That that corps were more to be depended upon than the trained-bands. Upon which the deponent told the pannel, That, by the act of parliament constituting the guard, he was allowed to send them a mile from the city. And then Mr. Baillie, one of the magistrates at that time, said, That if the volunteers were willing to go out to assist the dragoons, the city-guard could not be better employed than to go along with them, as it might have the desired effect of obstructing the rebels passage to Edinburgh: or words to that purpose. Upon

which the pannel said. "You are in the right, Mr. Baillie: In place of 50, the whole guard shall go, and so many of the new-raised regiment as are levied." And orders were given, and they marched out accordingly. Depones, That, upon the 14th, the pannel signed an order for bringing into the town all the ladders, ammunition and arms that could be found in the suburbs; and the same was given to an officer who brought in several arms. Depones, That when sir Robert Dickson's volunteers came to town, they were ordered to one of the Kirks; and bread and ale was given to them by order of some of the magistrates. That when the pannel came to the Goldsmiths'-hall, the deponent acquainted him of it; who said, it was very well; and he hoped, they had got it soon enough. Depones, That, upon Sunday's evening, the deponent understood, that the pannel was in Mrs. Clarke's, with some of the captains of the volunteers, who were employed in making dispositions for those who were to defend the city, in case of any attack. That, about twelve o'clock, he came to the Goldsmiths'-hall, and said, he was to go the grand round; and returned therefrom about four o'clock. Depones, That Mr. Fowkes came in to the pannel, upon Monday the 16th in the morning, and said to him, That as the dragoons at Corstorphin had been under arms all night, they would greatly stand in need of some meat; and desired it should be provided. That, in consequence thereof, some of the magistrates sent to a butcher to provide beef; which was provided, and, by order of the magistrates, boiled in the different taverns of the town. Depones, That, upon Monday evening, the deponent was in the Goldsmiths'-hall, when Mr. Griffith and a serjeant came from the castle at different times from general Guest, desiring the pannel to give orders for spiking the cannon on the walls. To which the pannel answered, That he could give them no orders; but that the general might give orders for so doing, for there was nobody to obstruct them.

IX. *John Yeltes*, merchant, and late one of the bailies of Edinburgh, depones, That, upon the afternoon of Monday the 16th September 1745, as there was a great stir in the town, upon account of the dragoons going eastward in great haste, the deponent and the pannel went to see the West-port shut; which was accordingly done; and a party of the city-guard and trained-bands were posted there. That the deponent went from the West-port to Bristow-port, and found it shut; and afterwards went to Goldsmiths'-hall. As he came from Bristow-port to Goldsmiths'-hall, the people on the streets were calling after him, Why would the magistrates pretend to defend the city, when the dragoons had gone eastward? He found in the Goldsmiths'-hall the pannel, several of the magistrates and council, and a great crowd of the inhabitants, who were crying out against any attempt to defend the town, since the dragoons had gone away and left

them. That the crowd and press was so great there, that it was resolved to remove to the New Church Isle; and, when they came there, the deponent observed a very great crowd of the inhabitants and burghesses; to whom the pannel addressed himself, saying, That, as hitherto they had made a noble stand for the defence of the city, he hoped they would not now give it up: and, as for himself, he should be the first man that would mount the walls, in case of danger. That, nevertheless, the deponent did not observe, that the pannel's words made any great impression upon the audience; for the generality of them continued to declare their sentiments against defending the town; and a few only spoke to the contrary. And being interrogate, If the deponent was acquainted with all, or a great many of the people he saw there? says, That he was not acquainted with them all; but that he knew a great many of them, whom he always looked upon as people well-affected; and some of them were people of good credit and substance in the city, and others of them not. Depones, That he knew there were two deputations sent to the camp of the rebels; and he himself was one of the deputies; and that the great scope of the deputations was, to gain time, among other things, with a view of consulting with the inhabitants, what was proper to be done. That, as he returned with the first deputation, he met with some one or other, whose name he does not remember, who told him, That bailie Mansfield had been dispatched after him, upon an information laid before the pannel and magistrates, by Mr. Grosset, That sir John Cope, in all appearance, would very soon land; and that bailie Mansfield, if he had overtaken the deputies, was to have stopped them. However coming too late, the deputies returned with an answer; wherein, among other things, there was this condition, That the Pretender's son was to be acknowledged as Prince Regent; and, when this condition was mentioned, the pannel declared, That it was such a condition as he neither would nor could submit to. And depones, That, in his opinion, no man in life could do more for the defence of the city than the pannel did.

X. *Hugh Hathorn*, merchant, and late dean of guild of Edinburgh, a witness formerly adduced in this cause for the pursuer, and now adduced and examined for the pannel, depones, That, after the pannel's return from the New Church Isle to the Goldsmiths'-hall, in the afternoon of Monday the 16th of September, the letter from the Pretender's son, being the first in the list of writings subjoined to the criminal letters, was read publicly in the said Goldsmiths'-hall: and as it was now generally thought, there was little hopes of defending the town, after the volunteers had delivered up their arms; so there was little said there about it. Depones, That, about the same time, a message was brought to the pannel by Robert Griffith, desiring an order

from the pannel for nailing up the cannon that were mounted on the town-walls: to which the pannel answered, That he might nail them up if he pleased; and a town-officer should be sent with him, to shew him where they were. Depones, That, on the evening of the said 16th of September, after Mr. Grosset had brought advice of sir John Cope's being seen off Dunbar, he and provost Drummond went away from Goldsmiths'-hall, in order, as they said, to bring back the dragoons; but they did not return. Depones, That the two deputations that were sent out to the camp of the rebels, were, in the deponent's apprehension, intended in order to procure a delay, and to gain time to put the people in a better way, who were then in a great hurry and confusion. And further depones, That the pannel's subscription for maintaining the Edinburgh regiment was 20*l*. per month; and the deponent does not know that any person subscribed so much.

XI. *Mr. Robert Pringle*, advocate, depones, That, upon Sunday the 15th of September 1745, he had been all morning with the volunteers in the College-yard, till about ten or eleven forenoon, after the churches were convened; and then they separated: and the deponent and bailie Stewart came up the high-street, where they met dean of guild Allan; who informed them of a measure that had been resolved on, That 250 volunteers, with the town-guard, and some other troops, should march out with the dragoons, to support them. That bailie Stewart and the deponent were pretty much surprised with the measure, believing that the volunteers were not quite fit for such service; and supposing that the gentlemen who had concerted that measure were at gen. Guest's lodging, bailie Stewart and the deponent resolved to go down there, and lay their difficulties before them. That, in the Cannon-gate, they met the pannel and provost Drummond coming up in a coach together; and they stopped the coach upon seeing the deponent and bailie Stewart: and very soon the intended measure was spoken of; and bailie Stewart and the deponent began to tell them their difficulties; and provost Drummond said, "Gentlemen, for God's sake! do not spoil a good measure," and desired them to come into the coach; which they did; and persisted in representing the difficulties in executing that design; and the pannel said, "Gentlemen, this is no measure or proposal of mine, but proceeded from a voluntary offer of provost Drummond's, which, he said, would be readily agreed to," or words to that purpose: and this he repeated two or three times in their way coming up to town.

XII. *Walter Scot*, merchant in Leith, depones, That, about two days before the rebels entered the city of Edinburgh, there came a person to the deponent at Leith, with a letter from the pannel, to be sent on board the man of war lying in the road, and desired that the

deponent would forward it. That it was a sealed letter : but the bearer of it told the deponent, That the purport of it was to get gunners to serve the cannon on the town-wall. Depones, That the deponent forwarded the letter, as he was desired ; and the same person who brought it to him, came to him afterwards, and told him, he had got an answer to it ; which, the deponent thinks, was addressed to the pannel. Depones, That, after the return of the foresaid letter, a second message came to the deponent, from the pannel, desiring, that a search might be made in Leith for gunners to serve the said cannon. That such a search was made, but no gunners found, except one Macgill, commander of a custom-house-boat ; and he was sent up to town.

XIII. *William Henderson*, writer, a witness formerly adduced in this cause for the pursuer, and now adduced and examined for the pannel, depones, That, upon Sunday the 15th of September 1745, the pannel concurred with lord Somerville, in granting a press-warrant for pressing men and carts, to carry materials for repairing the city-walls. Depones, That the 2d week of the said month of September, the pannel granted a warrant for searching, seizing, and carrying into the town, all such arms and ladders as should be found in the suburbs adjoining to the town. Depones, that, on Sunday morning the 15th of September, the deponent was ordered by the pannel, to go to the city-guard, and get 24 men of the guard-soldiers and Edinburgh regiment, to assist Baillie Bryden in mounting the cannon on the city-walls. Depones, That, upon Sunday the 15th of September, the pannel, at the desire of gen. Guest, upon being advised by him, that 250 volunteers had agreed to go out with the dragoons to Corstorphin, to sustain them, ordered out the whole men of the city-guard, and 50 men of the Edinburgh regiment, on the same service. That, at two o'clock afternoon, the deponent heard Mr. Forrest and baillie Mansfield report to the Provost, That they had delivered his message to gen. Guest, who said, He was surprised that the volunteers had not marched out with the dragoons ; and, had he known that they would not, he should not have ordered Hamilton's regiment to decamp from Leith to Corstorphin, but would have ordered Gardiner's to march from Corstorphin to the links of Leith. Upon which the pannel said, "The blame shall not lie at my door ;" and immediately sent the deponent, with orders for the city-guard, and the 50 of the Edinburgh regiment, instantly to join the dragoons, and to take their orders from the commanding officer of the dragoons. That the deponent immediately went out, and found the city-guard and Edinburgh regiment in a field betwixt the Colt-bridge and Bruce-hill, with their arms grounded ; and the deponent told them the orders he had from the pannel. Depones, That capt. Dalzell then told the deponent, That a serjeant and 16 men had been left

at the court of guard ; and that, if any thing should happen, it would be proper that they should be sent after them : and, upon the deponent's reporting this to the pannel, he immediately ordered the serjeant and 16 men to follow their corps ; and the guard was supplied with 28 constables. That, at the deponent's return from the Colt-bridge, which was about five at night, he found the pannel in the Goldsmiths'-hall. That, betwixt seven and eight, the deponent called at Lord Justice Clerk's, and was there told, the pannel was in that house. That, betwixt nine and ten, he sent for the deponent to Mrs. Clarke's, to write out the orders for the several guards. That from thence the pannel went to Goldsmiths'-hall, and, after twelve at night, went the grand round. Depones, That, upon Monday about ten o'clock, a message came to the Provost, signifying, that the dragoons wanted provisions. Upon which the pannel immediately sent for Mr. Steedman vintner, and ordered him forthwith to provide as much beef and cheese as should be necessary for them. That, about eleven o'clock, col. Clayton came to the pannel, complaining, that no victuals had been sent them. Upon which the pannel immediately signed press-warrants, for impressing carts to carry out provisions, and to go to the flesh-market and cheesemongers' shops, and to take as much cheese and beef as was necessary, and get the beef boiled in several taverns ; and recommended it to the deponent to see these orders executed : which the deponent accordingly did ; and baillie Gavin Hamilton went along with him. Depones, That, after Mr. Gross had, on Monday evening, brought the news of sir John Cope's being seen off Dunbar, and, as the deponent thinks, about seven o'clock of that evening, the pannel sent the deponent to the guard at the Netherbow port, which was then a serjeant's guard, part of the city-guard, with orders to allow nobody to go out or come in at the port. That the deponent went accordingly, and delivered his orders to the serjeant of the guard, whose name was Riddel.

XIV. *George Lauder*, surgeon in Edinburgh, depones, That on Monday evening the 16th September 1745, about seven or eight of the clock at night, (he is sure it was not then quite dark,) the Provost, and a good many of the town-council, being then convened in the council-chamber, the Provost, now pannel, said to them, Gentlemen, I think it would be proper to take advice of the officers of the castle, or to let the officers of the castle know the situation we are in by the letter we have received from the rebels' camp, threatening military execution in case we should put out of the way any of our arms or military stores, and to see if they shall think proper to do any thing. Upon which one in the company said, that the deponent would be a proper person to be sent with such a message to general Preston, because of his relation to him. Upon which the pannel directed the deponent to go to the castle, and

acquaint generals Preston or Guest of the situation the Provost and magistrates were in, in respect of the said threatening letter, on account whereof they durst do nothing themselves with the arms or military stores; and to see whether these generals would think proper to do any thing in it. That, when this message was proposed, and agreed to, there were present in the council-chamber, besides the pannel and the deponent, Mr. Treasurer Forrest, as the deponent thinks, and Mr. Orrock and several other members of the council, whose names the deponent cannot recollect, and Mr. William Forbes one of the principal clerks, and Mr. Lindsay depute clerk; and the message was proposed, and agreed to openly, and above-board. That the deponent went immediately up to the castle; and, in the way, passed ensign Robertson, and a party of the castle-soldiers, standing a little above the Weigh-house. That, when he came to the castle, the deponent called first at general Preston, but was told, that he was gone to bed; and from thence he went to general Guest, and began to deliver him his message from the provost and council, of the hard situation they were in, by reason of the foresaid threatening letter, in case they should put out of the way any of their arms or military stores; and then the general cut him short, and said, What then? Do you intend to deliver up your arms to the rebels? No, general, answered the deponent; had that been our intention, I had not come here; but I am sent to acquaint you of the terror the inhabitants are in; and that we dare not do any thing ourselves, for fear of military execution: and therefore, if any thing occurs to you, you may do it; or words to that purpose. The general answered, And what would you have me to do? Will your Provost give me a written order to send a party for the arms? No, replied the deponent; that is what neither he nor the council can do; for that would be constructed the same thing as if they did it themselves. That the general appeared to be in a passion, and said, that is like the rest of your Provost's conduct; I will send no party, unless he send me a written order. And then Robert Griffith came in, and told the general, that the party with ensign Robertson were in the streets, waiting his orders. Then, said he, recall the party, for the Provost will give me no written order; and, unless he give me one, I will send no party. Depones, That he now also recollects another expression he had to the general, to wit, That though we dare give you no written order; yet, if you will send a party, I don't believe that any of those who are possessed of the arms will refuse to deliver them. That the deponent returned from the castle to the council-chamber, and reported to the pannel, and the other persons present, openly, and above-board, the whole that had passed betwixt general Guest and him; and remembers, that the pannel said, I hope you took care to hint to the general, that he might send a party if he had a mind; or words to that purpose.

And further depones, That Mr. Griffith first went away from the general, and the deponent immediately followed him; and, just as the deponent was coming away, the general said, What do you intend to do with your cannon? The deponent answered, "I fear, general, they must run the same fate with the rest." And the general replied, I don't believe they are of much use. And, being interrogate by the pursuer, depones, That the matters above deponed upon, happened, in point of time, before the message that Mr. Groset and Mr. Coult were sent with to the castle. And being farther interrogate, depones, he does not remember, whether there was any conversation in the council afterwards, when Mr. Groset and provost Drummond were there, upon the subject of the city-arms.

XV. *Archibald Stewart*, merchant in Edinburgh, depones, That he was praeses of the society of constables in the year 1745. That, on Sunday the 15th September, in the evening, the pannel sent the deponent, with a signed order addressed to Mr. Lyon store-keeper of the castle, for matches for the use of the cannon mounted on the city-walls; by virtue of which he received from him two coils of matches, for which he granted his receipt on the back of the order; which was left in Mr. Lyon's hands; which coils he forthwith brought down, and delivered into the Goldsmiths'-hall. That a very little while after this, by virtue of another signed order from the pannel, he searched a waste house in the Lawn-market, belonging to one Mr. Nerve, for arms and treasonable papers, which were suspected to be in it; but which, after a careful search, was found to be a misinformation. That, upon Monday afternoon, the 16th September, about three o'clock, he attended the pannel from the head of Forrester's Wynd to the West-port; at which place he the pannel visited the barricadoes; and desired the deponent to get up upon the town-wall, to look-out for one hundred dragoons, which he expected in town, for the defence of the city: which accordingly the deponent did; and remained there for about a quarter of an hour; and when he came down, desired one of the captains of the guard to send up two of his men to keep the same look-out, that the ports might be readily opened when the dragoons appeared; and thereafter attended the pannel in his return from the West-port, from whence he intended to go to Bristow-port. but, in his way, he was accosted by Mr. Thomas Dundas younger of Lethem; who desired to know of the pannel, if he intended to persist in the defence of the city? and said, That he did not ask this out of a vain curiosity, but at the desire of several substantial inhabitants of the city, whose lives and fortunes were at stake, and who, as well as himself, would take their measures according to his resolution. To which the pannel replied, "You know, Mr. Dundas, that at the desire of the principal inhabitants of this city, I wrote to London for arms to be put in

the hands of the citizens for the defence of the city; with what grace then can I, without striking a stroke, desist from defending it? No, Sir; I am determined I will not; and will take that place on the town-walls which I possess at the council-table." Soon after which the pannel came up to town.

Then the pannel declared, that as he was of opinion he had fully proved his Defences, he would not trouble the Court with any further proof.

Saturday 31st October 1747, betwixt five and six o'clock in the morning. "The Lords Commissioners of Justiciary ordain the Assize immediately to inclose in this place, and to return their Verdict against Monday next, at ten o'clock forenoon, in this court-house; and ordain the hail fifteen assizers to be then present, each under the pain of law, and the pannel also to be present said time, under the pain of law."

CURIA JUSTICIARIA, S. D. N. Regis, tenta in nova Sessionis Domo Burgi de Edinburgh, secundo Die Mensis Novembris 1747, per honorabiles Viros Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, Carolum Areskine de Tinwald, et Hugonem Dalrymple de Drummorie, Commissionarios Justiciarum dicti S. D. N. Regis.—(Lord Strichen, Præses.)

Curia legitimè affirmata.

Intran'

Archibald Stewart of the city of Edinburgh, merchant, and late lord provost of the said city, pannel, indicted and accused as in the former sederunt.

The persons who passed upon the assize of the pannel returned their Verdict, in presence of the said Lords; whereof the tenor follows, viz.

"At Edinburgh, the thirty-first day of October 1747 years, the assize having inclosed, did make choice of sir Alexander Nisbet to be their chancellor, and John Nisbet to be their clerk; and having considered the criminal libel, pursued at the instance of William Grant of Prestongrange, esq. his majesty's advocate, for his majesty's interest, against Archibald Stewart of the city of Edinburgh, merchant, and late lord provost of the said city, pannel, with the Lords Commissioners of Justiciary their interlocutor thereon, and writs produced, and depositions of the witnesses adduced for proving thereof, with the proof adduced for the pannel's exculpation: they, nemine contradicente, find the pannel Not Guilty. In witness whereof, their said chancellor and clerk have, in their names, subscribed these presents, place and date foresaid.

(Signed,)

"ALEX. NISBET, Ch.

"JO. NISBET, Clk."

"The Lords Commissioners of Justiciary, in respect of the foregoing Verdict of Assize,

assolzie the said Archibald Stewart simpliciter, and dismiss him from the bar.

(Signed,) "ALEX. FRASER, I. P. D."

"The Lords taking into consideration, that the fifteen assizers, who had passed upon the trial of Archibald Stewart, esq. late lord provost of Edinburgh,* had undergone a great fatigue, by no less attendance than ninety-four hours; and being of opinion, that, on this account, they should be excused from being summoned as assizers to pass upon trials before this court for some time to come; they therefore recommend to, and appoint the clerks of court, that, when the judges make up lists of assize, they put them in mind not to insert any of the said fifteen their names, in any roll or list of assize for the space of five years from the date of these presents.

(Signed,) "ALEX. FRASER, I. P. D."

Extracted from the Books of Adjournal of the High Court of Justiciary, by me John Davidson, principal clerk of the said court.

(Signed,) JO. DAVIDSON, Clerk.

In a Collection, which I have, of Jacobite Publications, of which some appear to have been printed in the year 1745 and others in the space of a few years afterwards, is, "A Poem composed the second of November 1747, the day the honourable Archibald Stuart, esq. was assolizied from his second Trial."

Mr. Hume lays it down (Comment. Trial for Crimes, vol. 2, chap. 16, p. 246), that all adjournment of the diet after the assize are sworn is forbidden, "because in consequence of such a dispersion the jurymen would return into a state of free intercourse with the world, and be exposed, severally, not only to the solicitations of those connected with the parties, but to the contagion also of all the rumours, opinions, and surmises which may be abroad concerning the fact, or the evidence and incidents in the trial. Be it therefore attended with ever so great a disadvantage to the prosecutor, still after allowing the trial to proceed this length, he must be content to let his charge take its fate with this assize, and on this libel, and with such evidence as he can command at this time." And afterwards (p. 249) having noticed that a "reason which may sometimes be urged for an adjournment, is that which arises from the great compass of the case, and extraordinary length of the proof; if it be such as the assize cannot without difficulty dispatch in a single sitting," he proceeds: "But as cases of this description are very rare, and as any such indulgence is plainly of bad example, and is founded in considerations of convenience rather than of absolute necessity; so it will never be ventured on without the consent of the pannel, and indeed should not easily be al-

* Nota, The jury sat till five o'clock Saturday evening.

lowed under the safeguard even of that condition." He also mentions, that this case of Provost Stewart is the only instance of such a proceeding with which he has met, and he notices the special circumstances (see p. 1011, 1012), under which the adjournment here took place. See, also, as to the practice in England, the Cases of Hardy and Horne Tooke, A. D. 1794, at the Old Bailey; and of Stone, at the bar of the court of King's-bench, A. D. 1796.

522. The Trials of WILLIAM JACKSON, WILLIAM CARTER, BENJAMIN TAPNER, JOHN COBBY, JOHN HAMMOND, RICHARD MILLS, senior, and RICHARD MILLS, junior, his Son, for the Murder of Wm. Gally and Daniel Chater: being the whole Proceedings on the Special Commissions of Oyer and Terminer and Gaol Delivery, for the County of Sussex, held at Chichester, the 16th, 17th, and 18th Days of January, 1748-9, before the Hon. Mr. Justice Foster, Mr. Baron Clive, and Mr. Justice Birch: 22 GEORGE II. A. D. 1749.

ON Monday the 16th of January, 1748-9, the Commission was opened, and the Commissioners' names called over, of whom were present, his grace the Duke of Richmond, the honourable Mr. Justice Foster, Mr. Baron Clive, Mr. Justice Birch; sir Richard Nill, sir Cecil Bishop, sir Hutchins Williams, barts.; John Butler, Robert Bull, esqrs.

The GRAND JURY.—Sir John Miller, bart. Foreman; sir Mathew Fetherstonhaugh, bart. sir Thomas Ridge, kat.; John Page, George Bramstone, William Battine, John Wicker, Edward Tredcroft, William Wicker, Samuel Blunt, William Pool, Peckham Williams, Thomas Bettesworth Bilson, Thomas Phipps, William Mitford, James Goble, John Cheal, William Leeves, Richard Nash, Thomas Fowler, William Peckham, Waller Bartlett, John Holliet, esqrs.; Francis Peachey, John Laker, William Peachey, John Pay, gents.

Being sworn of the Grand Jury,

Mr. Justice Foster spoke to them as follows:

Gentlemen of the Grand Inquest; It must certainly give great satisfaction to every man, who has a due concern for the peace of the kingdom, and the honour of his majesty's government, to see so numerous an appearance of persons of great rank and fortune attending the present service. For without a vigorous, steady, and impartial administration of justice, the ends of government will be totally defeated.

And what are the ends of government? they undoubtedly are, the welfare of the whole community, and the happiness of every single man in it; as far as the happiness of individuals is consistent with the welfare of the whole.

These are the great ends of government. And it is very certain they cannot be obtained without a due execution of the law upon offenders of all kinds.

And it is no inconsiderable instance of the wisdom of our law, that the opportunities of bringing offenders to justice are as frequent, as the nature of the case, in the ordinary course of things, seems to require. Justice is, as it were, brought home to every man's door twice in the year, at the stated returns of the circuits.

By this measure, two very wise and salutary purposes are at once served. The prosecution is ordinarily commenced and finished while things are recent, while facts and circumstances are fresh in memory, and while witnesses may be presumed to remain under a proper impression. And, on the other hand, the person who is the object of the prosecution, hath an early opportunity given to him of clearing up his innocence, if it shall happen to be his case.

It were to be wished, that these stated seasons had been at all times found sufficient to satisfy the demands of public justice. But the history of former times informs us, that they have not; and our own experience convinces us, that they are not at present sufficient for that purpose.

For what has been the case of this, and of some of the neighbouring counties for many, too many, years past? Dangerous confederacies have been formed, for very unwarrantable, very wicked purposes; for robbing the public of that revenue which is absolutely necessary to its support; and for defeating the fair trader in his just expectations of profit. These, to mention no more, are the necessary unavoidable consequences of the practice, which now goes under the general name of smuggling.

And however persons may palliate the matter to themselves or others, I wish every man who hath been directly or indirectly concerned in this practice, would lay his hand on his heart, and put this question to himself, wherein lies

the real difference, (I speak now of a difference in *foro conscientie*) wherein lies the real difference, between this sort of robbery, and the crime which usually goes under that denomination?

But this is not all; this wicked practice hath been supported by an armed force: by numbers of dissolute people assembled together, and acting in open day-light; in defiance of all the law, and all the justice of their country; and to the terror of his majesty's peaceable subjects.

And the mischief has not ended here. In some late instances, deliberate murders, attended with circumstances of great aggravation, have been committed in consequence, as it is to be feared, of these combinations.

These things loudly call for the animadversion of the public. They have been humbly represented to his majesty. And his majesty, out of his royal concern for the welfare of his people, the ruling principle which guides and animates his whole conduct, hath been pleased to intrust us, with his special commissions of Oyer and Terminer and gaol delivery for this county.

Our commissions do not extend to all the crimes which are cognizable under the general commissions which are executed in the circuit. They are confined to the offences of murder, manslaughter, and other felonies, and to the accessories to those offences: but as far as they do extend, they are just of the same nature as the circuit commissions. The same law, the same method of trial, and the same rules of evidence, are to take place in these as do in those.

Gentlemen, I shall have no occasion to enter into the several distinctions between the offences of murder, and what we commonly call manslaughter; because those distinctions are grounded on circumstances, which possibly may have no place in your present enquiry.

It is sufficient to say, that wherever it appears that the fact was committed with any degree of deliberation, and especially where it is attended with circumstances of cruelty, the usual distinctions between murder and manslaughter can never take place. The fact is, in the eye of the law, wilful murder of malice prepense.* And it involves every person concerned, as well those who are barely present, aiding and abetting, as those who actually commit the fact, in the same degree of guilt.

For where numbers of people engage in any felonious design, either for murder, robbery, or any other felony, every person so engaged, and present, aiding and abetting the fact, is considered as a principal in the felony. And the reason the law goes upon is this, that the presence of every one of the accomplices gives countenance, encouragement, and security to all the rest. And consequently the fact is considered in the eye of the law, and of sound rea-

son too, as the act of the whole party, though it be perpetrated perhaps by the hands of one. He is considered as the instrument by which the others act.

And when we say, that the presence of a person at the commission of a felony, will involve him in the guilt of the rest, we must not confine ourselves to a strict, actual presence, such a presence as would make him an eye or an ear witness of what passes.

For an accomplice may be involved in the guilt of the rest, though he may happen to be so far distant from the scene of action, as to be utterly out of sight or hearing of what passes.

For instance, If several persons agree to commit a murder or other felony, and each man takes his part: some are appointed to commit the fact, others to watch at a distance, to prevent a surprize, or to favour the escape of those who are more immediately engaged; the law says, that if the felony be committed, it is the act of all of them. For each man operated in his station towards the commission of it, at one and the same instant.

And so much doth the law abhor combinations of this kind, especially where innocent blood is shed, that a man may, in judgment of law, be involved in the guilt of murder, when possibly his heart abhorred the thoughts of it.

For if numbers of people assemble in prosecution of any unlawful design, with a resolution to stand by each other against all opposers, and a murder is committed by one of the party in prosecution of that design, every man so engaged at the time of the murder, is, in the eye of the law, equally guilty with him that gave the stroke.

Many cases might be put which come under this rule. I will confine myself to a few which the present solemnity naturally suggests.

For instance, numbers of people assemble for the purpose of running uncustomed goods, or for any of the purposes which now go under the general term of smuggling, with a resolution to resist all opposers (and the riding with fire-arms and other offensive weapons is certainly an evidence of that resolution), numbers of people, I say, assemble in this manner, and for this purpose. They are met by the officers of the revenue: one of the party, in prosecution of this unlawful design, fires on the king's officer, and kills him or any of his assistants: the whole party is, in the eye of the law, guilty of murder, though their original intention went no farther than smuggling. For that intention being unlawful, the killing, in prosecution of that intent, is murder. And every man, engaged in it, partakes of the guilt. The act of one, in prosecution of their common engagement, is considered as the act of all.

I will go one step further, the party assembled in the manner and for the purposes I have mentioned, is met by the king's officers, and an affray happens between them. During the affray one of the party fires at the king's

* See Leach's Hawkins's Pleas of the Crown, book 1, c. 31, s. 19.

officers, but misses his aim and kills one of his own party, perhaps his nearest relation or bosom-friend (if people of that character are capable of true friendship), this is murder in him, and in the whole party too. For if a man upon malice against another strikes at him, and by accident kills a third person, the law, as it were, transfers the circumstance of malice from him that was aimed at, to him that received the blow and died by it. And consequently, in the case I have just put, the person who discharged the gun being guilty of murder, all his accomplices are involved in his guilt; because the gun was discharged in prosecution of their common engagement, and it is therefore considered as the act of the whole party.

What I have hitherto said regards those who are present in the sense I have mentioned, and abetting the fact at the time of the commission of it. But there are others who may be involved in the same guilt, I mean the accessaries before the fact.

These are all people who, by advice, persuasion or any other means, procure the fact to be done, but cannot be said, in any sense, to be present at the actual perpetration of it.*

These persons are involved in the guilt, and liable in the case of wilful murder, to the same punishment as the principal offenders are.

I am very sensible, gentlemen, that I have been something longer than I needed to have been, if I had spoken barely for your information: But in this place, and upon this occasion, I thought it not improper to enlarge on some points, that people may see, and consider in time, the infinite hazard they run, by engaging in the wicked combinations I have mentioned; and how suddenly and fatally they may, being so engaged, be involved in the guilt of murder itself, while perhaps their principal view might fall very far short of that crime.

[After which the Bills being delivered to the Grand Jury, the Court adjourned.]

Tuesday, January 17, 1749.

The Grand Jury returned the Bills found into Court, upon which Benjamin Tapner, John Cobby, John Hammond, William Jackson, Richard Mills the elder, Richard Mills the younger, and William Carter, were set to the bar, and arraigned upon an indictment for the murder of Daniel Chater; the three first named as principals in the murder, and the four last as accessaries before the fact.

The Indictment sets forth in substance, That Benjamin Tapner, John Cobby, and John Hammond, together with Thomas Stringer and Daniel Perryer, not yet taken, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, upon the 19th day of February, in the 21st year of his present majesty's reign, with force and arms at the parish of Harting, in the county of Sussex, in and upon one Daniel

Chater, being then and there in the peace of God and his said majesty, feloniously, wilfully, and out of their malice aforethought, did make an assault; and that he the said Benjamin Tapner, a certain cord or rope made of hemp, of the value of sixpence, which he the said Benjamin Tapner had then and there in his hands, about the neck of him the said Daniel Chater then and there with force and arms, feloniously, wilfully, and out of his malice aforethought, did put, bind, and fasten; and that he the said Benjamin Tapner, with the rope aforesaid by him, about the neck of the said Chater, so put, bound, and fastened as aforesaid, him the said Chater then and there with force and arms, feloniously, wilfully, and out of his malice aforethought, did choke and strangle, of which said choking and strangling of him the said Chater, in manner aforesaid, he the said Chater did then and there instantly die. And that they the said John Cobby, John Hammond, &c. at the time of the felony and murder aforesaid, by him the said Benjamin Tapner, so feloniously, wilfully, and out of his malice aforethought, done, perpetrated, and committed, as aforesaid, them and there feloniously, wilfully, and out of their malice aforethought, were present, aiding, abetting, comforting, assisting, and maintaining the said Benjamin Tapner, the said Daniel Chater in manner and form aforesaid, feloniously, wilfully, and out of his malice aforethought, to kill and murder. And so that the said Benjamin Tapner, John Cobby, John Hammond, Stringer and Perryer, the said Daniel Chater in manner and form aforesaid, then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, did kill and murder, against his majesty's peace, his crown and dignity. Further sets forth, That Richard Mills the elder, Richard Mills the younger, William Jackson, and William Carter, together with John Mills, Thomas Willis, and Edmund Richards, not yet taken, before the felony and murder aforesaid, by them the said Benjamin Tapner, John Cobby, John Hammond, Stringer and Perryer, in manner and form aforesaid, feloniously, wilfully, and out of their malice aforethought, done, perpetrated, and committed, (to wit) upon the said 19th day of February, in the 21st year aforesaid, at the parish of Harting aforesaid, in the county of Sussex aforesaid, them the said Benjamin Tapner, John Cobby, John Hammond, Stringer and Perryer, the felony and murder aforesaid, in manner and form aforesaid, feloniously, wilfully, maliciously, and out of their malice aforethought to do, perpetrate, and commit, feloniously, wilfully, and out of their malice aforethought, did incite, move, instigate, stir up, counsel, persuade, and procure, against his majesty's peace, his crown and dignity.

[To which Indictment they severally pleaded Not Guilty.]

William Jackson and William Carter were
3 Z

* See Mac Daniel's Case, A. D. 1755, post.
VOL. XVIII.

also arraigned upon another indictment, as principals in the murder of William Gally, otherwise called William Galley.

The Indictment sets forth in substance, That William Jackson and William Carter, (together with Samuel Downer, alias Heward, alias Little Sams Edmund Richards and Henry Sheerman, alias Little Harry, not yet taken), not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, upon the 15th of February, in the 21st year of his present majesty's reign, with force and arms, at Rowland's Castle in the county of Southampton, in and upon one William Gally, otherwise called William Galley, being then and there in the peace of God and his said majesty, feloniously, wilfully, and out of their malice aforethought, did make an assault, and him the said William Gally, upon the back of a certain horse, then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, did put and set, and the legs of him the said William Gally, being so put and set upon the back of the said horse as aforesaid, with a certain rope or cord made of hemp, under the belly of the said horse, then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, did bind, tie, and fasten; and him the said William Gally, being so put and set upon horseback as aforesaid, with his legs so bound, tied, and fastened under the horse's belly as aforesaid, with certain large whips, which they had then and there in their right hands, in and upon the head, face, neck, shoulders, arms, back, belly, sides, and several other parts of the body of him the said William Gally, then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, for the space of one mile, did whip, lash, beat, and strike; by reason whereof, the said William Gally was then and there very much wounded, bruised, and hurt; and not being able to endure or bear the misery, pain, and anguish, occasioned by his having been so whipped, lashed, beat, and struck as aforesaid; and by his being so wounded, bruised, and hurt as aforesaid, then and there dropped down the left side of the said horse, on which he then and there rode, with his head under the horse's belly, and his legs and feet across the saddle upon the back of the said

upon which they the said Jackson, Richards, and Sheerman, then did the legs of the said William Gally, in and upon then and there with force and wilfully, and out of their malice aforethought, did again put and set, and the said Gally being again so the said horse as last aforesaid, with a certain rope or cord under the belly they then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, did again put and set, and him the said William Gally, being so put and set upon

the said horse as last aforesaid, with his legs so bound, tied, and fastened under the horse's belly, as last aforesaid, with the said whips which they had then and there in their right hands as aforesaid, in and upon the head, face, neck, arms, shoulders, back, belly, sides, and several other parts of the body of him the said William Gally, they then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, for the space of half a mile further, did again whip, lash, beat, and strike; by reason whereof he the said William Gally was then and there much more wounded, bruised, and hurt; and not being able to endure or bear the misery, pain, and anguish, occasioned by his having been so whipped, lashed, beat, and struck, in manner as aforesaid; and by his being so wounded, bruised, and hurt, in manner as aforesaid, did then and there drop a second time from off the said horse, with his head under the horse's belly, and his legs and feet across the saddle. Upon which they, the said Jackson, Carter, Downer, Richards, and Sheerman, then and there again untied the legs of him the said William Gally, and him, in and upon another horse, behind a certain other person, did then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, put and set; and the said William Gally, being so put and set upon horseback, as last aforesaid, with the same whips which they had then and there in their right hands as aforesaid, in and upon the head, face, neck, arms, shoulders, back, belly, sides, and several other parts of the body of the said William Gally, did then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, for the space of two miles further, until they came into the parish of Harting, in the county of Sussex aforesaid, again whip, lash, beat, and strike, by reason whereof the said William Gally was then and there much more wounded, bruised, and hurt; and not being able to endure or bear the misery, pain, and anguish, occasioned by his having been so wounded, bruised, and hurt, in manner as aforesaid, then and there in the parish of Harting aforesaid, got off the said horse; upon which they the said Jackson, Carter, Downer, Richards, and Sheerman, him the said William Gally, in and upon another horse, whereon the said Edmund Richards then and there rode with the belly of him the said William Gally across the pommel of the saddle, on which the said Richards then and there rode, then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, did put and lay; but before they had gone the space of eighty yards further, the said William Gally not being able to bear the motion of the said horse, on which he was so put and laid as last aforesaid, by reason of his having been so whipped, lashed, beat, and struck as aforesaid; and by reason of his being so wounded, bruised, and hurt, in manner as aforesaid, then and there tumbled off the said horse, and fell upon the ground in the common

highway there, by which fall he the said William Gally was then and there much more wounded, bruised, and hurt; whereupon they the said Jackson, Carter, Downer, Richards and Sheerman, him the said William Gally, in and upon another horse by himself, then and there with force and arms, feloniously, wilfully, and out of their malice aforethought, did put and set; but the said Gally not being able to sit upright upon the said last-mentioned horse, he the said Sheerman, otherwise Little Harry, did then and there get up upon the same horse, behind him the said Gally, in order to hold him on; but after they the said Jackson, Carter, Downer, Richards and Sheerman, and the said Gally had rode on a quarter of a mile further together, in manner aforesaid, he the said William Gally, not being able to sit upon the said horse, or ride any further upon the same, through the great misery, pain, and anguish, occasioned by his having been so whipped, lashed, beat, and struck, as aforesaid, and by his being so wounded, bruised, and hurt, in manner as aforesaid, then and there tumbled off the said horse, on which he was so put and set as last aforesaid, and again fell to the ground; and as he so tumbled and fell, the said Henry Sheerman, otherwise Little Harry, who rode behind the said Gally, and upon the same horse with him, in manner aforesaid, then and there with force and arms, feloniously, wilfully, and out of his malice aforethought, gave to him the said Gally a most violent thrust and push; by reason whereof, the said Gally then and there fell, with much more weight and force to the ground, than otherwise he would have done; and was thereby then and there much more wounded, bruised, and hurt. And that by reason of the said binding, tying, and fastening, of him the said William Gally, by them the said Jackson, Carter, Downer, Richards and Sheerman, in manner and form aforesaid; and of the whipping, lashing, beating, and striking, of him the said Gally, by them, in manner and form aforesaid; and of the several wounds, bruises, and hurts, which he the said William Gally received, from such whipping, lashing, beating, and striking, in manner aforesaid, and other wounds, bruises and hurts, which he the said William Gally so received from the several falls, which he so had from off the said several horses, on which he was so by them put, set, and laid, in manner and form aforesaid; and of the said thrust and push, which he the said Henry Sheerman, otherwise Little Harry, so as aforesaid, gave him the said Gally, as he the said Gally so tumbled and fell from off the said horse, as last aforesaid, he the said William Gally, at the parish of Harting aforesaid, in the county of Sussex aforesaid, did instantly die. And further, That they the said William Jackson, William Carter, Samuel Downer, alias Heward, alias Little Sam, Edmund Richards, and Henry Sheerman, alias Little Harry, him the said William Gally, with force and arms, in manner and form aforesaid, feloniously, wil-

fully, and out of their malice aforethought, did kill and murder, against his majesty's peace, his crown and dignity.

PETTY JURY.

John Burnand, foreman, John Hipkin,
William Faulkner, William Hobbs,
Richard North, John Shotter,
William Halsted, Thomas Sturt,
Henry Halsted, William Poe,
John Woods, Christopher Wilson.

The Counsel for the Crown were Mr. Banks, Mr. Smith, Mr. Purcas, Mr. Burrell, and Mr. Steele.

Mr. Justice Foster, before the jury were sworn, acquainted the prisoners they might each of them challenge twenty of the pannel, without shewing cause; but if they challenged more, they must shew a reasonable cause for so doing; and that if they agreed to join in their challenges they might be tried together, but if they did not, they would be tried separately; and left them to act in that behalf, as they should see proper.

The prisoners consulted among themselves, and agreed to join and be tried together. And then the jury being sworn, and charged by the clerk of the arraignments,

Mr. Steele opened the Indictment against the seven prisoners, for the murder of Daniel Chater. After which,

Mr. Banks, the king's counsel, spoke as follows: This is an indictment against the seven prisoners at the bar, for the murder of Daniel Chater. It is against the three first, viz. Benjamin Tapner, John Cobby, and John Hammond, as principals in that murder, by being present, aiding, abetting, and assisting therein; and against Thomas Stringer, and Daniel Perryer, as principals also, and who are not yet apprehended. And it is against the four last prisoners, viz. William Jackson, William Carter, Richard Mills the elder, and Richard Mills the younger, as accessaries before the murder; and also against three others as accessaries before the fact, viz. John Mills, another son of Richard Mills the elder, Thomas Willis, and Edmund Richards, not yet taken and brought to justice.

Although this indictment hath made a distinction between the several prisoners, and divided them into two classes, of principals and accessaries; yet the law makes no distinction in the crime. And in case all the prisoners are guilty of the charge in this indictment, they will be all equally liable to the same judgment and punishment.

In the outset of this trial I shall not enlarge upon the heinousness of murder in general; nor shall I dwell upon those many circumstances of aggravation, attending this murder in particular. When I come to mention those aggravating circumstances of cruelty and barbarity, in the course of this trial, I doubt not but they will have all that effect upon the gentlemen of the jury, which they ought to have;

to awaken and fix your attention to every part of this bloody transaction; and to balance that compassion which you feel for the prisoners, though they felt none for others. The effect I mean these circumstances should and ought to have, is, to clear the way for that justice, which the nation expects and calls for from your determination and verdict.

To comply with this general demand of justice upon the prisoners, his majesty (ever attentive to the good and welfare of the kingdom, the preservation of his subjects, the protection of the innocent, and the punishment of the guilty,) in order to give the prisoners the earliest opportunity of proving their innocence, and of wiping off this foul suspicion of murder they now lie under; or if guilty of a breach of the laws of God and man, that they may suffer the punishment due to their guilt; his majesty has been pleased by a special commission, to appoint this trial to be before their lordships, not less knowing in the laws, than tender and compassionate in the execution thereof.

I cannot here omit taking notice of the unhappy cause of this fatal effect, now under your consideration. Every one here present, will in his own thoughts anticipate my words; and knows, I mean smuggling. Smuggling is not only highly injurious to trade, a violation of the laws, and the disturber of the peace and quiet of all the maritime counties in the kingdom; but it is a nursery of all sorts of vice and wickedness; a temptation to commit offences at first unthought of; an encouragement to perpetrate the blackest of crimes without provocation or remorse; and is in general productive of cruelty, robbery, and murder.

It is greatly to be wished, both for the sake of the smugglers themselves, and for the peace of this county, that the dangerous and armed manner now used of running uncustomed goods, was less known, and less practised here.

It is a melancholy consideration to observe, that the best and wisest measures of government, calculated to put a stop to this growing mischief, have been perverted and abused to the worst of purposes. And what was intended to be a cure to this disorder, has been made the means to increase and heighten the disease.

Every expedient of lenity and mercy was at first made use of, to reclaim this abandoned set of men. His majesty, by repeated proclamations of pardon, invited them to their duty and to their own safety. But instead of laying hold of so gracious an offer, they have set the laws at defiance, have made the execution of justice dangerous in the hands of magistracy, and have become almost a terror to government itself.

The number of the prisoners at the bar, and of others involved in the suspicion of the same guilt, the variety of circumstances attending this whole transaction, the length of time in the completion thereof, and the general expectation of mankind to be informed of every minute circumstance leading and tending to

finish this scene of horror, will necessarily lay me under an obligation of taking up more time, than will be either agreeable to the Court, or to myself.

To avoid confusion in stating such a variety of facts, with the evidence and proofs thereof; and to fix and guide the attention of the gentlemen of the jury to the several particular parts of this bloody tragedy, at last completed in the murder of Chater; I shall divide the facts into four distinct periods of time.

1st, What happened precedent to Chater's coming to a public house, the sign of the White Hart, at Rowland's Castle, in Hampshire, kept by Elizabeth Paine, widow, upon Sunday the 14th of February, 1747-8.

And this period of time will take in the occasion and grounds of the prisoners' wicked malice to the deceased, and the cause and motive to his murder.

2d, What happened after Chater's arrival at the widow Paine's, to the time of his being carried away from thence by some of the prisoners, to the house of Richard Mills the elder, at Trotten in Sussex.

This will disclose a scene of cruelty and barbarity, previous to Chater's murder; and shew how active and instrumental the prisoners Jackson and Carter were therein.

3d, What happened after Chater was brought to the house of Richard Mills the elder, to the time of his murder, upon Wednesday night the 17th of that February.

This will take in that barbarous usage of Chater at Mills's house; a consultation of sixteen smugglers in what manner to dispose of Chater, and their unanimous resolution to murder him; and will shew Tapner, Cobby, and Hammond, to be principals therein; and the other four prisoners to be accessaries.

4th, And last period takes in the discovery of Chater's body in a well, where he was hung, with the proofs that it was the body of Chater.

In the opening of this case, it will be impossible for me to avoid the frequent mention of one William Gally, also suspected to have been murdered; and for whose murder, two of the prisoners, viz. Jackson and Carter, are indicted, and are to be tried upon another indictment.

But the murder of Gally is not the object of your present consideration, nor do I mention his name, either to aggravate this crime, by taking notice of his murder also; nor to inflame the jury against the prisoners at the bar. But I do it for the sake of method, and for the purpose only of laying the whole case before the jury; for the story of Chater's murder cannot be told, without disclosing also what happened to Gally, his companion and fellow-sufferer.

To begin with the first period of time. Some time in September 1747, a large quantity of uncustomed tea had been duly seized by one captain Johnson, out of a smuggling cutter, and by him lodged in the custom-house of Poole, in the county of Dorset.

In the night of the 6th of October following, the custom-house of Poole was broke open by

a numerous and armed gang of smugglers; and the tea which had been seized and there lodged, was by them taken and carried away.

This body of smugglers, in their return from Poole, passed through Fordingbridge, in Hants; where Dimer, one of that company, was seen and known by Chater. Dimer was afterwards taken up, upon suspicion of being one of those who had broke open the custom-house of Poole, and was in custody at Chichester for further examination, and for further proof that he was one of that gang.

And in order to prove the identity of Dimer, and that he was one of that gang, Daniel Chater, a shoemaker at Fordingbridge, (the person murdered) was sent in company with, and under the care of William Gally, a tidewaiter of Southampton, by Mr. Sheerer, collector of the customs there, with a letter to major Battine, a justice of peace for Sussex, and surveyor-general of the customs for that county. Sunday morning, the 14th of February, 1747-8, Gally and Chater set out from Southampton, with Mr. Sheerer's letter, on their journey to major Battine's house, at East-Marden, in the neighbourhood of Chichester.

At the New-inn at Leigh, in Havant parish in Hants, Chater and Gally met with Robert Jenkes, George Austen, and Thomas Austen, and having shewed them the direction of the letter to major Battine, they told them they were going towards Stanstead, where Chater and Gally were informed major Battine then was; and said they would go with them, and shew them the road. Their direct way to Stanstead lay near to Rowland's Castle; but Jenkes and the two Austens carried them to Rowland's Castle, that Sunday about noon; where this cruel plot was first contrived, and in part carried into execution.

The malice conceived by the prisoners against Chater, from what I have already mentioned, appears not to have arisen from any injury or suspicion of injury done by the deceased to the prisoners; but because Chater dared to give information against a smuggler, and to do his duty in assisting to bring a notorious and desperate offender to justice, he was to be treated with the utmost cruelty, his person was to be tortured, and his life at last destroyed. What avail the laws of society, where no man dares to carry them into execution? Where is the protection of liberty and life, if criminals assume to themselves a power of restraining the one, and destroying the other?

Having mentioned the motive of the prisoners to this murder, I shall now open to you (what I proposed in the second period of time) a scene of cruelty and barbarity, tending to the murder of Chater, begun at Rowland's Castle, by the two prisoners Jackson and Carter, in company with others; and from thence continued, until Chater was brought to the house of Richard Mills the elder, at Trotten, upon Monday morning the 15th of February, before it was light.

And here you will observe, how cruelly and wickedly in general the gang assembled at

Rowland's Castle behaved; and in particular how active Jackson and Carter appeared in every step of this fatal conspiracy.

Soon after Chater and Gally, and the three others, had arrived at Rowland's Castle, the widow Paine suspected Chater and Gally intended some mischief against the smugglers; and for that purpose enquired of George Austen who the two strangers were, and what their business was? He privately informed her, they were going to major Battine with a letter. She desired he would either direct the two strangers to go a different way from major Battine's, or would detain them a short time at her house, until she could send for Jackson, Carter, and others. And she immediately sent her son William for the prisoner Jackson; and soon afterwards ordered her other son Edmund to summon the other prisoners, Carter, Edmund Richards, Samuel Heward, Henry Sheerman, William Steel, and John Raiss, who all lived near Rowland's Castle; and accordingly they all came; as also did Jackson's and Carter's wives. They were immediately informed by the widow Paine of what she suspected, and had been informed concerning the two strangers. Jackson and Carter being very desirous of seeing the letter to major Battine, got Chater out of the house, and endeavoured to persuade him to let them see the letter, and to inform them of the errand to major Battine. But upon Gally's coming out to them, and interposing to prevent Chater's making any discovery, they quarrelled with Gally, and beat him to the ground; Gally complained of this ill usage, and said he was the king's officer, and to convince them, shewed his deputation.

Chater and Gally were very uneasy at this treatment, and wanted to be gone; but the gang insisted upon their staying; and in order to secure and get them entirely into their own power, they plied them with strong liquors, and made them drunk, and then carried them into another room to sleep.

During the two hours Chater and Gally slept, the letter was taken out of Chater's pocket; whereby it appeared that Chater was going to give information against Dimer. The secret being thus disclosed to the gang, the next thing to be considered of by the smugglers, was how to save their accomplice Dimer, and to punish Chater and Gally, for daring to give information against him. For that purpose, whilst Chater and Gally were asleep, several consultations were held.

It was first proposed secretly to convey Chater and Gally into France; at that time at war with England.

The second scheme was, for all present to contribute three-pence a week for the maintenance of Chater and Gally, who were to be confined in some private place, and there subsisted until Dimer should be tried. And as Dimer was done unto, so Chater and Gally were to be dealt with.

The third and last proposal was, to murder both.

With a view and intention to execute this last, and the most cruel proposal, Jackson went into the room about seven of that evening, where Chater and Gally lay asleep, and awaked them. They both came out very bloody, and cut in their faces; but by what means, or what Jackson had there done to them, does not appear. They were immediately afterwards forced out of the house by Jackson and Carter; the others present and consenting and assisting: Richards, one of the company, with a cocked pistol in his hand, swore he would shoot any person through the head, who should make the least discovery of what had passed there.

Chater and Gally were put upon one horse; and, to prevent their escape, their legs were tied under the horse's belly; and both their legs tied together; and the horse was led by William Steel. After they had been thus carried about an hundred yards from Rowland's Castle, Jackson cried out to Carter and the company, Lick them, damn them, cut them, slash them, whip them. Upon which they whipped and beat them over their heads, faces, shoulders, and other parts of their bodies, for the space of a mile. With this cruel treatment, they both fell down under the horse's belly, with their heads dragging upon the ground. They were again put upon the horse, and tied as before, and whipped and beat with the like severity along the road for about another mile. And when they cried out through the agony of their pain, pistols were held to their heads, and they were threatened to be shot, if they made the least noise or cry. Being unable to endure this continued and exquisite pain, and to sit on horse-back any longer, they fell a second time to the ground. By this inhuman usage, they were rendered incapable of supporting themselves any longer on horseback. Gally was afterwards carried behind Steel, and Chater behind Heward. The prisoners, Jackson and Carter, with the rest of the company, still continued their merciless treatment of Chater and Gally; but instead of whipping, they now began to beat them on their heads and faces, with the butt end of their whips, loaded with lead. When they came to lady Holt park in Sussex, Gally almost expiring with the torture he had underwent, got down from behind Steel; and it was proposed to throw him alive into a well adjoining to that park; in which well Chater was three days after hanged by the same gang. Gally was then thrown across the pommel of the saddle, and carried before Richards. He was afterwards laid along alone upon a horse, and supported by Jackson, who walked by him; and was at last carried before Sheerman, who supported him by a cord tied round his breast. When they came to a lane called Conduit-lane, in Rogate parish in this county, Gally, in the extremity of anguish, cried out, I shall fall, I shall fall. Upon which Sheerman swore, Damn you, if you will fall, do then; and as Gally was falling he gave him a thrust to the

ground; after which Gally was never seen to move, or heard to speak more.

Jackson, Carter, and the others, in order to prevent a discovery of the murder of Gally, went about one of the clock on the Monday morning to the Red Lion at Rake, in Sussex, a public-house kept by William Scardefield, whither they carried Chater all over blood, and with his eyes almost beat out; and also brought the body of Gally. They obliged Scardefield to shew them a proper place for the burial of Gally; and accordingly he went with Carter, Heward, and Steel, to an old fox earth, on the side of a hill near Raikes, at a place called Harting Combe, where they dug a hole, and buried Gally.

The same morning, and long before it was light, whilst some were employed in the burial of Gally, Jackson and Sheerman carried Chater to the house of Richard Mills the elder, at Trotten.

I am now come to the third period of time; from Chater's arrival at the house of Richard Mills the elder, to his murder upon Wednesday night the 17th of February.

And here it is, that Richard Mills the elder, first appears to be privy, and consenting to the intended murder of Chater. A private house was thought much more proper and safe for the confinement of Chater, than a public-house, at all times open to every man; and therefore Chater was to be removed from Scardefield's. The prisoners and their companions being no strangers to old Mills, but his intimate acquaintance, and confederates in smuggling, where could Chater be so secretly imprisoned, as at the private-house of the elder Mills? And where could he be more securely guarded, than under the roof of one of their own gang? With these hopes and reliance, and in full confidence of the secrecy and assistance of old Mills, Chater was brought to his house by Jackson and Sheerman; when they came there, they told old Mills they had got a prisoner; he must get up, and let them in. Old Mills got up, and received Chater his prisoner; whose face was then a gore of blood, many of his teeth beat out, his eyes swelled, and one almost destroyed. I shall here omit one or two particular circumstances, which the witnesses will give an account of; which shew that old Mills also was void of all tenderness and compassion.

Chater was received by him as a prisoner, and a criminal; and therefore was to be treated as such. Old Mills's house itself, was thought too good a prison for him; and therefore he was soon dragged into a skeeling or out-house, adjoining to the house; wherein lumber and fuel were kept. And though Chater was in so weak and deplorable a condition, as to be scarce able to stand; yet to prevent all chance and possibility of his escape, he was chained by the leg with an iron chain, fastened to a beam of the out-house. He was guarded night and day; sometimes by Sheerman, and sometimes by Heward, who came there that Monday

evening. Thus he continued in chains, until he was loosened for his execution. But lest he should die for want of sustenance, and disappoint their wicked designs; he was to be fed, and just kept alive, until the time and manner of his death was determined. During the whole time of this imprisonment, old Mills was at home, and in his business as usual. He betrayed not the trust reposed in him; he acquainted nobody with what had happened, nor with whom he was intrusted; but, like a gaoler, took care to produce his prisoner for execution.

On Wednesday the 17th of February, there was a general summons of all the smugglers then in the neighbourhood of Scardefield's house, who had been concerned in breaking open the custom-house at Poole, to meet that day at Scardefield's. Upon which notice, all the prisoners (except old Mills) came that day to Scardefield's. And there were also present, John Mills, another son of old Mills, Edmund Richards, Thomas Willis, Thomas Stringer, Daniel Perryer, William Steel and John Raiss, Heward and Sheerman still continuing at old Mills's, and there guarding Chater. It was at this consultation at Scardefield's, unanimously agreed by all present, that Chater should be murdered.

This was a deliberate, serious, and determinate act, of minds wickedly and cruelly disposed, and executed with all the imaginable circumstances of barbarity.

At this meeting Tapner, Cobby, and Hammond were first concerned in, and became privy and consenting to this murder. And there also Richard Mills the younger first became an accessory to this murder: But he was so eager in the pursuit of it, that he particularly advised and recommended it; and said, he would go with them to the execution, but he had no horse. And when he was told, that the old man (meaning Chater) was carried by a steep place in the road to Rake, he said—"If I had been there, I should have called a council of war, and he should have come no farther."

About eight of the clock on that Wednesday evening, all who were present at the consultation at Scardefield's (except Richard Mills the younger, John Mills, and Thomas Willis) went from Scardefield's to the house of old Mills, where they found Chater chained and guarded by Heward and Sheerman.

They told him he must die, and ordered him to say his prayers. And whilst he was upon his knees, at prayers, Cobby kicked him; and Tapner, impatient of Chater's blood, pulled out a large clasp-knife, and swore he would be his butcher, and cut him twice or thrice down the face, and across his eyes and nose. But old Mills, in hopes of avoiding the punishment due to his guilt, by shifting Chater's execution to another place, said,—“Don't murder him here, but carry him somewhere else first.”

He was then loosened from his chains, and was by all the prisoners (except Mills the father and the son), and by all the gang that came

from Scardefield's, carried back to that well, wherein Gally had before been threatened to be thrown alive. Jackson and Carter left the company some small distance before the others came to the well; but described the well to be fenced round with pales, and directed them where to find it; and said, We have done our parts, meaning, we have murdered Gally: and you shall do your parts, meaning, you shall murder Chater.

Tapner, in order to make good what he had before said (and happy had it been for him, had he shewn more regard to his actions and less to his words,) after Chater had been forced over the pales which fenced the well, pulled a rope out of his pocket, put it about Chater's neck, fastened the other end to the pales, and there he hung Chater in the well until he was dead.

But soon after the body was let loose, and had fallen to the bottom of this well, which was dry, one of the accomplices imagined he heard Chater breathe, and that there were still some remains of life in him.

To put an end to a life so miserable and wretched, they threw pales and stones upon him. This was the only act, that had any appearance of mercy and compassion; and it brings to my remembrance the saying of the wisest of men, fully verified in this fatal instance of Chater's murder—"The mercies of the wicked are cruelty."

I am now come to the fourth and last period of time.

And here it is observable, that although Providence had for many months permitted this murder to remain undiscovered, yet it was then disclosed and brought to light, when the appointed time was come, and an opportunity given, to apprehend and bring to justice many of the principal offenders.

Upon the 17th of September last, search was made in pursuance of information given, for the body of Chater. And the body was found with a rope about its neck, covered with pales, stones, and earth, in that well I before mentioned, close by lady Holt park, in a wood called Harrass-wood, belonging to Mr. Carryll.

By the length of time, from February to September, the body was too much emaciated to be known with any certainty. But by his boots, clothes, and belt, there also found, it evidently appeared to be the body of the unfortunate Chater.

I have now opened to you the substance of all the most material facts; and should the proofs support the truth of those facts, no man can doubt the consequence thereof, that Chater was murdered, and that the prisoners were his murderers.

Mr. Smyth, another of the king's counsel, also spoke as follows: May it please your lordships and gentlemen of the jury, I am likewise of counsel against the prisoners at the bar, three of whom are indicted as principals

for the murder of Daniel Chater, the other four as accessories before the fact to that murder.

The crime they are charged with is one of the greatest that can be committed against the laws of God and man, and in this particular case attended with the most aggravating circumstances.

It was not done in the heat of passion, and on provocation, but in cold blood, deliberately, on the fullest consideration, in the most cruel manner, and without any provocation; the occasion being as you have heard, only because he dared to speak the truth, he had seen Dimer passing through Fordingbridge, and had made oath of it before a magistrate, being required so to do.

This prosecution therefore is of the utmost importance to the public justice of the nation, and to the safety and security of every person; not only in this county, but in the kingdom; for if such offenders should escape with impunity, the consequence would be, that no crime could be punished. It would teach highwaymen, housebreakers, and all other criminals, to unite in the manner those men have done, and whoever received injuries from them, would not dare complain, or take any steps towards bringing them to justice, for fear of exposing themselves to the resentment and revenge of their companions.

Our constitution, therefore, which must be supported by a regular administration of justice, and a due execution of our laws, depends in some measure, on bringing such offenders to condign punishment; and it is to be hoped a few examples of this kind will restore the peace and tranquillity of this country.

In shortly stating the facts, I shall endeavour to point out to you the share, which every one of the persons at the bar had in this murder.

In October 1747, the custom-house at Poole was broke open; the smugglers who did it, in their return passed through Fordingbridge, a town in Hampshire, where Chater saw Dimer among them; and having declared so, was obliged to make oath of it before a magistrate; on which information Dimer was taken up and committed to Chichester gaol for further examination; and on the 14th of February, Chater was sent by the collector of Southampton, in company with Gally, with a letter to Mr. Battine, surveyor-general of the customs, in order that Chater might see if the man in Chichester gaol was the same person he saw at Fordingbridge.

These two men having enquired their way at the New-inn at Leith, one Jenkes undertook to direct them, and carried them to the widow Paine's at Rowland's Castle, who saying she feared they were going to do the smugglers some mischief, sent for Carter and Jackson, Steel, Raiss, Richards, Sheerman, and Heward, who having made Chater and Gally drunk, and seen the letter to Mr. Battine, consulted what to do with them. Some proposed to murder them, others to send them prisoners to

France, and others to confine them, till they saw what became of Dimer, and to treat them as he was dealt with.

Carter and Jackson having sent Jenkes away, this poor man and Gally were left absolutely in the power of them and the other smugglers; and indeed into worse hands he could not have fallen; had he been taken prisoner in battle by our enemies, he would have had quarter, and been treated with humanity: had he fallen into the hands of enemies of those nations who give no quarter, his lot would have been immediate death: but as it was his hard fate to fall into the hands of smugglers, he was to have neither quarter or immediate death, but was reserved to suffer the most cruel usage for several days, and afterwards murdered.

These poor wretches, after having been beat and abused at Paine's by Carter and Jackson, and the rest of the gang, were carried away by force, both set on one horse, with their legs tied under the horse's belly, and whipped and beat by direction of Carter and Jackson, till they fell; then were set up again in the same manner, and whipped and beat again, till they fell a second time; and were then set on separate horses, and used in the same manner, till Gally had the good fortune to be delivered by death from their cruelty; after which they carried Chater, who was bloody and mangled with the blows and falls he had received, to Scardefield's, at the Red Lion at Raikes, who observed Jackson's coat and hands to be bloody; and while Carter and the rest buried Gally, Jackson and Sheerman carried Chater to old Mills's in the night, between the 11th and 15th of February, where he was chained by the leg in the skedling, or out-house, till the Wednesday night following, and Sheerman and Heward guarded him.

Imagine to yourselves the condition of this unhappy man, certain to die by their hands, uncertain only as to the time, and the cruel manner of it; suffering for three days and three nights, pain, cold, and hunger; and what was infinitely worse, that terror and anxiety of mind, which one in his situation must continually labour under; he must doubtless envy the condition of his companion Gally, who by an early death was delivered from the misery he then endured.

On Wednesday following, being the 17th of February, all the prisoners at the bar (except old Mills) met at Scardefield's, and there were present also seven more; at which meeting they consulted what to do with Chater; and it was unanimously agreed by all the thirteen then present, to murder Chater; and young Mills, the prisoner at the bar, particularly advised it; and said, if he had a horse he would go with them to do it; and either then, or at another meeting at Scardefield's, when Carter and Jackson said, that as they came along, they brought Chater by a steep place thirty feet deep, young Mills said, If I had been there, I would have called a council of war, and he should have come no further.

This being determined, the prisoners Tapner, Cobby, Hammond, Carter, and Jackson, together with five more of that company, went to old Mills's, where they found Chater chained, and guarded by Sheerman and Heward, and told him he must die; he said he expected no other; Tapner then said he would be his butcher, and taking out a knife, cut him twice across the face; on which old Mills said, Don't murder him here, but take him somewhere else first.

Tapner, Cobby, Hammond, Carter, Jackson, and the rest, who came there together with Sheerman and Heward, then carried him away to murder him; Sheerman, Heward, and Richards, having been concerned in Gally's murder, said, the rest should kill Chater, and therefore went away at Harting; Carter and Jackson having been likewise concerned in Gally's murder, when they came to lady Holt park-gate, turned in there, and left the others; having first told them, the well is a little way off, you can't miss it, 'tis fenced round with pales, to keep the cattle from falling in.

Tapner, Cobby and Hammond, and the rest, went then to the well, where Tapner put a rope about Chater's neck to hang him; and some of the pales being broken down, Chater would have crept through. Tapner would not let him, but made him climb over the pales, weak as he was, and then hanged him in the well about a quarter of an hour, till they thought him dead; then having drawn him up till they could take hold of his legs, they threw him headlong into the well; and fancying they heard him breathe or groan, threw posts and stones in upon him, and went their way.

The terror this act of cruelty had spread through the country stopt every person's mouth, who had it in their power to give any information; so that the body was not found till September last, when it was so putrified and consumed, as not to be known, but by the belt which was about it, and which Chater's wife will prove to be her husband's. If there was any doubt as to the identity of the man, we could shew likewise, that being examined by the smugglers just before he was murdered, he said his name was Daniel Chater.

It appears therefore from this state of the case, that all the prisoners are guilty of the indictment. Tapner was present at the consultation at Scardefield's, and was the person who hanged him. Cobby and Hammond were present at the consultation, helped to carry him to the well, and were present at the murder, and therefore equally guilty with Tapner, as principals. Carter and Jackson took him away by force from Paine's, and by the treatment of him there and on the road, shewed an intention from the first to murder him, though perhaps the particular death he was to suffer, was not then agreed on; they were afterwards present at the consultation at Scardefield's, where it was resolved to murder him, and went almost to the well with him; and when they parted,

VOL. XVIII.

gave those who murdered him particular directions to the well. Young Mills was also at the consultation, and particularly advised and directed the murder, in which he declared he would have joined, if he had a horse. Old Mills though he kept no public-house, and therefore was not obliged to receive guests, receives this man brought in the night, in a bloody and deplorable condition; Chater is chained in his outhouse from Sunday night till Wednesday; yet Mills never discovers it to any person, or uses any means to deliver him, which is a strong evidence of his knowledge and approbation of their design; and when Tapner declared he would be his butcher and cut him, old Mills expresses no disapprobation of the murder, does not dissuade him from it, but desires him not to do it there, but carry him somewhere else first, which shews his approbation of the fact; though to secure himself, as he thought, from punishment, he would have had it committed at some other place.

This, gentlemen, is the fact, which shews, that securing themselves and their companions, was not their principal aim; were it so, they would have murdered this man as soon as they had him in their power; but their motive seems to have been revenge, and a disposition to torture one, who should dare to give any information, which might bring them or their friends into danger.

After hearing the whole evidence, if these men appear innocent, God forbid they should be found guilty; and I would not have the cruel circumstances of the fact incline you to believe any thing we suggest, that is not supported by the strongest proof: but if the fact is proved beyond a possibility of doubt, to be in the manner we have stated, I am sure you will do your duty, and by a just and honest verdict, deliver your country from men so void of humanity.

The following Witnesses were then called for the Crown:

Mr. Milner, collector of the customs at the port of Poole, deposed, That about the 7th of October, 1747, he had advice that the custom-house at Poole was broke open; upon which he hastened thither, and found the outer door burst open, and the other door broke in pieces; that the room wherein some run tea was lodged, was broke open, and all the tea carried away, excepting a little bag, containing about four or five pounds.*

* "The Short-hand Writer having omitted to take the several questions put to the witnesses with their answers in the words they were delivered, that defect cannot now be supplied.—But we having perused the following trials do certify, that the substance of the evidence given by the several witnesses is faithfully taken. And that upon the whole, this account of the proceedings under the commissions is in substance true. M. FOSTER, E. CLIVE, TRO. BIRCH."—Former Edition.

Mr. *Sheerer*, collector of the customs at Southampton, deposed, That in February last he received a letter from the commissioners of the customs, acquainting him, that one John Dimer was committed to Chichester jail, for breaking open the custom-house at Poole, with directions to send the deceased Daniel Chater, who could give some information against Dimer, to Mr. Battine the surveyor general, and to acquaint Mr. Battine with the occasion of his sending Chater; that he accordingly sent Chater with a letter addressed to Mr. Battine, under the care of one William Galley, a tidesman in the port of Southampton; that they set out on Sunday morning the 11th of February last; he could not take upon him to say how Chater was dressed, but he remembered he rode upon a dark brown horse, and had a great-coat on, with another coat under it, and upon the under coat a belt; he could not recollect how Galley was dressed, but remembered that he was mounted on a grey horse.

William Galley, the son of William Galley, deposed, That he remembered his father's setting out upon this journey to Mr. Battine, in February last; that he saw the letter to Mr. Battine the night before his father set out, and saw the directions; he remembered the dress his father had on; it was a blue great-coat, with brass buttons covered with blue, a close-bodied coat, of a light brown colour, lined with blue, with a waistcoat and breeches of the same, and that he rode on a grey horse; he remembered that Daniel Chater set out at the same time with his father, and had on a light surcoat coat, with red breeches and a belt round him, and rode upon a brown horse: that this was the last time he ever saw his father alive, and that he never saw Chater since.

Edward Holton deposed, That on the 14th of February last he saw Daniel Chater and another person, whom he took to be Mr. Galley, at his own house, at Havant, in the county of Hants; he knew Chater very well, and had some conversation with him; that Chater told him he was going to Chichester upon a little business, and then went out to Galley, and brought in a letter, which was directed to William Battine, esq. at East-Marden; upon which he (the witness) told him he was going out of his way; that Galley wished he would direct them the way; that he directed them to go through Stanstead, near Rowland's Castle; and that they said they should be back again the next day.

George Austen deposed, That on Sunday the 14th of February last he saw two men, one mounted upon a brown horse, and the other upon a grey, at the New-inn at Leigh, in the parish of Havant; that they came to the New Inn when he was there, and enquired the way to East-Meon; to which place he was going to direct them, when one of the men, who had a

blue coat on, pulled a letter out of his pocket, which he (the witness) looked at, and seeing it was directed to East-Marden, he told them they were going ten miles out of the way; and that he and his brother Thomas Austen, and his brother-in-law Robert Jenkes, were going part of their road, and would conduct them the best they could; that they went no farther together than to a place called Rowland's Castle, to a public-house which was kept by the widow Paine; the two strangers called for rum at widow Paine's. This was about the middle of the day, or something after. That the widow Paine asked him if he knew these men; or whether they belonged to his company; he told her they were going to Mr. Battine's, and that he was going to show them the way; she then said she thought they were going to do harm to the smugglers, and desired him to set them out of the way, which he refused to do; she then seemed uneasy, and she and her son consulted together; that her son went out, and the prisoner Jackson came in in a little time; that the prisoner Carter, and several more, came thither soon afterwards. He knew none but Jackson and Carter. That Jackson enquired where the two men were bound for; and the man in the light coat answered, they were going to Mr. Battine's, and from thence to Chichester; but Carter was not by at that time; that the two strangers had some rum, and Jackson called for a mug of hot, which was gin and beer mixed, or something of that kind, and to the best of his knowledge they all drank together; he did not see any ill treatment, nor either of the men bloody, whilst he was there; that he went away between one and two, and left the two men there; the widow Paine called him out of doors, and told him his brother Jenkes wanted to speak to him; when he came out, his horse was at the hedge by the back door, and his brother said he wondered why the two men did not go away; upon which he went back again into the house, and his brother was uneasy because he did so; that the widow Paine advised him to go home, and said the two men would be directed the way; he was uneasy at going without them, because he saw so many men come in, and imagined they had a design to do some harm to them; that when he went away, Jackson and Carter were left with the two men, to the best of his knowledge; and Jackson, as well as the widow Paine, persuaded him to go home. He was positive that Jackson and Carter were there, for he knew them very well.

The Court asked Jackson and Carter, if they would ask this witness any questions?

To which they both answered in the negative.

Thomas Austen was then called: deposed, That he was at the New-inn at Leigh on Valentine's day last, with his brother George; he saw two men there who enquired the way to Mr. Battine's; he went from thence with them

to Rowland's Castle; they went to the widow Paine's at that place, and called for a dram of rum; the prisoners were not there at first, but in a little time Jackson came; and soon afterwards the prisoner Carter. That the widow Paine spoke to him at the outer door before either of the prisoners came, and asked him if he knew the two men, and said she was afraid they were come to do the smugglers some mischief, and that she would send for William Jackson; her son went for him, and he soon came, and another little man and his servant; he saw one Joseph Southern there and the prisoner Carter, but Carter did not come so soon as Jackson; he (the witness) stayed there till seven o'clock in the evening, and about that time William Jackson struck one of the men in the face, who to the best of his remembrance had a blue coat on; they all drank pretty freely from one o'clock, and he was drunk and went to sleep, and the two men were fuddled and went to sleep in the little room; that about seven o'clock Jackson went into the room and waked the two men, and when they came out of the room, it was that Jackson struck one of them; after they came out, the two men went away with Jackson and Carter, and one William Steele, and Edmund Richards; he did not remember that they were forced away, and did not see them upon the horses, nor did he ever see them any more; this was between seven and eight o'clock.

Being asked, whether he saw either of the men produce his deputation, or heard any high words?

Said he did not; that he was asleep the best part of the afternoon; and did not see any ill treatment, but that one blow which he had mentioned, and did not observe any blood about them when they went away.

Being cross-examined at the request of the prisoners,

Said, he did not know who the two strangers were, but they were the same persons that his brother George spoke of, and had a letter for Mr. Battine; that one of them had a blue coat on, and rode upon a grey horse, and the other man rode upon a brownish horse; he did not see the direction of the letter, but he heard it read by Robert Jenkes.

Robert Jenkes deposed, That he saw two men upon the 14th of February last at the New-inn at Leigh, one of them upon a blackish horse, the other upon a grey, and dressed in riding coats; they were the same men that the witnesses George and Thomas Austen had spoke of; they went together to Rowland's Castle, and got there about twelve o'clock or something after, and went into a house there which was kept by the widow Paine; he did not hear her give any directions to send for any body; but the prisoners Jackson and Carter soon came thither; he stayed there about an hour and a half, and whilst he was there he did not see any abuse, or observe that either

of the men was bloody; he had no conversation with Jackson, further than that Jackson said he would see the letter which was going to major Battine, and Carter he believes might say so too; when he wanted to go away, Jackson would not suffer him to go through the room where the two men were; that Jackson told him if he had a mind to go, he might go through the garden to the back part of the house; he did so, and found his horse there, and went away; he could not say why Jackson refused to let him go through the room, but believed it was for fear the two men should go away with him; that he did not order his horse to be led round to the garden himself; that George Austen and he went away together upon his horse, and that Jackson would see the letter one of the men had in his pocket, and the witness saw the direction of it, which was to William Battine, esq. at East Marleu.

Being cross-examined by the prisoner Carter, whether Carter said he would see the letter? Answered, both Carter and Jackson said so, and that Carter did say he would see the letter that was going to Mr. Battine; that he (the witness) did not order his horse to be carried to the back part of the house; and that Carter was by when he was told by Jackson, that if he had a mind to go, his horse should be led to the back part of the house.

Joseph Southern swore, That on Sunday the 14th of February last, he saw Jenkes, the two Austens, and two other men on the road coming from Havant towards Rowland's Castle, one of them had a blue coat on and rode a grey horse; that he went to Rowland's Castle himself that day, and saw Jenkes, Austen, and the same two men sitting on horseback drinking at the widow Paine's door; he stayed there best part of an hour, and saw them and several other persons in the house; that he saw the prisoners Carter and Jackson in the house whilst he stayed there; he sat down and drank a pint of beer by the kitchen fire, but the other persons were in another room; that he saw the two men come out to the door and go in again, and one of them had an handkerchief over his eye, and there was blood upon it; that he met this man as he was going in, and heard him say to Jackson, "I am the king's officer, and I will take notice of you that struck me." That Carter was not present when this was said, but was in the house; the man who spoke thus to Jackson had a parchment in his hand when he met him at the door, he likewise saw a letter in his hand, and heard him say he was going to Mr. Battine with it; that he (the witness) went away between two and three o'clock, and did not know what became of the letter, nor had he heard either Jackson or Carter say what became of it.

The prisoners Jackson and Carter said they would not ask him any questions.

William Garret swore, he was at the widow Paine's on the 14th of February last, about four o'clock in the afternoon, and saw the pri-

soners Jackson and Carter and two strangers there; that one of them who had a blue coat on had received a stroke upon his cheek, and the blood ran down it; that just as he came in, this man was standing up by the back of a chair, and Jackson stood by him, and he heard Jackson say, "That for a quarter of gin he would serve him so again," by which the witness understood that Jackson had struck him before; he did not hear the man say he was the king's officer, but he heard Jackson say, "You a king's officer! I'll make you a king's officer, and that you shall know." That when he went away, he left them all there.

The prisoners would not ask him any questions.

William Lamb deposed, That he went to the widow Paine's, at Rowland's Castle, on the 14th of February last, about four in the afternoon, and found Jackson and Carter there; that before he went, he saw one of the widow Paine's sons call Carter aside, at his house at West-Bourne; that there were several other people there in another room, amongst whom were Thomas Austen, and two men that were strangers to him, one of whom had on a blue gaberdine: the two men, he understood, were going with a letter to Mr. Battine; he saw no ill treatment during the little time he stayed there; that Edmund Richards, one of the company, pulled out a pistol, and said, "That whoever should discover any thing that passed at that house, he would blow his brains out." Jackson and Carter were not in the room when these words were spoken, as he believes. He saw the man in the blue gaberdine pull a parchment out of his pocket, and heard him tell the people he was the king's officer: his wig was then off, and there was blood upon his cheek; that he saw a letter, which he understood to be going to Mr. Battine; one Kelly, and the prisoner Carter, had it in their hands, but he did not know how they came by it; he did not see the directions of the letter; he observed it was broke open when he saw it in the hands of Carter and Kelly; and he understood, by the discourse of the company, that it was a letter which the two strangers were to carry to Mr. Battine, but he never heard it read.

The prisoners Carter and Jackson would not ask him any questions.

Richard Kent deposed, That he was at the widow Paine's on the 14th of February last; and that Edmund Richards told him, that if he spoke a word of what he had heard or seen there, he would shoot him through the body; but Jackson and Carter were not in the room when Richards said this.

George Poate deposed, That he was at Rowland's Castle, on Sunday the 14th of February last, about seven o'clock in the evening, or after, and saw nine men there, and that the prisoners, Jackson and Carter, were two of them; he stayed there about half an hour, and as soon as he came in, he saw four or five men with

great coats and boots on, most of them upon their legs, as if they were just going; he went and warmed himself by the kitchen fire, and sat down by Thomas Austen, who was then asleep; he called for a pint of beer, and soon after he heard the stroke of a whip repeated three or four times, in a little room that was at the corner of the kitchen, but did not see who gave the blows, nor who received them; that he afterwards heard a strange rustling of people, more than before, and saw seven or eight men come into the kitchen; that he knew the prisoners Jackson and Carter, and William Steele, Edmund Richards, and two that went by the names of Sam and Harry; there were two other persons there, whom, to his knowledge, he had never seen before nor since; and could give no account of them, nor did he observe how they were dressed; that soon after he thought he heard a blow, and he saw Jackson in a moving posture, as if he had just given a blow, and was drawing up his arm in a proper form, as if he was going to give another; but William Paine stepped up, and called him fool and blockhead for so doing; upon which he sunk his arm, and did not behave in the like manner any more, in his sight; that just as they were going out of doors, Jackson turned round, with a pistol in his hand, and asked for a belt, strap, or string, but nobody gave him either, and he put his pistol into his great-coat pocket, and went away with the rest; that by the trampling of horses he supposed they all went on horseback, but which way he knew not; it was between seven and eight o'clock, as nigh as he could guess, when they went off; he did not hear any conversation about one of the strangers being the king's officer, nor did see the blow given, nor the person to whom the other blow was going to be given.

The prisoners would not ask him any questions.

John Raiss deposed, That on Sunday, the 14th of February, he was at Rowland's Castle, between twelve and one o'clock at noon; that when he came there he found Edmund Richards, William Steele, the prisoners Carter and Jackson, and Little Sam, Richard Kelly, Jackson's wife, and Galley and Chater; he saw Jackson take Chater to the door, and heard him ask him if he knew any thing of Dimer; and Chater answered he did, and was obliged to go and speak against him; that Galley then went out to keep Chater from talking to Jackson; whereupon Jackson knocked Galley down with his fist; that Galley came in again, and soon after Jackson and Carter. When they were all come in, he (the witness) with the prisoners Jackson and Carter, and Edmund Richards, went into the back room; that there they enquired of Jackson what he had got out of the shoemaker (meaning Daniel Chater); that Jackson informed them, that Chater said he knew Dimer, and was obliged to come in as a witness against him; that then they con-

sulted what to do with them (Chater and Galley); this was about three o'clock in the afternoon: they first proposed to carry them to some secure place, where they might be taken care of till they had an opportunity of carrying them over to France; that when this proposition was made, the prisoners, Jackson and Carter, and Richards, and himself were present; and this resolution was taken to send them out of the way, that Chater should not appear against Dimer; and afterwards it was agreed to fetch a horse, and carry them away: that Galley and Chater appeared very uneasy, and wanted to be gone; and thereupon Jackson's wife, to pacify them, told them that she lived at major Battine's, and her horse was gone for, and as soon as it came she would shew them the way to Mr. Battine's; that he (the witness) then went to Chichester, and saw no more of them that night.

Being cross-examined, at the request of the defendant's counsel, said, at this consultation there was nothing mentioned but the securing them, in order to carry them to France.

This witness having gone thus far in his evidence, was set by for the present; the Counsel for the Crown declaring that they would call him again, to give an account of what passed on the 17th, after they had examined the next witness.

William Steele deposed, That he was at the widow Paine's on Sunday the 14th of February; that the prisoner Jackson, Little Sam, one Kelly, and two men more, and Jackson's wife, were there when he came, which was about two o'clock in the afternoon, and soon afterwards Little Harry, the prisoner Carter, Edmund Richards, John Raiss, and Carter's wife, came thither; he did not know how Carter or Jackson came to be there, but the widow Paine's son came and called him (the witness) out, and said he must go to the Castle, for there were two men come to swear against the shepherd, meaning John Dimer; that when he came in they were in general sober, as far as he saw, but they sat drinking together about two hours; that Jackson took Chater out of the house, to examine him about Dimer, and after they had been out some time, Galley went out to them, but soon returned, and said Jackson had knocked him down; the witness saw he was bloody all down the left cheek; that Jackson was not in the room when Galley came in, but came in with Carter a little time afterwards; that then Galley, addressing himself to Jackson, said he did not know any occasion Jackson had to use him in that manner, and that he should remember it, and took down his name in Jackson's presence. Galley likewise said he was an officer, and shewed his deputation to the people that were in the room; the company continued drinking till Galley and Chater were quite fuddled, and went into a little inner room to sleep; this was about four or five o'clock, and they continued in the little room two or three hours; the rest of the company sat drink-

ing all the while, consulting what to do with Galley and Chater. The prisoners, Jackson and Carter, and Little Sam, Little Harry, Richards, and the witness, were at this consultation. It was proposed to put them (Galley and Chater) out of the way, because they should not appear against the shepherd, meaning Dimer, and it was proposed to throw them into the well, in the horse-pasture, about half a mile from Rowland's Castle, but it was thought not convenient to put them into a well so near, for fear of a discovery; it was then proposed to join, and each man to allow them three-pence a week, and to keep them in some secret place till they saw what became of Dimer, and as Dimer was served, so these two people (Chater and Galley) were to be served; this was talked of while Chater and Galley were asleep, and there was no other proposal made, as he heard. But while they were talking these things, the wives of Carter and Jackson said it was no matter what became of them (Galley and Chater), or what was done to them; they ought to be hanged, for they were come to ruin them, meaning the smugglers: that about seven o'clock Carter and Jackson went into the inner room, and waked Galley and Chater, and brought them out of the room, very bloody and very drunk; he did not see what passed in the room, but was sure they did not go in so bloody; and he believed Jackson and Carter had kicked and spurred them; they set Galley the officer upon a brown or black horse, and Chater up behind him; Jackson, Carter, and Richards, put them on horse-back and tied their legs under the horse's belly, and also tied their legs together; they then tied a line to the bridle, and he (the witness) got upon a grey horse and led them along; that just after they turned round the corner about twenty or thirty yards from the house, Jackson cried out, Whip them, lick them dogs, cut them; it was then dark and the company whipped and lashed them with their horse-whips, some on one side and some on the other, with great violence on the face and head and other parts of the body, and continued doing so while they rode about half a mile to a place called Wood's Ashes; that there they alighted, and Little Sam gave all the company a dram or two, but none to Galley and Chater; that as soon as they were mounted again Jackson and Carter cried out, Damn them, lick them, whip them; and they were whipped as before for about a mile further, and then they fell down under the horse's belly with their heads upon the ground, and their legs over the saddle; they were immediately set up again, and their legs tied together in the same posture; and the company went on whipping them as before, till they came to a place called Goodthrough Dean, which was about half a mile further; they were beat very much, and in the judgment of the witness, it was almost impossible they should sit their horses; when they came to Dean, somebody of the company pulled out a pistol, and said, he would shoot them (Galley and Chater) through the head

if they made any noise whilst they went through the village; he could not tell who it was that threatened to shoot them, but apprehends it was done for fear the people in the village should hear them; they went on but a foot pace, and after they got through Dean, they were whipped again as before; and when they came near a place called Idsworth, they fell down again under the horse's belly, and then some of the company loosed them, and set up the officer (Galley) behind him (the witness,) and Chater behind Little Sam, and in this manner they proceeded towards lady Holt park, which is near three miles from Idsworth, whipping Galley and Chater as before; but the lashes of their whips falling upon the witness, as he sat before Galley, he (the witness) could not bear the strokes, and therefore they left off whipping Galley in that manner; Galley sat upon the horse till they got to lady Holt park, and then being faint and tired with riding, he got down, and Carter and Jackson took him one by the arms and the other by the legs, and carried him towards a well by the side of lady Holt park; that Jackson said to Carter, "We will throw him into the well;" to which Carter replied, with all his heart, and Galley seemed indifferent what they did with him; but some of the company saying it was pity to throw him into the well, Jackson and Carter set him up behind the witness again, and Chater was still behind Little Sam; they went on in this manner till they came to go down a hill, when Galley was faint and tired, and could not ride any further, and got down there; upon which Carter and Jackson laid him on a horse before Edmund Richards, with his belly upon the pommel of the saddle, they laid him across the horse, because he was so bad that they could not contrive to carry him in any other manner, and they carried him so for about a mile and a half from the well; that then Richards being tired of holding him, let him down by the side of the horse; and Carter and Jackson put him upon the grey horse that he (the witness) was upon, and the witness got off; they set him up, his legs across the saddle, and his body lay over the horse's mane; that in this posture, Jackson held him on; he did not remember that any body else held him at that time; that they went on for about half a mile in this manner, Galley crying out vehemently all the time, "Barbarous usage, for God's sake shoot me through the head or through the body;" he (the witness) thought Jackson was at this time pinching him by the privy parts, for there were no blows given when he cried so; that Chater was still with the company behind Little Sam, and they went on for about two miles and a half further, the company holding Galley by turns on the horse, till they came to a dirty lane; at this place, Carter and Jackson rode forwards, and bid the rest of the company stop at the swing-gate beyond the water, till they should return; Jackson and Carter came to them again at the swing-gate, and told them,

that the man of the house, whither they went, was ill, and that they could not go thither; by which he understood that they had been in the neighbourhood to get entertainment. It was then proposed to go forward to the house of one Scardefield; and Little Harry tied Galley with a cord, and got up on horseback behind him, in order to hold him up on the horse, and they went on till they came to a gravelly knap in the road; at this place Galley cried out, "I shall fall, I shall fall;" whereupon Little Harry said, "Damn you, then fall," and gave him a push, and Galley fell down and gave a spirt, and never spoke a word more; he (the witness) believed his neck was broke by the fall; that then they put him upon the horse again, and went away for Raika, to the sign of the Red-Lion, which was kept by William Scardefield; that Chater was behind Little Sam, and was carried to Scardefield's house, and was very bloody when they came to Scardefield's; that Jackson and Little Harry went from Scardefield's with Chater about three o'clock in the morning; and Jackson afterwards returned to Scardefield's, and said he had left Chater at old Mills's house, and that Little Harry was left to look after him that he might not escape; this was Monday the 15th of February, and they remained all that day at Scardefield's house; that the prisoner, Richard Mills the younger, was there on that day; and upon hearing from Carter and Jackson that they had passed by a precipice of about thirty feet deep, when they had Chater with them, he said, "If I had been there, I would have called a council of war on the spot, and he (Chater) should have gone no further;" or to that effect. That two or three days afterwards the company met at Scardefield's again, to consult what to do with Chater; that the prisoners John Raiss, Carter, and Jackson, the prisoner Richard Mills the younger, a son of the prisoner Richard Mills the elder, Thomas Willis, John Mills, another son of old Mills, the prisoners Tapner, Cobby, and Hammond, and Thomas Stringer, Edmund Richards, and Daniel Perrier, and he, (the witness) were there consulting what to do with Chater; and John Mills proposed to take him out, and load a gun, and tie a string to the trigger, and place him (Chater) against the gun, and that they should all of them pull the string, to involve every one of them in the same degree of guilt; but this proposal was not agreed to. Then Jackson and Carter proposed to carry him back to the well, and to murder him there, which was agreed to by all the company; but Richard Mills the younger and John Mills said, they could not go with them to the well because they had no horses; and as it was in their (the other persons) way home, they might do it as well without them; and so it was concluded to murder Chater, and then to throw him into the well; that in the evening they went away from Raika to the house of the prisoner Richard Mills the elder, and found Chater in a back skeeling, or out-house, run up at the back of

Mills's house, a place they usually put turf in; he was chained with an iron chain, about three yards long, to a beam that went across the skeeling, about as high as his head; that Chater was bloody about the head, and had a cut upon one of his eyes, but he could see with it; that the prisoner, Richard Mills the elder, was at home himself, and fetched out bread and cheese for them to eat, and gave them drink, and received them, and made them welcome; that the house is a private house, no inn or ale-house; that they all of them went to and again between the house and the skeeling, and that the prisoner, Richard Mills the elder, was at home all the while; that the prisoner Tapner pulled out a clasp knife and opened it, and swore to Chater "that knife should be his butcher," and cut him over both his eyes, and down his forehead, so that he bled to a great degree. He was ordered by some of the company to say his prayers, for they were come to kill him, and kill him they would; that Tapner said this, and some of the company were then in the skeeling, and the rest of them were in the house, but no one interposed to save his life; that he (the witness) was in the skeeling, when Chater was advised to say his prayers, and was cut, and that Chater was chained by the leg at that time. When they had kept him there as long as they thought fit, somebody of the company unlocked the chain, and set him on horseback, and John Raiss, Edmund Richards, Little Harry, Little Sam, the prisoner Tapner, Thomas Stringer, the prisoners Cobby and Hammond, Little Daniel, the prisoners Jackson, Carter, and the witness, set out with him for lady Holt park, to carry him down to the well; that when they came to a place called Harting, Richards, Little Harry, and Little Sam, went back; and when the rest came to the white gate by lady Holt park, Carter and Jackson left them, but first told them they must keep along a little further, and they could not miss the well; that it was about 200 yards further, and that there were some pales on the right hand of it; that there were pales round the well. They went on, found the well by the direction Carter and Jackson had given them, and carried Chater with them; that then Tapner, Stringer, and Cobby got off their horses, and Tapner pulled a cord out of his pocket, and put it about Chater's neck, and led him towards the well. Chater seeing two or three pales down, said he could get through, but Tapner said, "No, you shall get over," and he did so, with the rope about his neck; they then put him into the well, and hanged him, winding the rope round the rails, and his body hung down in the mouth of the well for about a quarter of an hour; and then Stringer took hold of his legs to pull him aside, and let his head fall first into the well, and Tapner let the rope go, and down fell the body into the well head-foremost; that they stayed there some time, and one of the company said he thought he heard him breathe in the well; upon which they got a post or two, and

threw them into the well upon him, and there they left him.

The prisoner, Richard Mills the elder, said, he never heard any talk about the man's being to be killed, and that he desired the people would take him away, and said he would not have him murdered.

Steele, the witness, being cross-examined as to this, said, He never heard the prisoner say he would not have them murder the man; and added, to be sure he must hear them talk of murdering him, while they were at his house.

John Raiss, being called again, said, That after he had left the company at the widow Paine's, on the 14th of February, as mentioned in the former part of his evidence, he met some of the same company, and others, on the Wednesday evening following, being the 17th of February, at Scardefield's, at Raikes; that the prisoners, Richard Mills the younger, Carter, Jackson, Tapner, Cobby, and Hammond, with Steele, Richards, Little Sam, Daniel Perrier, John Mills, and Thomas Willis, were there; and it was proposed at that meeting to murder Chater. He could not say who first made the proposal, but, to the best of his knowledge, it was either Carter or Jackson, and it was agreed to by all the company; it was not then resolved how it was to be done, but only in general, that he was to be murdered, and thrown into a well; that they went to the house of the prisoner, Richard Mills the elder, to join Little Harry, who was left there to take care of Chater, and found Chater chained by the leg upon some turf in a skeeling, at the backside of the house; that the prisoner, Richard Mills the elder, was at home, and ordered his house-keeper to fetch bread and cheese, and some household beer, for any of them to eat and drink that would, and believes Mills knew that they came for Chater; that Tapner and Cobby were very earnest to go and see Chater; and Tapner having his knife in his hand said, "This knife shall be his butcher;" that thereupon the prisoner, Richard Mills the elder, said, "Pray do not murder him here, but carry him somewhere else before you do it;" that old Mills said this, upon seeing that Tapner had his knife in his hand, and hearing him declare it should be his (Chater's) butcher; that they then went out into the skeeling, and found Chater sitting upon some heath or turf, and Tapner ordered him to say his prayers: while he was repeating the Lord's Prayer, Tapner cut him over the face with his knife, and Cobby stood by, kicking him and damning him. This too was whilst the poor man was saying the Lord's Prayer. That Chater asked them what was become of Galley? and they told him he was murdered, and that they were come to murder him. Upon which Chater earnestly begged to live another day. That Cobby asked him his name, and whether he had not formerly done harvest-work at Selsea? To which he answered, That his name was Daniel Chater, and that he had harvested at

Selsea, and there he became acquainted with Dimer. Cobby and Tapner asked him what they had fed him with at old Mills's, and he said pease pottage; that Little Harry unlocked the horse-lock, that was on his (Chater's) legs, and Tapner, Cobby, and Stringer, brought him out of the skeeling, and set him upon Tapner's mare, in order to carry him to the well, to be there murdered, and thrown in; and that all the company knew, at that time, what was to be done with him; that they rid about three miles towards the well, and sometimes whipped Chater with their horsewhips: and Tapner observing that he bled, swore, if he blooded his (Tapner's) saddle, he would whip him again. When they came to Harting, Carter, Jackson, Richards, Little Sam, Little Harry, and Steele, said, "We have done our parts, and you (meaning the rest of the company) shall do yours." By which they meant, as he took it, that they had murdered Galley, and that the rest should murder Chater; and Richards, Little Sam, and Little Harry, stopped there, and did not accompany them any further; the rest went on towards the well; but Carter and Jackson stopped before they came to it, and told them the well was a little further off, describing it to them, and told them they could not miss finding it, and there left them; that he (the witness) and Tapner, Cobby, Stringer, Hammond, Perryer, and Steele, came to the well, got off their horses, and took Chater off his horse, the witness was not certain which, and either Tapner or Cobby put a cord round his neck; that there was a shord in the pales about the well; and he heard Chater say he could get through there; but Cobby said, "Damn you, no, you shall not, you shall get over;" that Tapner wound the cord round the pales, and Chater being put into the mouth of the well, hung by the neck for about a quarter of an hour, and then they loosened the rope, and turned the body, that it fell into the well head-foremost. They staid there till some of the company thought they heard him breathe, and then went to get a rope at lady Holt park, to go down into the well to murder him quite, but met Jackson and Carter at lady Holt park, who told them there was a long ladder; but they could not rear the ladder, and so got some posts, and threw them down into the well.

The prisoner, *Hammond*, desired the witness might be asked, Whether, when they were at old Mills's, he did not offer to ride away, and make a discovery; but was prevented by the company?

Raiss said he never heard him say any thing about it; but some of the company did threaten any of the rest who should refuse to go to the murder of Chater.

Ann Pescod deposed, That two men came to her father's on the 15th of February, about one or two o'clock in the morning, and called for Thomas Pescod her father; that she asked one of them his name, and he said it was William Jackson: Her father, who was then very

ill, said they might come in if they would; that Jackson did come in, and asked if they could not abide in the house some time; to which she answered, No, because her father was ill; and thereupon Jackson turned to the other man, and said, We cannot think of abiding here, as the man is so ill, and so they went away. She saw that Jackson's hand was bloody.

William Scardefield deposed, That he kept the Red Lyon at Raiko, in the parish of Rogate, and that in the night, between the 14th and 15th of February last, the prisoners Jackson and Carter, with Steele and Richards, came to his house, and called out to him, "For God's sake get up, and let us in!" That he let them in, and lighted a candle, and saw they were bloody; he asked them how they came to be so, and they said they had had an engagement with some officers, and had lost their goods, and some of their men they feared were dead, and some were wounded; that they said they would go and call them that were at the other public house; and while he was gone down into the cellar, he heard horses come to the door, and some of the men went into the kitchen, some into the brew-house, and some into the parlour; that he saw two or three men in the brew-house, and there lay something like a man before them by the brew-house door, and he heard them say he was dead; that some of them calling for liquor, he carried a glass of gin into the parlour, and saw a man standing upright in the parlour, with his face bloody, and one eye swelled very much; that Richards was in the parlour with the man, and objected to his coming in; and the prisoners Carter and Jackson, and three others were then in the brew-house, and Steele was with them; after they had drank three mugs of hot, they got their horses out, and sent him down for some brandy and rum; but when he came up with it, all the company were gone twenty yards below the house, though several of them came back to drink, one or two at a time; that he did not know what became of the man that he saw standing in the parlour, but he observed they separated into two companies; that one of the company, a little man, asked him if he did not know the place where they laid up some goods a year and an half ago; and the prisoner Carter came back, and said they must have a lanthorn; that Richards fell in a passion because he refused to go along with them; and upon seeing him coming towards them with a light, the company parted; that he saw a horse stand at a little distance, and there seemed to him to be a man lying across the horse, and two men holding him on, and he believed that the person he saw lying across the horse was dead, but he was not nigh enough to see whether he was or not.

That on the Wednesday or Thursday following, about twelve or one at noon, the prisoners Jackson and Carter, and all the rest of

the company came again to his house: that the prisoner Richard Mills the younger, and his brother John were sent for, and came to them.

Edward Sones proved, that on the 16th or 17th of September last, he found the body of a dead man in a well in Harras Wood, within 200 yards of Lady Holt house, and that there were two pieces of timber over the body: that he went immediately to get the coroner's inquest; and when he came back, he saw the man had boots on, and there was a rope about his neck; and that the well is by Lady Holt park, in the county of Sussex.

Mr. Brackstone produced the boots and a belt that were taken off the body, and given to him by the coroner.

Mrs. Chater, the widow of Daniel Chater, deposed, That she remembered her late husband set out from Southampton on the 14th of February last, and that she had never seen him since that time; she looked upon the belt produced by *Mr. Brackstone*, and said she knew it was the same belt her husband had on when he set out from home, by a particular mark in it; and she believed that the boots produced were likewise her husband's.

Mr. Sones proved also, that the horse, which Chater set out upon, was found about a month afterwards, and delivered to the owner.

The King's Counsel submitted it here.

Mr. Justice Foster acquainted the prisoners, that the king's counsel having gone through their evidence, it was now their time to offer what they could in their own defence.

He repeated to each of the prisoners the particular facts the evidence had charged him with, and asked them severally what they had to say to clear themselves of that charge.

To which the prisoner *Tapner* said, he did not know that they were going to murder the man; but Jackson and Richards threatened to kill him if he would not go with them, and he received three or four cuts from Hammond or Daniel Perryer, but he did not know which; that Richards and another man tied the rope; and he denied that he drew a knife, or cut Chater across the face.

Mr. Justice Foster told him, that supposing he was threatened in the manner he insisted on, yet that would be no legal defence in the present case; and that in every possible view of the case, it was infinitely more eligible for a man to die by the hands of wicked men, than to go to his grave with the guilt of innocent blood on his own head.

Cobby said, he did not know what they were going to do with the man, that he never touched him, and knew nothing of the murder.

Hammond said, when he understood what they were going to do, he wanted to go off and make a discovery: But the company prevented him; and that by the company he meant all the prisoners.

VOL. XVIII.

Richard Mills the elder said, he did not know what they were at, and did not think they would have hurt the man, and did not know he was chained till after they were gone away.

Richard Mills the younger said, he knew nothing of the matter, and never saw either of the men (Galley and Chater) in his life; he acknowledged he was at Scardefield's house, but said he knew nothing of the murder, and denied the charge; that Scardefield was the only witness he had, for he (Scardefield) knew when he came, and how long he stayed there.

Jackson said, the man who said he would be Chater's butcher, was his butcher, and nobody else; that he (Jackson) was not by when he was murdered, and was not guilty of it.

Mr. Justice Foster cautioned him not to deceive himself, and told him, that with regard to the present charge, it was not necessary that he should have been present at the murder; he was not charged with being present, but as an accessory before the fact, in advising and procuring the murder to be done; and that was the fact he was called upon to answer.

Carter said, when he went to the widow Paine's, he only thought they were going to carry the men out of the way till they saw what should become of Dimer, and that he never laid hands upon them; and went along with the company to prevent mischief.

Scardefield the witness was then called again, and *Richard Mills* the younger being asked whether he would ask him any questions, only desired he might be asked what time he came to his house, and how long he stayed there; to which Scardefield answered, That Mills came to his house about half an hour after one, stayed there about an hour and an half, and went away on foot.

The rest of the prisoners said they had not any witnesses.

Upon which, *Mr. Justice Foster* opened to the jury the substance of the indictment, as before set forth; and told them, that whether the prisoners, or any of them, were guilty in manner as therein they are severally charged, must be left to their consideration, upon the evidence that had been laid before them.

That in order to enable them to apply the evidence to the several parts of the charge, it would be proper for him first to acquaint them how the law determines in cases of this nature; that with regard to the persons charged as principals, wherever several persons agree together to commit a murder, or any other felony, and the murder or felony is actually committed, every person present, aiding, and abetting, is, in the eye of the law, guilty in the same degree, and liable to the same punishment as he who actually committed the fact. And the reason the law goes upon is this, that the presence of the accomplices gives encouragement, support, and protection to the person who actually commits

the fact; and at the same time contributes to his security.

That it is not necessary that the proof of the fact, in cases of this nature, should come up to the precise form of the indictment. For if the indictment charges that A did the fact, and that B and C were present, aiding and abetting, if it be proved that B did the fact, and that A and C were present, aiding, and abetting, they will be all guilty within the indictment.

That accessaries before the fact, are those who not being present in any sense of the law at the time the fact is committed, have advised or otherwise procured the fact to be done. These persons, in the case of wilful murder, will be liable to the same punishment as those who committed the murder, by their instigation, advice or procurement.

He then summed up the evidence very largely,* and applied it to the case of the several prisoners; and concluded, that if upon the whole, the jury should be of opinion that either of the principals (Tapner, Cobby, Hammond, or the others charged as principals in the indictment) did strangle the deceased, and that the prisoners, Tapner, Cobby, and Hammond, were present, aiding and abetting, they will be within this indictment.

And if they should be of opinion, that the prisoners, charged as accessaries before the fact, did advise, consent to, or procure the murder, they likewise will be guilty within this indictment, though they were not present when the fact was committed.

The Jury, after some little consideration, gave their verdict, that Tapner, Cobby and Hammond, were Guilty of the murder, as laid in the indictment:

And Richard Mills the elder, Richard Mills the younger, William Jackson, and William Carter, were Guilty, as accessaries before the fact.

Wednesday, Jan. 18, 1748-9.

William Jackson and William Carter were tried upon the other indictment, on the which they had been arraigned the day before, as principals in the murder of William Galley, and to which they had pleaded, Not Guilty.

Mr. Steele opened the indictment to the jury, and Mr. Bankes, the king's counsel, spoke to much the same purport as the day before.

Mr. Smyth, another of the king's counsel, spoke as follows, viz. I shall only add a word or two, to explain to you why these two men,

* The particulars of the judge's charge to the jury in summing up the evidence, are omitted, through the mistake of the shorthand writer, which is mentioned in the advertisement in the note; and the state of the evidence is now reduced to so narrow a compass, that the inserting the judge's charge, would have been little more than a repetition of the evidence, in the same order as it stands in the trial. *Former Edition.*

who were convicted yesterday as accessaries before the fact to the murder of Chater, and thereby liable to suffer death, should be tried a second time, as principals, for the murder of Galley.

The reasons for it are; in the first place, it will be necessary to convict them as principals for the murder of Galley, otherwise the accessaries to that murder, either before or after the fact, cannot be convicted.

Another reason is, as the intention of all prosecutions, as well as punishments, is not so much to revenge and punish what is past, as to deter others from committing the like crimes; it may be of service to the public to have every circumstance of this cruel transaction disclosed, to shew how dangerous to their neighbours, and to the country in general, those persons are who are concerned in smuggling, and how much it concerns every man to use his utmost endeavours to suppress, and bring them to justice; and it may have another good effect, in preventing persons from engaging in that lawless practice, when they see it consequentially engages them in crimes, which at first they might never intend; for I believe, if these unhappy men had been told, when they first began smuggling, that the time would come when they would coolly bathe their hands in the blood of two innocent men, (had as they now are) they would then have been shocked, and startled at the very imagination of it; yet men are so naturally led from one vice to another, that having once transgressed the laws of their country, they have insensibly arrived at such an height of wickedness, as to commit this heinous crime without the least hesitation or remorse.

After which the following witnesses were called for the crown, viz.

Mr. Milner, Mr. Sheerer, William Galley, and Edward Holton; whose evidence upon this trial was to the same effect as it was upon the former.

Robert Jenkes also proved the same upon this trial, as he did upon the former, with this addition; That when they were at the widow Paine's, Jackson and Carter both said they would see the letter for Mr. Battine, because they thought the men were going to swear against the smugglers; that both Jackson and Carter hindered him from going through the room where the two men were; and that one of the men had on a blue great-coat. Being cross-examined, at the request of Carter, whether he hindered him from going through the room? Answered, That both did.

Joseph Southern, William Lamb, William Garnet, and George Poat, proved the same, as upon the former trial.

John Raiss, to the first part of his evidence relating to the transactions at the widow Paine's, added, that the blood ran down from Galley's head and face, on Jackson's knocking him down; and that Galley and Chater were not fuddled when he went away.

William Steele, to his former evidence, added, That whilst they were at the widow *Paine's*, *Jackson* said, "That if any of the gang went away from them, he would shoot them through the head, or through the body, or serve them as bad as the two men should be served." That he supposed *Jackson* meant by this, that he would murder any of their own company, or use any of them as ill as they did the officer and *Chater*, if they left them; that when the company left off whipping *Galley* with their thongs, and lashes of their whips, as mentioned in the former trial, because the lashes of the whip reached this witness, they beat him with the butt-end of their whips, which were very heavy, till one of their whips was beat all to pieces; that the gravelly knap, where *Galley* was pushed off the horse, when he died, was in *Conduit-lane*, in *Rogate* parish; and that *Little Harry* pushed him in the back, and shoved him down; and that the prisoners, *Jackson* and *Carter*, *Little Sam*, and *Richards*, were in company when he died; that they laid his body upon a horse, and one man held him on one side, and another on the other side, and so they led the horse along; that *Carter* and another went before to call *Scardefield* up; and when they came there, they laid *Galley's* body down in the kitchen at *Scardefield's*, and carried *Chater* into another room; they drank every one a dram, and *Jackson* and *Carter* asked *Scardefield* if he knew any place to bury that man in, and he said No; but they said he must go with them; and they got a spade, and a candle and lanthorn, and they laid *Galley* on horse-back again, and he (the witness,) *Carter*, *Little Sam*, and *Scardefield*, went back for about a mile, and he held the horse whilst *Scardefield*, *Carter*, and *Little Sam*, went to find the place to bury him in; and when they had found it, *Carter* and *Sam* came back to him, and left *Scardefield* to dig the grave; they went and buried him there, and returned back to *Scardefield's* again; that *Jackson* told them, that whilst they were burying *Galley*, he and *Little Harry* went to carry *Chater* to *old Mills's*; that they buried *Galley* two or three feet deep, in the heart of a sand-pit, about three or four, or five o'clock in the morning. Being cross-examined, and asked by *Carter*, whether he (*Carter*) struck *Galley*? Answered, That they all struck him. Being asked, at the request of the prisoners' counsel, what was the consequence of that thrust that *Little Harry* gave *Galley*, when he fell the last time? Answered, That he thought by the fall *Galley's* neck was broke, because as soon as he was down he gave himself a turn, and stretched out his hands and legs, and never stirred or spoke afterwards; that *Galley* was not falling, till *Little Harry* gave him the push: said he did not know the parish of *Rogate*, or that the place where *Galley* died was within that parish, any otherwise than that he had been there since, and several people said it was the parish of *Rogate*. He was then asked, Whether the

gravelly knap was in the county of *Southampton* or county of *Sussex*? Answered, That he could not tell; that he had never heard, as he remembered, what county that place was in; but he was carried thither last Friday, to see the place, and he shewed to some people, then present, the spot of ground where *Galley* fell off the horse, and he believed he should know one of the men that were with him.

John Aslett being called up, *Steele* said, he was one of the men that was there.

Aslett was then sworn, and proved that he was with *Steele* and some dragoons on Friday last; that *Steele* pointed down to the ground with a stick, and said, "There the man died!" That he (the witness) took particular notice of that place, and is sure it was in *Sussex*; that he now lives at *Harting*, and was born and bred just by, and had lived there ever since he was a lad, and borne the offices of surveyor and constable.

Steele, on cross-examination, said, he knew the place very well again, by the little gravelly rising of the ground.

William Scardefield proved the same as in the former trial, with the following facts relating to the burial of *Galley*; that one of the gang asked him if he knew the place where they laid up some goods about a year and a half ago, and he told him he did; upon which the man said, "You must go along with us;" but the witness told him his wife was ill, and he could not leave the house; and then *Carter* came in and asked for a lanthorn, and *Edmund Richards* told him he must go with them; to which he replied, If he must go, he must; that when he came down the hill a little way from his own house, he saw two companies, one on the right and the other on the left; that *Carter*, *Steele*, and a short man he did not know, went on to the place, which was about three quarters of a mile back again; he found the place, and one of them came up after him, and he told him where it was; upon which they brought the horse up to a rough kind of a dell, and the short man fell a-digging, and it being a very cold night, he (the witness) took the spitter and dug to keep himself warm; there seemed to him to be a man upon the horse, and it fell like a man into the pit, and they covered it up; he believed it to be the body of a man, but he did not help to put it in, and was about three or four yards from it; he never went nigh the ground afterwards, and did not see the body of a man upon the horse afterwards, or any where else; that the earth was thrown over the pit, and the short man did most of the work; and he did not enquire, or choose to ask any questions about it.

Edward Sones proved the finding the body of a dead man, about the 15th of September, in a fox earth, within three quarters of a mile of *Raikes*; that there were boots upon the legs, and a glove upon one hand; that the body was

very much perished, and had a waistcoat and breeches on.

John Greentree produced a coat, which he took up beyond Harting pond in the public road, on the 15th of February last; and swore that there were some writings and a letter-case in the pocket, which he said he should know if he was to see them again.

Upon this, a parchment was delivered into court by Mr. Battine, a justice of the peace, in whose custody it had been left, and shewn to the witness, who said it was the same that he found in the coat pocket.

It was then read in court, and appeared to be a deputation under the hands of the commissioners of the customs, dated the 1st of April, 1731, appointing William Galley to be a tidesman in the port of Southampton.

William Galley, the son of the deceased, looked at the coat which the other witness produced, and proved it to be his father's coat.

John Greentree said, the coat was bloody when he found it.

The King's Counsel submitted it here, upon which the prisoners being called upon to make their defence,

The prisoner *Carter* said, he never intended to hurt the man, and never struck him, and only intended to carry him away to take care of him, till they knew what became of *Dimer*; and that he had not any witnesses.

The prisoner *Jackson* had nothing to say.

Mr. Justice *Foster* opened to the jury the substance of the indictment, as before set forth, and told them, that where several people join to do an act, in itself unlawful, and death ensues from any thing done in prosecution of that unlawful design, they will be all considered as principals in murder, if they were all present, aiding or abetting therein; that it was not necessary that each of the prisoners at the bar should be guilty of every single abuse that was offered to the deceased, in the long series of barbarities the witnesses for the crown had laid before them; if all or any of those abuses contributed to his death, and the prisoners at the bar were engaged in the several designs against him, and present, aiding and abetting the others, they will be guilty within this indictment.—He then summed up the evidence, and applied it to the case of the prisoners.

The Jury, after some little consultation together, gave their verdict, That William Jackson and William Carter were both Guilty.

The counsel for the crown then moved for judgment; and the prisoners being set to the bar, and severally asked what they had to say why judgment of death should not pass on them, and none of them offering any thing in arrest of judgment,

Mr. Justice *Foster* spoke to them as follows:

Benjamin Tapper, John Cobby, John Hammond, William Jackson, William Carter, Richard Mills the elder, and Richard Mills the younger; you have been convicted upon very full and satisfactory evidence of the murder of Daniel Chater; three of you as principals, and the rest as accessaries before the fact.

And you William Jackson and William Carter stand farther convicted, as principals in the murder of William Galley.

Deliberate murder is most justly ranked among the highest crimes human nature is capable of; but those you have respectively been convicted of, have been attended with circumstances of very high and uncommon aggravation.

The persons who have been the objects of your fury, were travelling on a very laudable design, the advancement of public justice. For this they were beset in their inn, tempted to drink to excess, and then laid asleep in an inner room, while a consultation was held in what manner to dispose of them: and in the end a resolution was taken to carry them to some distant place, and to dispatch them by some means or other.

In consequence of this resolution they were set on horseback, and exercised with various kinds of cruelty for five hours together, till one of them sunk under the hardships he suffered, and died upon the road.

The other was carried to a place of safe custody, there kept chained on a heap of turf, expecting his doom, for three days. During this dreadful interval, a second consultation was held, and a resolution taken to dispatch him too: Not a single man, of thirteen who were present, offering one word in his behalf.

He was accordingly hurried to his death; and though he begged earnestly to live but one day longer, that small respite was denied him. I will not repeat every circumstance; but I cannot forbear putting you in mind of one. When the poor man was told he must die that very night, some of you advised him to say his prayers, and accordingly he did address himself to prayer.

One would have hoped that this circumstance should have softened your hearts, and turned you from the evil purpose you were bent upon. Happy had it been for you, if you had then reflected, that God Almighty was witness to every thing that passed among you, and to all the intention of your hearts!

But while the man, under great distraction of thought, was recommending his soul to mercy, he was interrupted in his devotion by two of you, in a manner I scarce know how to repeat.

I hope your hearts have been long since softened to a proper degree of contrition for these things; and that you have already made a due preparation for the sentence I am now to pass upon you.

If you have not, pray lose not one moment more. Let not company, or the habit of drinking, or the hopes of life, divert you from it;

for Christian charity obliges me to tell you, that your time in this world will be very short.

Nothing now remains but that I pass the sentence upon you which the law of your country, in conformity to the law of God, and to the practice of all ages and nations, has already pronounced upon the crime you have been guilty of.

This Court doth therefore award, 'That you Benjamin Tapner, William Carter, John Hammond, John Cobby, Richard Mills the elder, Richard Mills the younger, and William Jackson, and each of you, shall be conveyed from hence to the prison from whence you came, and from thence you shall be led to the place of execution, where you shall be severally hanged by the neck, until you shall be dead, and the Lord have mercy upon your souls!'

After sentence the prisoners were carried back to Chichester jail. The Court were pleased to order them all for execution the very next day, and that the bodies of Jackson, Carter, Tapner, Cobby, and Hammond, the five principals, should be hung in chains. Accordingly they were carried from the jail, to a place called the Broyls, near Chichester; where, in the presence of great numbers of spectators on Thursday the 19th day of January 1748-9, about 2 o'clock in the afternoon, all of them were executed except Jackson, who died in jail some few hours after sentence of death was pronounced upon him.

The heinousness of the crimes of so notorious offenders may possibly excite in the reader a desire to be informed of their respective behaviour, whilst under sentence of death, and at the place of execution;* to satisfy which is subjoined the following authentic account, under the hands of the several clergymen who attended them alternately in jail, and together at the place of execution.

"The first time I went to the malefactors under condemnation, being the evening after sentence was passed upon them, I prayed with them all; viz. Carter, Tapner, Cobby, Hammond, and the two Mills's (Jackson being dead just before I went to the jail); but many persons being present, I had no opportunity of saying any thing material, and therefore told them I would visit them early the next morning, which I did accordingly.

"After prayers, I talked with them about their unhappy condition, and the heinous crimes that brought them into it. I asked them, if they desired to receive the sacrament; they all and each of them begged that I would administer it to them; accordingly I attended them again about ten o'clock for that purpose, and during the whole time of my performing that office, they all behaved with great decency and devotion, especially Carter and Tapner.

* A short account of their execution is given in the *Gentleman's Magazine* for 1749, p. 43.

"Afterwards, I put the following questions to them, and desired they would be sincere in their answers as dying men; first, whether they did not acknowledge the sentence that was passed upon them to be just, and what they highly deserved? Carter, the most sensible and penitent amongst them, first answered, Yes; as did afterwards Tapner, Cobby, and Hammond; but the two Mills's did not.

"2dly, I asked them whether they forgave every body? They all and each answered, They forgave all the world. Tapner then owned, that Edmund Richards and another were the cause of his ruin, but yet he forgave them.

"Carter laid his ruin to Jackson.

"JOHN SMYTH,

"Curate of St. Pancras, in Chichester."

"Both Carter and Tapner, a few hours before their execution, confessed to me, that they, with several others, assembled together, with a design to rescue Dinner out of Chichester jail; that the only person amongst them, who had arms, was Edmund Richards; but that being disappointed by a number of persons who had promised to join them from the east, their scheme was frustrated, and their purpose carried no farther into execution; that one Stringer was at the head of this confederacy, but not present with them at the time of their assembling together.

SIXON HUGES,

"Vicar of Donnington in Sussex."

"Benjamin Tapner, of West Stoke in Sussex, labourer, aged twenty-seven, before he was turned off, owned the justice of his sentence, and desired all young persons to take warning by his untimely end, and avoid bad company, which was his ruin. When in jail, before he was brought out for execution, he said, he did not remember he put the rope about Chater's neck.

"William Carter, of Rowland's Castle, in Hampshire, thatcher, aged thirty-nine, both at the place of execution, and in the jail, confessed the justice of the sentence passed upon him, and in both places acted more suitably to a person in such unhappy circumstances than any of them. He likewise at the gallows, in the same manner as Tapner did, cautioned every one against those courses, that had brought him to so shameful an end. Tapner and Carter, when all the ropes were fixed, shook hands, but what, or whether any words then passed between them, was not heard.

"Richard Mills the elder, of Trotten in Sussex, colt-breaker, aged 63, was unwilling to own himself guilty of the fact for which he died, and said, he never saw Chater; but being asked whether he never heard him, as he was confined so long, and in so terrible a condition, in the next room to that in which he generally sat? made no answer.

"Richard Mills the younger, of Stedham in Sussex, colt-breaker, son of the aforesaid Richard Mills, aged 37, would willingly have been thought innocent; and it being put to

him, whether he made that speech about the council of war, &c. and whether he was not at the consultation? denied both; but in the latter, Tapner confronted him, and said, 'Yes, major, you was there.' To which Mills replied, 'Ay, for a quarter of an hour, or so,' or to that purpose. It so happened that his rope was first fixed to the gallows, and a considerable space of time was taken up in fixing the rest; which interim he might have much better employed, than he did, gazing one while at the spectators, and then at the hangman (who was on the gallows, tying the ropes of the other malefactors), till the cart was almost ready to drive away.

"John Cobby, of Sidlesham in Sussex, labourer, aged 30, appeared to be very much dejected, and said little in jail, and nothing at the gallows.

"John Hammond, of Bersted in Sussex, labourer, aged 40, seemed likewise very much dejected, and had little to say for himself, excepting his pretending that the threats of Jackson, Carter, and the rest, were the occasion of his being concerned in the murder.

"Cobby's excuse was much the same.

"They all, except the two Mills's, seemed sensible of the heinous nature of the crime for which they died, and behaved as became men in their unhappy condition, more particularly Carter; but Mills, the father and son, appeared hardened and unaffected, both in the jail and at the gallows; especially the son, who was most insensible, and seemed by his behaviour, which has been mentioned before, even when his rope was fixed to the gallows, to be as little moved at what he was about to suffer, as the most unconcerned spectator. However, just before the cart drove away, he and his father seemed to offer up some prayers to God.—(Signed,) R. SANDHAM, Vicar of Subdeanry in Chichester. JOHN SMYTH, Curate of St. Pancrass."

As Jackson died so soon after condemnation, no other account can be given of him, than that he was of Welsworth, near Rowland's Castle, in Hampshire, labourer, aged about fifty years; and that being very ill, all the time of his trial, as he had been for a considerable time before, was shocked at the sentence of death, and the apprehension of being hung in chains, to such a degree, as hastened and brought on his death, before he could pay the forfeit of his life, in that ignominy to which he was most deservedly doomed, and more peculiarly due to him as a ring-leader in these most cruel and horrid barbarities and murders.

He professed the Romish religion some years before his death, and that he died a Roman Catholic may very reasonably be presumed from a printed paper which was found carefully sewed up in a linnen purse in his waistcoat pocket, immediately after his death, supposed to be a Popish relique, and containing the following words: "Sancti tres Reges Gaspar, Melchior, Balthasar, Orate pro Nobis nunc et in Hora Mortis Nostræ. Ces Billets ont touché aux Trois Testes de S. S. Rois à Cologne. Ils sont pour Les Voyageurs, contre Les Malheurs de Chemins, Maux de Teste, Mal-caducque, Fievres, Sorcellerie, toute sorte de Malefice, Mort subite."

In English thus: "Ye Three Holy Kings, Gaspar, Melchior, Balthasar, pray for us now, and in the hour of death.—These papers have touched the three beads of the holy kings at Cologne. They are to preserve travellers from accidents on the road, head-achs, falling-sickness, fevers, witch-craft, all kinds of mischief, and sudden death."

The body of William Carter was hung in chains, in the Portsmouth-road, near Raikes in Sussex; the body of Benjamin Tapner, on Rook's-hill, near Chichester; and the bodies of John Cobby and John Hammond upon the sea-coast, near a place called Selsey Bill, in Sussex, where they are seen at a great distance, both east and west.

The bodies of Mills, the father and son, having neither friend or relation to take them away, were thrown into a hole, dug for that purpose, very near the gallows, into which was likewise thrown the body of Jackson. Just by is now erected a stone, having the following inscription:

"Near this place was buried the body of William Jackson, a proscribed smuggler, who, upon a special commission of Oyer and Terminer, held at Chichester, on the 16th day of January 1748-9, was, with William Carter, attainted for the murder of William Galley, a custom-house officer; and who likewise was, together with Benjamin Tapner, John Cobby, John Hammond, Richard Mills the elder, and Richard Mills the younger, his son, attainted for the murder of Daniel Chater; but dying in a few hours after sentence of death was pronounced upon him, he thereby escaped the punishment which the heinousness of his complicated crimes deserved, and which was the next day most justly inflicted upon his accomplices.

"As a Memorial to posterity, and a warning

"to this and succeeding generations,

"This Stone is erected,

"A. D. 1749."

523. The Trial of MARY BLANDY, Spinster, for the Murder of her Father, Francis Blandy, gent. at the Assizes held at Oxford for the County of Oxford, on Saturday the 29th of February, 1752. Before the Hon. Heneage Legge, esq. and Sir Sydney Stafford Smythe, knt. two of the Barons of his Majesty's Court of Exchequer. [Published by Permission of the Judges.]
25 GEORGE II. A. D. 1752.

ON Monday the 2d of March 1752, a Bill of Indictment was found by the grand inquest for the county of Oxford, against Mary Blandy, spinster, for the murder of Francis Blandy, late of the parish of Henley upon Thames, in the said county, gentleman.

On Tuesday, the 3d of March 1752, the Court being met, the prisoner Mary Blandy was set to the bar, when the Court proceeded thus:

Clerk of the Arraignment. Mary Blandy, hold up thy hand. (Which she did.) You stand indicted by the name of Mary Blandy, late of the parish of Henley upon Thames, in the county of Oxford, spinster; daughter of Francis Blandy, late of the same place, gentleman, deceased; for that you, not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, and of your malice aforethought, contriving and intending, him the said Francis Blandy, your said late father, in his life-time, to deprive of his life; and him feloniously to kill and murder, on the 10th day of November, in the 25d year of the reign of our sovereign lord George the second, now king of Great Britain; and on divers days and times, between the said 10th day of November, and the 5th day of August, in the 25th year of the reign of his said majesty, with force and arms, at the parish of Henley upon Thames aforesaid, in the county aforesaid, did knowingly, wilfully, and feloniously, and of your malice aforethought, mix and mingle certain deadly poison, to wit, white arsenic, in certain tea, which had been at divers times, during the time above specified, prepared for the use of the said Francis Blandy, to be drank by him: You the said Mary, then and there well knowing that the said tea, with which you did so mix and mingle the said deadly poison as aforesaid, was then and there prepared for the use of the said Francis Blandy, with intent to be then and there administered to him, for his drinking the same; and the said tea with which the said poison was so mixed as aforesaid, afterwards, to wit, on the said 10th day of November, and on the divers days and times aforesaid, at Henley upon Thames aforesaid, was delivered to the said Francis, to be then and there drank by him; and the said Francis Blandy, not knowing the said poison to have been mixed

with the said tea, did afterwards, to wit, on the said 10th day of November, and on the said divers days and times aforesaid, there drink and swallow several quantities of the said poison, so mixed as aforesaid with the said tea; and that you the said Mary Blandy might more speedily kill and murder the said Francis Blandy, you the said Mary Blandy, on the said 5th day of August, and at divers other days and times between the said 5th day of August and the 14th day of August, in the 25th year of the reign of our said sovereign lord George the second, now king of Great Britain, &c. with force and arms, at the parish of Henley upon Thames aforesaid, in the county aforesaid, did knowingly, wilfully, feloniously, and of your malice aforethought, mix and mingle certain deadly poison, to wit, white arsenic, with certain water-gruel, which had been made and prepared for the use of your said then father, the said Francis Blandy, to be drank by him, you the said Mary then and there well knowing that the said water-gruel, with which you did so mix and mingle the said deadly poison as aforesaid, was then and there made for the use of the said Francis Blandy, with intent to be then and there administered to him for his drinking the same; and the same water-gruel, with which the said poison was so mixed as aforesaid, afterwards, to wit, on the same day and year, at Henley upon Thames aforesaid, was delivered to the said Francis, to be then and there drank by him; and the said Francis Blandy, not knowing the said poison to have been mixed with the said water-gruel, did afterwards, to wit, on the said 5th day of August, and on the next day following, and on divers other days and times afterwards, and before the said 14th day of August, there drink and swallow several quantities of the said poison, so mixed as aforesaid with the said water-gruel; and the said Francis Blandy, of the poison aforesaid, and by the operation thereof, became sick, and greatly distempered in his body; and from the several times aforesaid until the 14th day of the same month of August, in the 25th year aforesaid, at the parish aforesaid, in the county aforesaid, did languish; on which said 14th day of August, in the 25th year aforesaid, the said Francis Blandy, at the parish aforesaid, in the county aforesaid, of that poison died: And so you, the

said Mary Blandy, him the aforesaid Francis Blandy, at Henley upon Thames aforesaid, in manner and form aforesaid, feloniously, wilfully, and of your malice aforethought, did poison, kill and murder, against the peace of our said lord the king, his crown and dignity.

Clerk of the Arraignment. How sayest thou, Mary Blandy, art thou Guilty of the felony and murder whereof thou standest indicted, or Not Guilty?

Prisoner. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Pris. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Cl. of Arr. Cryer, make a proclamation for silence.

Cryer. Oyez, Oyez, Oyez! My lords the king's justices strictly charge and command all manner of persons to keep silence, upon pain of imprisonment.

Cryer. Oyez! You good men, that are impannelled to try between our sovereign lord the king and the prisoner at the bar, answer to your names, and save your fines.

The Jury were called over and appeared.

Cl. of Arr. You, the prisoner at the bar, these men which were last called, and do now appear, are those who are to pass between our sovereign lord the king and you, upon the trial of your life and death; if therefore you will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn: And you shall be heard.

Cl. of Arr. Anthony Woodward.

Cryer. Anthony Woodward, look upon the prisoner; you shall well and truly try, and true deliverance make, between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to the evidence: So help you God.

And the same oath was administered to the rest, (which were sworn) and their names are as follow:

Anthony Woodward, sworn. Charles Harrison sworn. Samuel George Glaze, sworn. William Farebrother, sworn. William Haynes, sworn. Thomas Crutch, sworn. Henry Swell, challenged. John Clarke, sworn. William Read, challenged. Harford Dobson, challenged. William Stone, challenged. William Hawkins, sworn. John Haynes, the elder, sworn. Samuel Badger, sworn. Samuel Bradley, sworn. William Brooks, challenged. Joseph Jagger, sworn.

Cl. of Arr. Cryer, count these.

JURY.

Anthony Woodward,	John Ciarke,
Charles Harrison,	William Hawkins,
Samuel George Glaze,	John Haynes, sen.
William Farebrother,	Samuel Badger,
William Haynes,	Samuel Bradley,
Thomas Crutch,	Joseph Jagger.

Cryer. Gentlemen, are ye all sworn?

Cl. of Arr. Cryer, make proclamation.

Cryer. Oyez, Oyez, Oyez! If any one can inform my lords the king's justices, the king's serjeant, the king's attorney-general, or this inquest now to be taken, of any treasons, murders, felonies, or misdemeanors, committed or done by the prisoner at the bar, let him come forth, and he shall be heard, for the prisoner stands now at the bar, upon her deliverance; and all persons that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth and give their evidence, or they will forfeit their recognizances.

Cl. of Arr. Mary Blandy, hold up thy hand; Gentlemen of the Jury, look upon the prisoner, and hearken to her charge; she stands indicted by the name of Mary Blandy, of the parish of Henley upon Thames, in the county of Oxford, spinster, daughter of Francis Blandy, late of the same place, gentleman, deceased, for that she not having [as in the indictment before set forth.] Upon this indictment she has been arraigned, and upon her arraignment has pleaded Not Guilty; and for her trial has put herself upon God and her country, which country you are: your charge therefore is, to enquire whether she be guilty of the felony and murder whereof she stands indicted, or not guilty. If you find her guilty, you shall enquire what goods or chattels, lands or tenements she had at the time of the felony committed, or at any time since: if you find her not guilty, you shall enquire whether she fled for the same: if you find that she did fly for the same, you shall enquire of her goods and chattels, as if you had found her guilty: if you find her not guilty, and that she did not fly for the same, say so, and no more; and bear your evidence.

The Hon. Mr. Barrington then opened the indictment. After which,

The Hon. Mr. Bathurst spoke as follows:

May it please your lordships, and you gentlemen of the jury, I am counsel in this case for the king, in whose name, and at whose expense, this prosecution is carried on against the prisoner at the bar, in order to bring her to justice, for a crime of so black a dye, that I am not at all surprised at this vast concourse of people collected together to hear, and to see the trial and catastrophe of so execrable an offender as she is supposed to be.

For, gentlemen, the prisoner at the bar, Miss Mary Blandy, a gentlewoman by birth and education, stands indicted for no less a crime than that of murder: and not only for murder, but for the murder of her own father; and for the murder of a father passionately fond of her; undertaken with the utmost deliberation; carried on with an unvaried continuation of intention; and at last accomplished by a frequent repetition of the baneful dose, administered with her own hands. A crime so shocking in its own nature, and so aggravated in all its circumstances, as will (if she is proved to be guilty

of it) justly render her infamous to the latest posterity; and make our children's children, when they read the horrid tale of this day, blush to think that such an inhuman creature ever had an existence.

I need not, gentlemen, paint to you the heinousness of the crime of murder. You have but to consult your own breasts, and you will know it.

Has a murder been committed? Who ever beheld the ghastly corpse of the murdered innocent weltering in its blood, and did not feel his own blood run slow and cold through all his veins?—Has the murderer escaped? With what eagerness do we pursue? With what zeal do we apprehend? With what joy do we bring to justice? And when the dreadful sentence of death is pronounced upon him, every body hears it with satisfaction, and acknowledges the justice of the divine denunciation, that, "By whom man's blood is shed, by man shall his blood be shed."

If this then is the case of every common murderer, what will be thought of one, who has murdered her own father? who has designedly done the greatest of all human injuries to him, from whom she received the first and greatest of all human benefits? who has wickedly taken away his life, to whom she stands indebted for life? who has deliberately destroyed, in his old age, him, by whose care and tenderness she was protected in her helpless infancy? who has impiously shut her ears against the loud voice of nature and of God, which bid her honour her father, and instead of honouring him, has murdered him?

It becomes us, gentlemen, who appear here as counsel for the crown, shortly to open the history of this whole affair, that you may be better able to attend to and understand the evidence we have to lay before you. And though, in doing this, I will endeavour rather to extenuate than to aggravate: yet I trust I have such a history to open as will shock the ears of all who hear me.

Mr. Francis Blandy, the unfortunate deceased, was an attorney at law, who lived at Henley in this county. A man of character and reputation; he had one only child,—a daughter,—the darling of his soul, the comfort of his age. He took the utmost care of her education, and had the satisfaction to see his care was not ill-bestowed; for she was genteel, agreeable, aprihtly, sensible. His whole thoughts were bent to settle her advantageously in the world. In order to do that, he made use of a pious fraud, (if I may be allowed the expression) pretending he could give her 10,000*l.* for her fortune. This he did in hopes that some of the neighbouring gentlemen would pay their addresses to her: for out of regard to him, she was from her earliest youth received into the best company; and her own behaviour made her afterwards acceptable to them. But how short-sighted is human prudence! What was intended for her promotion, proved his death and her destruction.

VOL. XVIII.

For, gentlemen, about six years ago, one captain William Henry Cranstoun, a gentleman then in the army, happened to come to Henley to recruit. He soon got acquainted with the prisoner, and hearing she was to have 10,000*l.* fell in love—not with her, but with her fortune. Children he had before; married he was at that time, yet concealing it from her, he insinuated himself into her good graces, and obtained her consent for marriage.

The father, who had heard a bad character of him, and who had reason to believe what was afterwards confirmed, that he was at that very time married, you will easily imagine was averse to the proposal. Upon this captain Cranstoun and the prisoner determined to remove that obstacle out of their way, and resolved to get as soon as possible into possession of the 10,000*l.* that the poor man had unfortunately said he was worth.

In order for this, the captain being at Mr. Blandy's house in August 1750, they both agreed upon this horrid deed. And that people might be less surprised at Mr. Blandy's death, they began by giving out that they heard music in the house:—a certain sign (as Mr. Cranstoun had learned from a wise woman, one Mrs. Morgan, in Scotland) that the father would die in less than twelve months.—The captain too pretended he was endowed with the gift of second sight, and affirmed that he had seen Mr. Blandy's apparition. This was another certain sign of his death, as she told the servants; to whom she frequently said her father would not live long. Nay, she went farther, and told them, he would not live till the October following.

When it was she first began to mix poison with his victuals, it is impossible for us to ascertain; but probably it was not long after November 1750, when Mr. Cranstoun left Henley. The effects of the poison were soon perceived. You will hear Dr. Addington, his physician, tell you, Mr. Blandy had for many months felt the dreadful effects of it. One of the effects was the teeth dropping out of his head, whole from their sockets. Yet what do you think, gentlemen, the daughter did when she perceived it? "She damn'd him for a toothless old rogue, and wished him at hell." The poor man frequently complained of pains in his bowels; had frequent reachings and sickness: Yet, instead of desisting, she wanted more poison to effect her purpose. And Mr. Cranstoun did accordingly in the April following send her a fresh supply; under the pretence of a present of Scotch pebbles, he inclosed a paper of white arsenic. This she frequently administered in his tea; and we shall prove to you, that in June, having put some of it into a dish of tea, Mr. Blandy disliking the taste, left half in the cup. Unfortunately! a poor old char-woman (by name Ann Emmet) glad to get a breakfast, drank the remainder, together with a dish or two more out of the pot, and eat what bread and butter had been left. The consequence was,

4 C

that she was taken violently ill with purging and vomiting, and was in imminent danger of her life. The poor woman's daughter came and told Miss Blandy how ill her mother was; she, sorry that the poison was misapplied, said, "Do not let your mother be uneasy, I will send her what is proper for her." And accordingly sent her great quantities of sack whey and thin mutton broth, than which no physician could have prescribed better: And thus drenched the poor woman for ten days together, till she grew tired of her medicines, and sent her daughter again to Miss Blandy to beg a little small beer. "No, no small beer," the prisoner said, "that was not proper for her." Most plainly then she knew what it was the woman had taken in her father's tea. She knew its effect. She knew the proper antidotes.—Having now experienced the strength of the poison, she grew more open and undaunted; was heard to say, "Who would grudge to send an old father to hell for 10,000l.?" I will make no remark upon such a horrid expression,—it needs none. After this she continued to mix the poison with her father's tea as often as she had an opportunity. Soon afterwards Susan Gunnell, another witness we shall call, happened to drink some which her master had left; she was taken ill upon it, and continued so for three weeks. This second accident alarmed the prisoner. She was afraid of being discovered. She found it would not mix well with tea. Accordingly she wrote to Mr. Cranstoun for further instructions. In answer to it, he bids her "put it into some liquid of a more thickish substance."

The father being ill, frequently took water-gruel. This was a proper vehicle for the powder. Therefore from this time you will find her always busy about her father's gruel. But lest Susan Gunnell, who had been ill, should eat any of it, she cautioned her particularly against it; saying, "Susan, as you have been so ill, you had better not eat any of your master's water-gruel; I have been told water-gruel has done me harm, and perhaps it may have the same effect upon you." And lest this caution should not be sufficient, she spoke to Betty Binfield, the other maid servant, and asked her whether Susan ever eat any of her father's gruel, adding, "She had better not; for if she does, it may do for her, you may tell her." Evidently then she knew what were the effects of the powder she put into her father's gruel; for if it would 'do for' the servant, it would 'do for' her father.

But the time approached beyond which she had foretold her father would not live.—It was the middle of July, and the father still living.—At this Mr. Cranstoun grows impatient. Upon the 18th of July he writes to her, and expressing himself in an allegorical manner, which however you will easily understand, he says, "I am sorry there are such occasions to clean your pebbles; you must make use of the powder to them, by putting it

in any thing of substance, wherein it will not swim a-top of the water, of which I wrote to you of in one of my last. I am afraid it will be too weak to take off their rust, or at least it will take too long a time." Here he is encouraging her to double the dose; says, he is afraid it will be too weak, and will take up too much time. And, as a further incitement to her to make haste, describes the beauties of Scotland, and tells her that his mother, lady Cranstoun, had employed workmen to fit up an apartment for her at Lennel-house.

Soon after the receipt of this letter she followed the advice. And you will accordingly find the dose doubled. Her father grew worse, and, as she herself told the servants, complained of a fireball in his stomach, saying, "He never will be well till he has got rid of it." And yet you will find she herself, fearful lest he should get rid of it, was continually adding fuel to the fire, till it had consumed her father's entrails.

Gentlemen, I will not detain you by going through every particular, but bring you to the fatal period. Upon the 3d of August, being Saturday, Susan Gunnell made a large pan of water-gruel for her master. Upon Monday the 5th, the prisoner will be proved to go into the pantry where it was kept, and after having, according to Mr. Cranstoun's advice, put in a double dose of the powder, she stirred it about for a considerable time, in order to make it mix the better. When, fearing she should have been observed, she went immediately into the laundry, to the maids, and told them, that "she had been in the pantry, and after stirring her papa's water-gruel, had eat the oatmeal at the bottom," saying, that, "if she was ever to take to the eating any thing in particular, it would be oatmeal." Strange inconsistency! She who had cautioned the maid against it not above a fortnight before, who had declared that it had been prejudicial to her own health, is on a sudden grown mighty fond of it.—But the pretence is easily to be seen through. That afternoon some of the water-gruel was taken out of the pan, and prepared for her father's supper. She again in the kitchen takes care to stir it sufficiently; looks at the spoon; rubs some between her fingers; and then sends it up to the poor old man her father. He scarce had swallowed it, when he was taken violently ill, and continued so all the next day, with a griping, purging, and vomiting. Yet she herself orders a second mess of the same gruel for her father's supper on the Tuesday, and was herself the person who carried it up to her father, and administered it to him as nourishment. The poor old man, grown weak with the frequent repetition, had not drank half the mess before he was seized, from head to foot, with the most violent pricking pains, continual reaching and vomiting;—and was obliged to go to bed without finishing it. The next morning the poor char-woman coming again to the house, unfortunately eat the remainder of the gruel, and was instantly affected in so

violent a manner, that for two hours together it was thought she would have died in Mr. Blandy's house. The prisoner at this time was in bed; but the maid going up to her room, told her how ill dame Emmet had been; at the same time saying, she had eat nothing but the remainder of her father's water gruel. The prisoner's answer was, "Poor woman! I am glad I was not up, I should have been shocked to have seen her"—should have been shocked to have seen the poor char-woman eat what was prepared for her father; but was never shocked at her father's eating it, or at his sufferings!

Gentlemen, in the afternoon of the Wednesday, notwithstanding the poor man, her father, had suffered so much for two days together, yet she again endeavours to give him more of the same gruel. "No," (says the maid) "it has an odd taste; it is grown stale, I will make fresh." "It is not worth while to make fresh now, it will take you from your ironing; this will do," was the prisoner's answer. However, Susan made fresh, after which wanting the pan to put it in, she went to throw away what was before in it. Upon tilting the pan, she perceived a white powder at the bottom, which she knew could not be oat-meal. She shewed it her fellow-servant, when feeling it they found it gritty. They then too plainly perceived what it was had made their poor old master so ill. What was to be done? Susan immediately carried the pan with the gruel and powder in it, to Mrs. Mounteney, a neighbour and friend of the deceased. Mrs. Mounteney kept it till it was delivered to the apothecary, the apothecary delivered it to the physician, and he will tell you, that upon trying it, he found it to be white arsenic. Mr. Blandy continued from day to day to grow worse. At last, upon the Saturday morning, Susan Gunnell, an old honest maid servant, uneasy to see how her poor master had been treated, went to his bed-sicle, and, in the most prudent and gentlest manner, broke to him what had been the cause of his illness, and she strong ground there was to suspect that his daughter was the occasion of it. The father, with a fondness greater than ever a father felt before, cried out, "Poor love-sick girl! What will not a woman do for the man she loves? But who do you think gave her the powder?" She answered, "She could not tell, unless it was sent by Mr. Cranstoun." "I believe so too," says the master, "for I remember he has talked learnedly of poisons. I always thought there was mischief in those cursed Scotch pebbles."

Soon afterwards he got up and came to breakfast in his parlour, where his daughter and Mr. Littleton, his clerk, then were. A dish of tea, in the usual manner, was ready poured out for him. He just tasted it, and said, "This tea has a bad taste;" looked at the cup, then looked hard at his daughter. She was, for the first time, shocked, burst into tears, and ran out of the room. The poor fa-

ther, more shocked than the daughter, poured the tea into the cat's bason, and went to the window to recover himself. She soon came again into the room. Mr. Littleton said, "Madam, I fear your father is very ill, for he has flung away his tea." Upon this news she trembled, and the tears again stood in her eyes. She again withdrew. Noon afterwards the father came into the kitchen, and addressing himself to her said, "Molly! I had like to have been poisoned twenty years ago, and now I find I shall die by poison at last." This was warning sufficient. She immediately went up stairs, brought down Mr. Cranstoun's letters, together with the remainder of the poison, and throw them (as she thought unobserved) into the fire. Thinking she had now cleared herself from the suspicious appearances of poison, her spirits mend, "she thanked God, that she was much better, and said, her mind was more at ease than it had been." Alas! how often does that, which we fondly imagine will save us, become our destruction? So it was in the present instance. For providentially, though the letters were destroyed, the paper with the poison in it was not burnt. One of the maids having immediately flung some fresh coals upon the fire, Miss Blandy went well satisfied out of the room. Upon her going out, Susan Gunnell said to her fellow-servant, "I saw Miss Blandy throw some papers in the fire, let us see whether we can discover what they were." They removed the coals, and found a paper with white powder in it, wrote upon, in Mr. Cranstoun's hand, "Powder to clean the pebbles." This powder they preserved, and the doctor will tell you, that it was white arsenic, the same which had been found in the pan of gruel.

Having now (as she imagined) concealed her own being concerned, you will find her the next day endeavouring to prevent her lover from being discovered. Mr. Blandy of Kingston, having come the night before to see her father, on Sunday morning she sent Mr. Littleton with him to church; while they were there, she sat down and wrote this letter to her beloved Cranstoun:

"Dear Willy; my father is so bad, that I have only time to tell you, that if you do not hear from me soon again, don't be frightened. I am better myself. Lest any accident should happen to your letters, take care what you write. My sincere compliments. I am ever yours."

"My father is so bad."—Who had made him so? Yet does she say she was sorry for it? No, she knew her father was then dying by that powder that he had sent her, yet could acquaint him she was herself better. Under those circumstances could caution him to take care what he wrote, lest his letters should be discovered! What can speak more strongly their mutual guilt? This letter she sealed with no less than five wafers. When Mr. Littleton came from church, she privately

gave it to him, desiring it might be directed as usual, and put into the post. Mr. Littleton was at that time too well apprised of this black transaction to obey her commands. He opened the letter. Took a copy of it. Upon further recollection, carried the original to the father, who hid him open and read it. He did so. What do you think, gentlemen! was all the poor old man said upon this discovery?

He only again dropped these words, "Poor love-sick girl! What will not a woman do for the man she loves?"

Upon the Monday morning, after having been kept for two days without seeing her father, by the order of the physicians, her conscience, or rather fear, began to trouble her; she told the maid she should go distracted if she did not see her father, and sent a message to beg to see him. Accordingly she was admitted. The conversation between them was this: "Papa, how do you do?" "My dear, I am very ill." She immediately fell upon her knees, and said, "Dear Sir, banish me where you will; do with me what you please, so you do but pardon and forgive me. And as to Mr. Cranstoun, I never will see, write, or speak to him again." He answered, "I do forgive you, but you should, my dear, have considered that I was your own father." Upon this the prisoner said, "Sir, as to your illness I am innocent." Susan Gunnell, who was present, interrupted her at this expression, and told her, she was astonished to hear her say she was innocent, when they had the poison to produce against her, that she had put into her father's water-gruel, and had preserved the paper she had thrown into the fire. The father, whose love and tenderness for his daughter exceeded expression, could not bear to hear her thus accused; therefore turning himself in his bed, cried out, "Oh that villain! that hath eat of the best, and drank of the best my house could afford, to take away my life, and ruin my daughter!" Upon hearing this, the daughter ran to the other side of the bed to him; upon which he added, "My dear, you must hate that man, you must hate the very ground he treads on." Struck with this, the prisoner said, "Dear Sir, your kindness towards me is worse than swords to my heart. I must down upon my knees, and beg you not to curse me." Hear the father's answer, a father then dying by poison given by her hand: "I curse thee, my dear! no, I bless you, and will pray to God to bless you, and to amend your life;" then added, "So do, my dear, go out of the room, lest you should say any thing to accuse yourself." Was ever such tenderness from a parent to a child! She was prudent enough to follow his advice, and went out of the room without speaking. His kindness was swords to her heart, for near half an hour. Going down stairs she met Betty Binfield, and whilst she was thus affected, owned to her, she had put some powder into her father's gruel, and that Susan and she for their honesty to their master deserved half her fortune.

Gentlemen, not to tire you with the particulars of every day; upon Wednesday, in the afternoon, the father died. Upon his death, the prisoner finding herself discovered, endeavoured to persuade the man-servant to go off with her; but he was too honest to be tempted by a reward to assist her in going off, though she told him it would be 500*l.* in his way. That night she refused to go to bed. Not out of grief for her father's death; for you will be told by the maid who sat up with her, that she never, during the whole night, shewed the least sorrow, compassion, or remorse upon his account. But in the middle of the night she proposed to get a post-chaise in order to go to London, and offered the maid twenty-five guineas to go with her. "A post-chaise! and go to London! God forbid, madam! I should do such a thing." The prisoner finding the maid not proper for her purpose, immediately put a smile upon her face, "I was only joking." Only joking! Good God! would she now have it thought she was only joking?

Her father just dead by poison: she suspected of having poisoned him; accused of being a parricide; and would she have it thought she was capable of joking?

When I see the assistance she now has, (and I am glad to see she has the assistance of three as able gentlemen as any in the profession) I am sure she will not be now advised to say she was then joking. But it will appear very plainly to you, gentlemen, that she was not joking; for the next morning she dressed herself in a proper habit for a journey, and, while the people put to take care of her were absent, stole out of the house, and went over Henley-bridge. But the mob, who had heard of what she had done, followed her so close, that she was forced to take shelter in a little alehouse, the Angel. Mr. Fisher, a gentleman, who was afterwards one of the jury upon the coroner's inquisition, came there, and prevailed with her (or in other words forced her) to return home. Upon her return, the inquest sitting, she sends for Mr. Fisher into another room and said, "Dear Mr. Fisher! what do you think they will do with me? will they send me to Oxford gaol?" "Madam!" said he, "I am afraid it will go hard with you. But if you have any of Mr. Cranstoun's letters, and produce them, they may be of some service to you." Upon hearing this, she cried out, "Dear Mr. Fisher! What have I done? I had letters that would have hanged that villain, but I have burnt them. My honour to that villain has brought me to my destruction." And she spoke the truth.

This, gentlemen, is in substance the history of this black affair. But, my lords! though this is the history in order of time, yet it is not the order in which we shall lay the evidence before your lordships and the jury. It will be proper for us to begin by establishing the fact, that Mr. Francis Blandy did die of poison. When the physicians have proved that, we will then proceed to shew, that he died of the poison put into the water-gruel on the 5th of August. After this we will call witnesses,

who from a number of circumstances, as well as from her own confession, will prove she put it into her father's water-gruel, knowing it was for her father, and knowing it to be poison.

Having done this, we will conclude with a piece of evidence which I forgot to mention before, and that is the conversation between her and Mr. Lane at the Angel. Mr. Lane and his wife happening to be walking at that time, finding a mob about the door, stepped into the alehouse, to see the prisoner. The moment she saw a gentleman, though it was one she did not know, she accosted him, "Sir! you appear to be a gentleman; for heaven's sake, what will become of me?" "Madam!" said he, "you will be sent to Oxford gaol, you will there be tried for your life; if you are innocent, you will be acquitted; if you are guilty, you will suffer death."

The prisoner upon hearing this, stamped with her foot, and said, "Oh! that damned villain!" Then pausing, "But why do I blame him? I am most to blame myself, for I gave it, and I knew the consequence." If she knew the consequence, I am sure there are none of you, gentlemen, but who will think she deserves to suffer the consequence.

And let me here observe, how evidently the hand of Providence has interposed to bring her to this day's trial, that she may suffer the consequence. For what, but the hand of Providence, could have preserved the paper thrown by her into the fire, and have snatched it unburnt from the devouring flame?—Good God! how wonderful are all thy ways! and how miraculously hast thou preserved this paper, to be this day produced in evidence against the prisoner, in order that she may suffer the punishment due to her crime; and be a dreadful example to all others who may be tempted in like manner to offend thy divine majesty!

Let me add, that next to Providence, the public are obliged to the two noble lords, whose indefatigable diligence in inquiring into this hidden work of darkness, has enabled us to lay before you, upon this occasion, the clearest and strongest proof that such a dark transaction will admit of. For poisoning is done in secret and alone; it is not like other murders, neither can it be proved with equal perspicuity. However, the evidence we have in this case is as clear and direct as possible; and if it comes up to what I have opened to you, I make no doubt but you will do that justice to your country, which the oath you have taken requires of you.

Mr. Serj. *Hayward*. May it please your lordships, and you gentlemen of the jury; I likewise am appointed to assist the crown on this occasion; but his majesty's learned counsel having laid before you so faithful a narrative of this dismal transaction, it seems almost unnecessary for me to take up any more of your time, in repeating any thing that has been before said; and indeed my own inclinations

would lead me to cast a veil over the guilty scene: a scene, so black, and so horrid, that if my duty did not call me to it, I could rather wish it might be for ever concealed from human eyes. But as we are now making inquisition for blood, it is absolutely necessary for me to make some observations upon that chain of circumstances, that attended this bloody contrivance and detested murder.

Experience has taught us, that in many cases a single fact may be supported by false testimony; but where it is attended with a train of circumstances that cannot be invented (had they never happened), such a fact will always be made out to the satisfaction of a jury, by the concurring assistance of circumstantial evidence. Because circumstances that tally one with another are above human contrivance. And especially, such as naturally arise in their order, from the first contrivance of a scheme to the fatal execution of it.

Having suggested thus much, I shall now proceed to lay before you those sort of circumstances that seem to me to arise through this whole affair, and leave it to your judgment, whether they do not amount to too convincing a proof that the prisoner at the bar has knowingly been the cause of her own father's death; for upon the prisoner's knowledge of what she did, will depend her fate.

Of all kinds of murders, that by poison is the most dreadful, as it takes a man unguarded, and gives him no opportunity to defend himself; much more so when administered by the hand of a child, whom one could least suspect, and from whom one might naturally look for assistance and comfort. Could a father entertain any suspicion of a child, to whom, under God, he had been the second cause of life? No sure, and yet this is the case now before you. The unfortunate deceased has received his death by poison, and that undoubtedly administered by the hand of his own,—his only,—his beloved child. Spare me, gentlemen, to pay the tribute of one tear to the memory of a person with whom I was most intimately acquainted, and to the excellency of whose disposition and integrity of heart, I can safely bear faithful testimony. Oh! Were he now living, and to see his daughter there, the severest tortures that poison could give, would be nothing to what he would suffer from such a sight.

And since the bitterest agonies must at this time surround the heart of the prisoner, if she does but think of what a father she has lost; I can readily join with her in her severest afflictions upon this occasion, and shall never blame myself, for weeping with those that weep; nor can I make the least question, but my learned assistants in this prosecution will with me rejoice likewise, if the prisoner, by making her innocence appear, shall upon the conclusion of this inquiry find occasion to rejoice. But, alas! too strong I fear will the charge against her be proved, too convincing are the circumstances that attend it: what those are, and

what may be collected from them, is my next business to offer to your consideration.

But before I enter thereupon, I must beg leave to address myself to this numerous and crowded assembly, whom curiosity hath led hither to hear the event of this solemn trial; hoping that whatever may be the consequence of it to the prisoner, her present melancholy situation may turn to our advantage, and reduce our minds to seriousness and attention. Solemn indeed I may well call it, as being a tribunal truly awful: for this method of trial, before two of his majesty's learned judges, has scarce ever been known upon a circuit; judges of undoubted virtue, integrity, and learning, who undergo this laborious and important work, not only for the sake of bringing guilt to punishment, but to guard and protect innocence whenever it appears.

But you, young gentlemen of this university, I particularly beg your attention, earnestly beseeching you to guard against the first approaches of, and temptations to vice. See here the dreadful consequence of disobedience to a parent. Who could have thought that Miss Blandy, a young lady virtuously brought up, distinguished for her good behaviour and prudent conduct in life, till her unfortunate acquaintance with the wicked Cranstoun, should ever be brought to a trial for her life; and that for the most desperate and bloodiest kind of murder, committed by her own hand, upon her own father? Had she listened to his admonitions, this calamity never had befallen her. Learn hence the dreadful consequences of disobedience to parents: and know also, that the same mischief, in all probability, may happen to such who obstinately disregard, neglect, and despise the advice of those persons who have the charge and care of their education; of governors likewise, and of magistrates, and of all others who are put in authority over them. Let this fix in your mind the excellent maxim of the good physician, "*Venienti occurrere morbo.*" Let us defend ourselves against the first temptations to sin, and guard our innocence as we would our lives; for if once we yield, though but a little, in whose power is it to say, Hitherto will I go, and no further?

And now, gentlemen of the jury, those observations I had before mentioned, I shall attempt to lay before you, in order to assist you in making a true judgment of the matter committed to your charge. The author and contriver of this bloody affair is not at present here. I sincerely wish that he was; because we should be able to convince him, that such crimes as his cannot escape unpunished. The unhappy prisoner, ruined and undone, by the treacherous flattery and pernicious advice of that abandoned, insidious and execrable wretch, who had found means of introducing himself into her father's family, and, whilst there, by false pretences of love, gained the affection of his only daughter and child. Love! did I call it? It deserves not the name; if it was

love of any thing, it was of the 10,000*l.* supposed to be the young lady's fortune. Could a man that had a wife of his own, and children, be really in love with another woman? Such a thing cannot be supposed, and therefore I beg leave to call it avarice and lust only; but be it what it will, the life of the father becomes an obstacle to the criminal proceedings that were intended and designed to be carried on between them, and therefore he must be removed, before that imaginary state of felicity could be obtained, according to their projected scheme. Mark how the destruction of this poor man is ushered into the world: apparitions, noises, voices, music, reported to be heard from time to time in the deceased's house. Even his days are numbered out, and his own child limits the space of his life but till the following month of October. What could be the meaning of this, but to prepare the world for a death that was predetermined? Who could limit the days of a man's life, but a person that knew what was intended to be done towards the shortening of it?

In order to bring this about, Cranstoun sends presents of pebbles, as also a powder to clean them; and this powder, gentlemen, you will find is the dreadful poison that accomplished this abominable scheme.

From time to time mention is made of the pebbles; but not a syllable of the powder. Why not of the one as well as of the other, if there had not been a mystery concealed in it? Preparation is made for an experiment of its power before Cranstoun's departure; he mixes the deadly draught; but the prisoner's conscience, not yet hardened, forced her to turn away her eyes, and she durst not venture to behold the cup prepared, that was to send the father into another world.

Soon after this Cranstoun quits the family, (having, no question, left instructions how to proceed farther in completing the scheme he had laid for taking off the old man) and this you'll find by letters under his own hand, that the powder, whatever it was, must not be mixed in too thin a liquid, because it might be discovered; and therefore water-gruel is thought fitter for the purpose. By the frequent mixtures that were made upon these occasions, the unfortunate servant and char-woman accidentally drank part of the deadly composition. When complaint is made of their sickness, how does the prisoner behave? Does she not administer to them with as much art and skill as a physician could? Does she not prescribe proper liquids and draughts to absorb and take off the edge of the corroding poison? If she knew not what it was, how could she administer so successfully to prevent the fatal consequences of it both in the maid and the char-woman? During this transaction, the unhappy father finds himself afflicted with torturing pains, immediately after receiving the composition from his daughter. Is there any care taken of him? Any physician sent for to attend him? Any looking draughts prepared to

quiet the racks and tortures that he inwardly felt? None at all, that I can find. He is left to take care of himself, and undergo those miseries that his own child had brought upon him, and yet had not the heart to give him any assistance. What could this proceed from, but guilt only? Would not an innocent child have made the strictest inquiry how her own father came to be out of order? Would she not have sought the world over for advice and assistance? But instead of that, you hear the bitterest expressions proceed from her, expressions sufficient to shock human nature. They have been all mentioned already by my learned leader, and I will not again repeat them.

Observe, as things come nearer the crisis, whether her behaviour towards her father carries any better appearance. When it began to be suspected that Mr. Blandy's disorder was owing to poison, and strongly, from circumstances, that the prisoner was privy to it; the poor man, now too far gone, being informed that there was great reason to suspect his own child, what expressions does he make use of? No harsher, than in the gentlest method saying, "Poor love-sick girl! I always thought there was mischief in those Scotch pebbles. O! That damned villain Cranstoun, that has eat of the best and drank of the best my house afforded, to serve me thus, and ruin my poor love-sick girl!" An incontestable proof that he knew the cause of his disorder, and the authors of it.

The report spread about the house of the father's suspicions, soon alarmed the prisoner: what does she do upon this occasion? Can any other interpretation be put upon her actions, than that they proceeded from a manifest intention to conceal her guilt? Why is the paper of powder thrown into the fire? From whence, as my learned leader most elegantly observes, it is miraculously preserved. What occasion for concealment, had she not been conscious of something that was wrong? If she had not known what had been in the paper, for what purpose was it committed to the flames? And what really was contained in that paper, will appear to you to be deadly poison.

The long wished-for and fatal hour at last arrives; and but a little before, a letter is sent by the prisoner to Cranstoun, that her father was extremely ill; begging him to be cautious what he writes, lest any accident should happen to his letters. Do the circumstances, the language, or the time of writing this letter, leave any room to suppose the prisoner could be innocent? They seem to me rather to be the fullest proof of her knowing what she had done. What accidents could befall Cranstoun's letters? Why is he to take care what he writes, if nothing but the effects of innocency were to be contained in those letters? In a very short time after this, the strength of the poison carries the father out of the world. Do but hear how the prisoner behaved thereupon. The father's corpse was not yet cold when she

makes application to the footman, with a temptation of large sums of money, as a reward, if he would go off with her; but the fidelity and virtue of the servant was proof against the temptation even of four or five hundred pounds. The next proposal is to the maid, to procure a chaise, with the offer of a reward for so doing, and to go along with her to London; but this project likewise failed, through the honesty of the servant. The next morning, in the absence of Edward Herne, (the guard that was set over her) she makes her escape from her father's house, and dressed as if going to take a journey, walked down the street; but the mob was soon aware of her, and forced her to take shelter in a public-house over the bridge. Do these proceedings look as if they were the effects of innocence? Far otherwise, I am afraid. Would an innocent person have quitted a deceased parent's house, at a time when she was most wanting to make proper and decent preparations for his funeral? Would an innocent person, at such a time as this, offer money for assistance to make an escape? I think not: And I wish she may find a satisfactory cause to assign for such amazing behaviour.

Let us put innocence and guilt in the scale together, and observe to which side the prisoner's actions are most applicable. Innocence, celestial virgin, always has her guard about her; she dares look the frowns, the resentments, and the persecutions of the world in the face; is able to stand the test of the strictest inquiry; and the more we behold her, still the more shall we be in love with her charms. But it is not so with Guilt: The baneful fiend makes use of unjustifiable means to conceal her wicked designs, and prevent discovery. Artifice and cunning are her supporters, bribery and corruption the defenders of her cause; she flies before the face of law and justice, and shuns the probation of a candid and impartial enquiry. Upon the whole matter, you, gentlemen, are to judge; and judge as favourably as you can for the prisoner.

If this were not sufficient to convince us of the prisoner's guilt, I think the last transaction of all will leave not the least room to doubt. When in discourse with persons that came to her at the house where she had taken shelter, what but a self-conviction could have drawn such expressions from her? In her discourse with Mr. Fisher about Cranstoun, you will find she declared she had letters and papers that would have hanged that villain: And again, says, "My honour, Mr. Fisher, to that villain has brought me to destruction:" And again, in her enquiry of Mr. Lane, What they would do with her, she bursts out into this bitter exclamation, "O! that damned villain!" Then after a short pause, "But why should I blame him? I am more to blame than he is, for I gave it him." How could she be to blame for giving it, if she knew not what it was? And, as it is said, went yet farther, and declared, "That she knew the consequence."

If she did know it, she must expect to suffer the consequence of it too.

Thus, gentlemen, have I endeavoured to lay before you some observations upon this transaction, and I hope you will think them not unworthy of your consideration. I trust I have said nothing that relates to the fact, that is not in my instructions; should it be otherwise, I assure you it was not with design. And whatever is not supported by legal evidence, you will totally disregard.

If any other interpretation than what I have offered, can be put upon these several transactions, and the circumstances attending them, I doubt not but you will always incline on the merciful side, where there is room for so doing.

We shall now proceed to call our evidence.

The other gentlemen, of counsel for the king, were Mr. Hayes, Mr. Nares, and Mr. Ambler.

The counsel for the prisoner, were Mr. Ford, Mr. Morton, and Mr. Aston.

Dr. Anthony Addington, and Dr. William Lewis, sworn.

Counsel. Did you, Dr. Addington, attend Mr. Blandy in his last illness?—Dr. Addington. Yes, Sir.

When were you called to him the first time?—On Saturday evening, August the 10th.

In what condition did you find him?—He was in bed; and told me, that, after drinking some gruel on Monday night, August the 5th, he had perceived an extraordinary grittiness in his mouth, attended with a very painful burning and pricking in his tongue, throat, stomach, and bowels, and with sickness and gripings; which symptoms had been relieved by fits of vomiting and purging.

Were these fits owing to any physic he had taken, or to the gruel?—Not to any physic; they came on very soon after drinking the gruel.

Had he taken no physic that day?—No.

Did he make any farther complaints?—He said, that, after drinking more gruel on Tuesday night, August the 6th, he had felt the grittiness in his mouth again; and that the burning and pricking in his tongue, throat, stomach, and bowels, had returned with double violence, and had been aggravated by a prodigious swelling of his belly, and exquisite pains and prickings in every external as well as internal part of his body; which prickings he compared to an infinite number of needles darting into him all at once.

How soon after drinking the gruel?—Almost immediately. He told me likewise, that, at the same time, he had had cold sweats, hiccup, extreme restlessness and anxiety; but that then, viz. on Saturday night, August the 10th, having had a great many stools, and some bloody ones, he was pretty easy every where, except in his mouth, lips, nose, eyes, and fundament; and except some transient gripings in his bowels. I asked him, to what he im-

puted those uneasy sensations in his mouth, lips, nose, and eyes? He said, to the fumes of something that he had taken in his gruel, on Monday night, August the 5th, and Tuesday night, August the 6th. On inspection, I found his tongue swelled, and his throat slightly inflamed, and excoriated. His lips, especially the upper one, were dry and rough, and had angry pimples on them. The inside of his nostrils was in the same condition. His eyes were a little blood-shot. Besides these appearances, I observed that he had a low, trembling, intermitting pulse; a difficult, unequal respiration; a yellowish complexion; a difficulty in the utterance of his words, and an inability of swallowing even a tea-spoonful of the thinnest liquor at a time. As I suspected that these appearances and symptoms were the effect of poison, I asked Miss Blandy, whether Mr. Blandy had lately given offence to either of his servants, or clients, or any other person? She answered, "That he was at peace with all the world, and that all the world was at peace with him." I then asked her, whether he had ever been subject to complaints of this kind before? She said, that he had often been subject to the cholic and heart-burn; and that she supposed this was only a fit of that sort, and would soon go off, as usual. I told Mr. Blandy, that I asked these questions, because I suspected that by some means or other he had taken poison. He replied, "It might be so," or in words to that effect: But Miss Blandy said, "It was impossible." On Sunday morning, August the 11th, he seemed much relieved; his pulse, breath, complexion, and power of swallowing, were greatly mended. He had had several stools in the night, without any blood in them. The complaints which he had made of his mouth, lips, nose, and eyes, were lessened; but he said the pain in his fundament continued, and that he still felt some pinchings in his bowels. On viewing his fundament, I found it almost surrounded with gleety excoriations and ulcers. About eight o'clock this morning I took my leave of him; but before I quitted his room, Miss Blandy desired I would visit him again the next day. When I got down stairs, one of the maids put a paper into my hands, which she said Miss Blandy had thrown into the kitchen fire. Several holes were burnt in the paper, but not a letter of the superscription was effaced. The superscription was, "The powder to clean the pebbles with."

What is the maid's name that gave you that paper?—I cannot recollect which of the maids it was that gave it me. I opened the paper very carefully, and found in it a whitish powder, like white arsenic in taste, but slightly discoloured by a little burnt paper mixed with it. I cannot swear this powder was arsenic, or any other poison, because the quantity was too small to make any experiment with, that could be depended on.

What do you really suspect it to be?—I really suspect it to be white arsenic.

Please to proceed, Sir.—As soon as the maid had left me, Mr. Norton the apothecary produced a powder, that, he said, had been found at the bottom of that mess of gruel, which, as was supposed, had poisoned Mr. Blandy: He gave me some of this powder, and I examined it at my leisure, and believe it to be white arsenic. On Monday morning, August the 12th, I found Mr. Blandy much worse than I had left him the day before. His complexion was very bad; his pulse intermitted; and he breathed and swallowed with great difficulty. He complained more of his fundament than he had done before. His bowels were still in pain. I now desired that another physician might be called in, as I apprehended Mr. Blandy to be in the utmost danger, and that this affair might come before a court of judicature. Dr. Lewis was then sent for from Oxford. I stayed with Mr. Blandy all this day. I asked him more than once, whether he really thought he had taken poison? He answered each time, that he believed he had. I asked him, whether he thought he had taken poison often? He answered in the affirmative. His reasons for thinking so, were, because some of his teeth had decayed much faster than was natural; and because he had frequently, for some months past, especially after his daughter had received a present of Scotch pebbles from Mr. Cranston, been affected with very violent and unaccountable prickings and beats in his tongue and throat, and with almost intolerable burnings, and pains in his stomach and bowels, which used to go off in vomitings and purgings. I asked him, whom he suspected to be the giver of the poison? The tears stood in his eyes; yet he forced a smile, and said,—“A poor love-sick girl—I forgive her—I always thought there was mischief in those cursed Scotch pebbles.” Dr. Lewis came about eight o'clock in the evening. Before he came, Mr. Blandy's complexion, pulse, breath, and faculty of swallowing, were got much better again; but he complained more of pain in his fundament. This evening Miss Blandy was confined to her chamber; a guard was placed over her; and her keys, papers, and all instruments wherewith she could hurt either herself, or any other person, were taken from her.

How came that?—I proposed it to Dr. Lewis, and we both thought it proper; because we had great reason to suspect her as the author of Mr. Blandy's illness; and because this suspicion was not yet publicly known, and, therefore, no magistrate had taken any notice of her.

Please to go on, Dr. Aiddington, with your account of Mr. Blandy.—On Tuesday morning, August the 13th, we found him worse again. His countenance, pulse, breath, and power of swallowing, were extremely bad. He was excessively weak. His hands trembled. Both they and his face were cold and clammy. The pain was entirely gone from his bowels, but not from his fundament. He was now and then a

little delirious. He had frequently a short cough, and a very extraordinary elevation of his chest, in fetching his breath; on which occasions an ulcerous matter generally issued from his fundament. Yet in his sensible intervals, he was cheerful and jocose: he said, “he was like a person bit by a mad dog; for that he should be glad to drink, but could not swallow.” About noon this day his speech faulted more and more. He was sometimes very restless, at others very sleepy. His face was quite ghastly. This night was a terrible one.—On Wednesday morning, August the 14th, he recovered his senses for an hour or more. He told me, he would make his will in two or three days; but he soon grew delirious again; and, sinking every moment, died about two o'clock in the afternoon.

Upon the whole, did you then think, from the symptoms you have described, and the observations you made, that Mr. Blandy died by poison?—Indeed I did.

And is it your present opinion?—It is; and I have never had the least occasion to alter it. His case was so particular, that he had not a symptom of any consequence, but what other persons have had, who have taken white arsenic; and, after death, had no appearance in his body, but what other persons have had, who have been destroyed by white arsenic.*

When was his body opened?—On Thursday in the afternoon, August the 15th.

What appeared on opening it?—I committed the appearances to writing, and should be glad to read them, if the Court will give me leave.

Then the Doctor, on leave given by the Court, read as follows:

“Mr. Blandy's back, and the hinder part of his arms, thighs, and legs, were livid. That fat which lay on the muscles of his belly, was of a loose texture, inclining to a state of fluidity. The muscles of his belly were very pale and flaccid. The cawl was yellower than is natural; and on the side next the stomach and intestines looked brownish. The heart was variegated with purple spots. There was no water in the pericardium. The lungs resembled bladders half filled with air, and blotted in some places with pale, but in most with black ink. The liver and spleen were much discoloured; the former looked as if it had been boiled, but that part of it which covered the stomach, was particularly dark. A stone was found in the gall-bladder. The bile was very fluid, and of a dirty yellow colour, inclining to red. The kidneys were all over stained with livid spots. The stomach and bowels were inflated, and appeared before any incision was made into them, as if they had been pinched, and extravasated blood had stagnated between their membranes. They contained nothing, as far as we examined, but a slimy bloody froth. Their coats were remark-

* The Doctor intended to have excepted the stone found in Mr. Blandy's gall-bladder.—*Former Edition.*

ably smooth, thin, and flabby. The wrinkles of the stomach were totally obliterated. The internal coat of the stomach and duodenum, especially about the orifices of the former, was prodigiously inflamed and excoriated. The redness of the white of the eye in a violent inflammation of that part, or rather the white of the eye just brushed and bleeding with the beards of barley, may serve to give some idea how this coat had been wounded. There was no schirrus in any gland of the abdomen; no adhesion of the lungs to the pleura; nor indeed the least trace of a natural decay in any part whatever."

Counsel, to Dr. Lewis.

Did you, Dr. Lewis, observe that Mr. Blandy had the symptoms which Dr. Addington has mentioned?—Dr. Lewis. I did.

Did you observe that there were the same appearances on opening his body, which Dr. Addington has described?—I observed and remember them all, except the spots on his heart.

Is it your real opinion, that those symptoms and those appearances were owing to poison?—Yes.

And that he died of poison?—Absolutely.

Dr. Addington cross-examined.

Prisoner's Counsel. Did you first intimate to Mr. Blandy, or he to you, that he had been poisoned?—Dr. Addington. He first intimated it to me.

Did you ask him, whether he was certain that he had been poisoned by the gruel that he took on Monday night, August the 5th, and on Tuesday night, August the 6th?—I do not recollect that I did.

Are you sure that he said he was disordered after drinking the gruel on Monday night, the 5th of August?—Yes.

Did you ever ask him why he drank more gruel on Tuesday night, August the 6th?—I believe I did not.

When did you make experiments on the powder delivered to you by Mr. Norton?—I made some the next day; but many more some time afterwards.

How long afterwards?—I cannot justly say; it might be a month or more.

How often had you powder given you?—Twice.

Did you make experiments with both parcels?—Yes: but I gave the greatest part of the first to Mr. King, an experienced chemist in Reading; and desired that he would examine it, which he did; and he told me that it was white arsenic. The second parcel was used in trials made by myself.

Who had the second parcel in keeping till you tried it?—I had it, and kept it either in my pocket, or under lock and key.

Did you never shew it to any body?—Yes, to several persons; but trusted nobody with it out of my sight.

Why do you believe it to be white arsenic?

—For the following reasons: 1. This powder has a milky whiteness; so has white arsenic. 2. This is gritty and almost insipid; so is white arsenic. 3. Part of it swims on the surface of cold water, like a pale sulphureous film; but the greatest part sinks to the bottom, and remains there undissolved; the same is true of white arsenic. 4. This thrown on red-hot iron, does not flame, but rises entirely in thick white fumes, which have the stench of garlic, and cover cold iron, held just over them, with white flowers; white arsenic does the same. 5. I boiled ten grains of this powder in four ounces of clean water, and then, passing the decoction through a filtre, divided it into five equal parts, which were put into as many glasses: into one glass I poured a few drops of spirit of sal ammoniac; into another some of the lixivium of tartar; into the third some strong spirit of vitriol; into the fourth some spirit of salt; and into the last some syrup of violets. The spirit of sal ammoniac threw down a few particles of pale sediment. The lixivium of tartar gave a white cloud, which hung a little above the middle of the glass. The spirits of vitriol and salt made a considerable precipitation of lightish coloured substance; which, in the former, hardened into glittering crystals, sticking to the sides and bottom of the glass. Syrup of violets produced a beautiful pale green tincture. Having washed the sauce-pan, funnel, and glasses, used in the foregoing experiments, very clean, and provided a fresh filtre, I boiled ten grains of white arsenic, bought of Mr. Wilcock, druggist in Reading, in four ounces of clean water; and filtering and dividing it into five equal parts, proceeded with them just as I had done with the former decoction. There was an exact similitude between the experiments made on the two decoctions. They corresponded so nicely in each trial, that I declare I never saw any two things in nature more alike, than the decoction made with the powder found in Mr. Blandy's gruel, and that made with white arsenic. From these experiments, and others, which I am ready to produce, if desired, I believe that powder to be white arsenic.*

* I have transcribed from Mr. Burnett's Treatise on the Criminal Law of Scotland, Appendix, N° XXIII, the following Remarks made by Dr. Black (Lectures on Chemistry, vol. 2, p. 428), regarding the duty of physicians, who may be consulted in cases where arsenic is suspected to have been administered, and the symptoms which usually occur in such cases:

"Physicians and surgeons are sometimes called upon, in cases of supposed murder by arsenic, to give their opinion; and the questions commonly put to them are these:

"1. Whether the appearances or symptoms observed in the dying and dead person, give reason to conclude that they were killed with arsenic?

"2. Whether certain drugs or powders which

Did any person make these experiments with you?—No: but Mr. Wilcock, the druggist, was present while I made them; and he weighed both the powder and the white arsenic.

When did Mr. Blandy first take medicines by your order?—As soon as he could swallow, on Saturday night, August the 10th. Before

had been given to the dead person or mixed with his food, and a part of which are committed to the physician to be examined, be arsenic or contain arsenic?

“It is necessary to be cautious in giving our answer to the first question, which seldom admits of a perfectly decisive answer if the presumption of poison rests on the symptoms alone; those produced by arsenic being not unlike to what appears in some diseases—such as the *cholera*; but these symptoms may add to the proof arising from other circumstances. The symptoms produced by a dose of arsenic, appear in a quarter of an hour, or not much longer, after it is taken. First, sickness and great distress at the stomach, soon followed by thirst and burning heat in the bowels. Then come on violent vomiting and severe cholic pains, and excessive and painful purging. This produces faintings, and cold sweats, and other signs of great debility. To this succeed painful cramps and contractions of the legs and thighs, extreme weakness, and death. After the death, the intestines are found inflamed and corroded; and sometimes inflammations and eruptions of the anus happen before death. In examining the dead body, we must take care that we be not deceived by the dissolution of the stomach by the gastric liquor, and account it an indication of arsenic. If we find arsenic in the stomach or intestines, or in the drugs or other suspected matter, which were given to the dead person, we can give a decisive answer to those two questions; but we must make ourselves sure that what we judge to be arsenic, be really so.

“We must therefore take care to be well acquainted with the qualities of arsenic, by which it is distinguishable from all other substances, and its distinctive properties are these:

“1. It is a heavy substance, which may therefore be separated by skilful elutriation from animal or vegetable matter, with which it may happen to be mixed in the bowels or in the drugs. Elutriation is commonly performed with water, but if the arsenic be mixed with oily or resinous drugs, it may be performed with alcohol. In examining the dead body, therefore, it may be proper to wash out the whole contents of the stomach and bowels into a basin of water, and then by careful elutriation, to try if any arsenic can be found in them. And in examining the drugs, if they be a mixture of different ingredients, we must dilute or dissolve them, by grinding them a little with water or spirits, and then elutriate.

“2. Arsenic, besides being a heavy substance, is volatile. When heated on a red-hot

that time he was under the care of Mr. Norton.

Benjamin Norton sworn.

Norton. I live at Henley; I remember being sent for to Mrs. Mounteney's in Henley, on Thursday, August the 8th, in order to shew me the powder. There was with her Susan

iron, it evaporates totally before it be red-hot, and goes off in white smoke.

“3. It is easily metallized by mixing it with three times its weight of the black flux, and heating the mixture in a tube.

“4. In this metallized state, it easily penetrates copper when assisted by heat, and gives to the copper a whitish colour, like that of lead or tin. It must be made of a dull red heat. This will completely dissipate corrosive sublimate, or other things which can whiten copper.

“5. In its metallized state, if it be suddenly heated to a sufficient degree on a red-hot iron, arsenic takes fire, and burns with a flame, from which arises a smoke, which is white arsenic; or, if the iron be not sufficient to make it take fire, it simply evaporates, and gives vapours which have an odour like that of garlic. The same odour is perceived, if we mix white arsenic, with an equal weight of charcoal-dust, and throw a little of the mixture on a burning coal, or on iron strongly heated, so as to set the charcoal-dust on fire.—This experiment has been often misunderstood.

“I have had occasion some time ago, to exercise myself on these experiments; and to try with how small a quantity of arsenic they might be made; I found I was able, by means of a small tube, to get metallized arsenic, from one grain weight of white arsenic, and with this metallized arsenic, I made the other experiments.

“The first symptoms which the arsenic produces, shew plainly, that for some time after it is taken, it acts on the stomach and intestines, as an highly irritating, inflammatory corrosive substance; but if the patient survives the violent effects, the poison being evacuated out of the bowels, the symptoms which appear afterwards, are those of excessive debility, and of great irritability of the intestinal canal, and of the whole system. The degree of debility is particularly remarkable. It is not only evident from the languor, distress, and feebleness of the patient, but also from the state of the pulse. I never felt a more feeble pulse than that of a person in this situation. All this is attended with a sort of paralytic affection of the limbs, and a degree of marasmus,” &c.

See, also, concerning this matter, the Trial of Donellan, for the murder of sir Theodosius Edward Allesley Boughton, Warwick Spring Assize, A. D. 1771, *coram* Buller, Justice, and particularly therein the evidence of the celebrated John Hunter; also the Case of Nairn and Ogilvie, A. D. 1765, in this Collection.

Gunnell, the servant-maid. She brought in a pan; I looked at it, and endeavoured to take it out, that I might give a better account of it; for as it lay, it was not possible to see what it was: then I laid it on white paper, and delivered it to Mrs. Mounteney, to take care of, till it dried; she kept it till Sunday morning, then I had it to shew to Dr. Addington; I saw the doctor try it once at my house, upon a red-hot poker; upon which I did imagine it was of the arsenic-kind.

Counsel.—Did you attend the deceased while he was ill?—*Norton.* I did; I went on the 6th of August; he told me he was ill as he imagined of a fit of the cholick; he complained of a violent pain in his stomach, attended with great reachings, and swelled, and a great purging; I carried him physic, which he took on the Wednesday morning; he was then better; on the Thursday morning, as I was going, I met the maid; she told me, he was not up; so I went about twelve: he was then with a client in the study; he told me the physic had done him a great deal of service, and desired more. I sent him some to take on Friday morning: I was not with him after Thursday.

Had you used to attend him?—I had for several years. The last illness he had before, was in July 1750. I used to attend him.

Did you ever hear Miss Blandy talk of music?—I did. She said, she had heard it in the house, and she feared something would happen in the family. She did not say any thing particular, because I made very light of it.

Did she say any thing of apparitions?—She said, Mr. Cranstoun saw her father's apparition one night.

How long before his death was it that she talked about music?—It might be about three or four months before.

Was the powder you delivered to Dr. Addington, the self-same powder you received of Mrs. Mounteney?—It was the very same, it had not been out of my custody.

Should you know it again?—I have some of the same now in my pocket. (He produces a paper sealed up with the earl of Macclesfield and lord Cadogan's seals upon it.) This is some of the same that I delivered to Dr. Addington.

[Cross-examined.]

Prisoner's Counsel. Who sent for you to the house?—*Norton.* I cannot tell that.

When you came, did you see Miss Blandy?—I did. She and Mr. Blandy were both together.

What conversation had you then?—I asked Mr. Blandy, whether or no he had eat any thing that he thought disagreed with him? Miss Blandy made answer, and said, her papa had had nothing that she knew of, except some peas, on the Saturday night before.

Did you hear any thing of water-gruel?—I knew nothing of that, till it was brought to me.

Had you any suspicion of poison then?—I had not, nor Mr. Blandy had not mentioned any thing of being poisoned by having taken water-gruel.

What did Miss Blandy say to you?—She desired me to be careful of her father in his illness.

Did she show any dislike to his having physic?—No, none at all; she desired, when I saw any danger, I would let her know it, that she might have the advice of a physician.

When was this?—This was on Saturday the 10th.

When he grew worse, did she advise a physician might be called in?—Yes, she did, after I said he was worse; she then begged that Dr. Addington might be sent for. Mr. Blandy was for deferring it till next day; but when I came down, she asked, if I thought him in danger? I said, he is; then she said, though he seems to be against it, I will send for a doctor directly; and sent away a man unknown to him.

Was he for delaying?—He was, till the next morning.

How has she behaved to him in any other illness of her father's?—I never saw but at such times she has behaved with true affection and regard.

Had she used to be much with him?—She used to be backwards and forwards with him in the room.

Did you give any intimation to Miss Blandy, after the powder was tried?—I did not; but went up to acquaint her uncle; he was so affected, he could not come down to apprise Mr. Blandy of it.

When did she first know that you knew of it?—I never knew she knew of it till the Monday.

How came you to suspect that at the bottom of the pan to be poison?—I found it very gritty, and had no smell. When I went down, and saw the old washerwoman, that she had tasted of the water-gruel, and was affected with the same symptoms as Mr. Blandy, I then suspected he was poisoned, and said, I was afraid Mr. Blandy had had foul play; but I did not tell either him or Miss Blandy so, because I found by the maid, that Miss was suspected.

Who did you suspect might do it?—I had suspicion it was Miss Blandy.

King's Counsel. When was Dr. Addington sent for?—*Norton.* On the Saturday night.

Mrs. Mary Mounteney sworn.

Mrs. Mounteney. Susan Gunnell brought a pan to my house on the 8th of August with water-gruel in it, and powder at the bottom, and desired me to look at it: I sent for Mr. Norton; he took the powder out on a piece of white paper, which I gave him: He delivered the same powder to me, and I took care of it and locked it up.

[Cross-examined.]

Prisoner's Counsel. Did you ever see any

behaviour of Miss Blandy otherwise than that of an affectionate daughter?—Mrs. Mounteney. I never did. She was always dutiful to her father, as far as I saw, when her father was present.

To whom did you first mention that this powder was put into the paper?—To the best of my remembrance, I never made mention of it to any body, till Mr. Norton fetched it away, which was on the 11th of August, the Sunday morning after, to be shewn to Dr. Addington.

Between the time of its being brought to your house, and the time it was fetched away, were you ever at Mr. Blandy's house?—No, I was not in that time, but was there on Sunday in the afternoon.

Had you not shewed it at any other place during that time?—I had not, Sir.

Did you on the Sunday, in the afternoon, mention it to Mr. or Miss Blandy?—No, not to either of them.

Susannah Gunnell sworn.

Gunnell. I carried the water-gruel in a pan to Mrs. Mounteney's house.

Counsel. Whose use was it made for?—Gunnell. It was made for Mr. Blandy's use, on the Sunday seven-night before his death.

Who made it?—I made it.

Where did you put it after you had made it?—I put it into the common pantry, where all the family used to go.

Did you observe any particular person busy about there afterwards?—No, nobody; Miss Blandy told me on the Monday she had been in the pantry, (I did not see her) stirring her father's water-gruel, and eating the oatmeal out of the bottom of it.

What time of the Monday was this?—This was some time about the middle of the day.

Did Mr. Blandy take any of that water-gruel?—I gave him a half-pint mug of it on Monday evening, for him to take before he went to bed.

Did you observe any body meddle with that half-pint mug afterwards?—I saw Miss Blandy take the tea-spoon that was in the mug, and stir the water-gruel, and after put her finger to the spoon, and then rubbed her fingers.

Did Mr. Blandy drink any of that water-gruel?—Mr. Blandy drank some of it; and on the Tuesday morning, when he came down stairs, he did not come through the kitchen as usual, but went the back way into his study.

Did you see him come down?—I did not.

When was the first time you saw him that day?—It was betwixt nine and ten; Miss Blandy and he were together; he was not well, and going to lie down on the bed.

Did you see him in the evening?—In the evening Robert Harman came to me, as I was coming down stairs, and told me, I must warm some water-gruel, for my master was in haste for supper.

Did you warm some?—I warmed some of that out of the pan, of which he had some the

night before, and Miss Blandy carried it to him into the parlour.

Did he drink it?—I believe he did; there seemed to be about half of it left the next morning.

How did he seem to be after?—I met him, soon after he had eat the water-gruel, going up stairs to bed; I lighted him up: As soon as he was got into the room, he called for a basin to reach; he seemed to be very sick, by his reaching a considerable time.

How was he next morning?—About six o'clock I went up the next morning to carry him his physic: He said he had had a pretty good night, and was much better.

Had he reached much over-night?—He had, for the basin was half-full, which I left clean over-night.

Was any order given you to give him any more water-gruel?—On the Wednesday Miss Blandy came into the kitchen, and said, Susan, as your master has taken physic, he may want more water-gruel, and as there is some in the house, you need not make fresh, as you are ironing. I told her, it was stale, if there was enough; and it would not hinder much, to make fresh; so I made fresh accordingly, and I went into the pantry to put some in for my master's dinner; then I brought out the pan (the evening before I thought it had an odd taste), so I was willing to taste it again, to see if I was mistaken or not: I put it to my mouth, and drank some, and taking it from my mouth, I observed some whiteness at the bottom.

What did you do upon that?—I went immediately to the kitchen, and told Betty Binfield, there was a white settlement, and I did not remember I ever had seen oatmeal so white before: Betty said, Let me see it; I carried it to her. She said, What oatmeal is this? I think it looks as white as flour. We both took the pan, and turned it about, and strictly observed it, and concluded it could be nothing but oatmeal. I then took it out of doors into the light, and saw it plainer; then I put my finger to it, and found it gritty at the bottom of the pan; I then recollected I had heard say, poison was white and gritty, which made me afraid it was poison.

What did you do with the pan?—I carried it back again, and set it down on the dresser in the kitchen; it stood there a small time, then I locked it up in the closet, and on the Thursday morning I carried it to Mrs. Mounteney, and Mr. Norton came there and saw it.

Do you remember Miss Blandy saying any thing to you about eating her papa's water-gruel?—About six weeks before his death, I went into the parlour; Miss Blandy said, Susan, what is the matter with you? You do not look well: I said, I do not know what is the matter; I am not well, but I do not know what the matter is. She said, What have you eat or drank? upon which I said, Nothing more than the rest of the family. She said, Susan, have you eat any water-gruel? for I am told water-gruel hurts me, and it may hurt you.

I said, It cannot affect me, madam, for I have not eat any.

What was it Betty Binfield* said to you about water-gruel?—Betty Binfield said, Miss Blandy asked, if I had eat any of her papa's water-gruel? saying, if I did, I might do for myself, a person of my age.

What time was this?—I cannot say whether it was just after or just before the time she had spoke to me herself. On the Wednesday morning, as I was coming down stairs from giving my master his physic, I met Elizabeth Binfield, with the water-gruel in a bason, which he had left; I said to the char-woman, Ann Emmet, Dame, you used to be fond of water-gruel, here is a very fine mess my master left last night, and I believe it will do you good; the woman soon sat down on a bench in the kitchen, and eat some of it, I cannot say all.

How was she afterwards?—She said, the house smelt of physic, and every thing tasted of physic; she went out, I believe into the wash-house, to reach, before she could finish it.

Did you follow her?—No, I did not; but about twenty minutes, or half an hour after that, I went to the necessary-house, and found her there vomiting and reaching, and, as she said, purging.

How long did she abide there?—She was there an hour and half, during which time I went divers times to her; at first I carried her some surfeit-water; she then desired to have some fair water; the next time I went to see how she did, she said she was no better; I desired her to come in a-doors, hoping she would be better by the fire; she said, she was not able to come in; I said, I would lead her in; I did, and set her down in a chair by the fire; she was vomiting, and reaching continually; she sat there about half an hour, or something more, during which time she grew much worse, and I thought her to be in a fit, or seized with death.

Did you acquaint Miss Blandy with the illness and symptoms of this poor woman?—I told Miss Blandy when I went into the room to dress her, about nine o'clock, that dame (the name we used to call her by) had been very ill that morning; that she had complained that the smell of her master's physic had made her sick; and that she had eat nothing but a little of her master's water-gruel, which he had left last night, which could not hurt her.

What did she say to that?—She said she was very glad she was not below stairs, for she should have been shocked to have seen her poor dame so ill.

As you have lived servant in the house, how did you observe Miss Blandy behave towards her father, and in what manner did she use to talk of him, three or four months before his

* N. B. The Counsel for the Prisoner waved the objection to this as hearsay evidence; because the Counsel for the Crown assured them, they should call Betty Binfield herself next. *Former Edition.*

death!—Sometimes she would talk very affectionately, and sometimes but middling.

What do you mean by middling?—Sometimes she would say, he was an old villain, for using an only child in such a manner.

Did she wish him to live?—Sometimes she wished for his long life, sometimes for his death.

When she wished for his death, in what manner did she express herself?—She often said, she was very unkind, and that if he was dead, she would go to Scotland, and live with lady Cranstoun.

Did she ever say how long she thought her father might live?—Sometimes she would say, for his constitution, he might live these twenty years; sometimes she would say, he looked ill and poorly.

Do you remember when Dr. Addington was sent for on the Saturday?—I do.

Had Miss Blandy used to go into her father's room after that time?—She did as often as she pleased till Sunday night; then Mr. Norton took Miss Blandy down stairs, and desired me not to let any body go into the room, except myself, to wait on him.

Did she come in afterwards?—She came into the room on Monday morning, soon after Mr. Norton came in, or with him; I went in about ten o'clock again.

What conversation passed between Miss Blandy and her father?—She fell down on her knees, and said to him, "Banish me, or send me to any remote part of the world; do what you please, so you forgive me; and as to Mr. Cranstoun, I will never see him, speak to him, nor write to him more so long as I live, so you will forgive me."

What answer did he make?—He said, "I forgive thee, my dear, and I hope God will forgive thee; but thee shouldst have considered better, than to have attempted any thing against thy father; thee shouldst have considered, I was thy own father."

What said she to this?—She answered, "Sir, as for your illness, I am entirely innocent." I said, "Madam, I believe you must not say you are entirely innocent, for the powder that was taken out of the water-gruel, and the paper of powder that was taken out of the fire, are now in such hands, that they must be publicly produced." I told her, I believed, I had one dose prepared for my master in a dish of tea, about six weeks ago.

Did you tell her this before her father?—I did.

What answer did she make?—She said, "I have put no powder into tea; I have put powder into water-gruel, and if you are injured, I am entirely innocent, for it was given me with another intent."

What said Mr. Blandy to this?—My master turned himself in his bed, and said to her, "Oh! such a villain! come to my house, eat of the best, and drink of the best that my house could afford, to take away my life, and ruin my daughter."

What else passed?—He said, "Oh! my

dear! thee must hate that man, thee must hate the ground he treads on, thee canst not help it." The daughter said, "Oh! Sir, your tenderness towards me is like a sword to my heart; every word you say is like swords piercing my heart; much worse, than if you were to be ever so angry. I must down on my knees, and beg you will not curse me."

What said the father?—He said, "I curse thee! my dear, how couldst thou think I could curse thee? No, I bless thee, and hope God will bless thee, and amend thy life;" and said further, "Do, my dear, go out of my room, say no more, lest thou shouldst say any thing to thy own prejudice: Go to thy uncle Stevens, take him for thy friend: poor man! I am sorry for him." Upon this she directly went out of the room.

Give an account of the paper you mentioned to her, how it was found.—On the Saturday before my master died, I was in the kitchen. Miss Blandy had wrote a direction on a letter to go to her uncle Stevens. Going to the fire to dry it, I saw her put a paper into the fire, or two papers, I cannot say whether. I went to the fire, and saw her stir it down with a stick: Elizabeth Binfield then put on fresh coals, which I believe kept the paper from being consumed. Sooth after Miss Blandy had put it in, she left the kitchen; I said to Elizabeth Binfield, "Betty, Miss Blandy has been burning something;" she asked, "Where?" I pointed to the grate, and said, "At that corner;" upon which Betty Binfield moved a coal, and took from thence a little paper; I stood by and saw her, she gave it into my hand; it was a small piece of paper, with some writing on it, folded up about three inches long. The writing was, "The powder to clean the pebbles," to the best of my remembrance.

Did you read it?—I did not, Elizabeth Binfield read it to me. [Produced in Court, part of it burnt, sealed up with the earl of Macclesfield and lord Cadogan's seals.] This is the paper, I believe, by the look of it; but I did not see it unfolded. I delivered it into Elizabeth Binfield's hand on Saturday night, between eleven and twelve o'clock. From the time it was taken out of the fire, it had not been out of my pocket, or any thing done to it, from that time till I gave it her. I went into my master's room about seven o'clock in the morning, to carry him something to drink; when he had drank it, I said, "I have something to say to you concerning your health, and concerning your family; I must beg you will not put yourself in a passion, but hear me what I have to say." Then I told him, "I believe, Sir, you have got something in your water-gruel, that has done you some injury, and I believe Miss Blandy put it in, by her coming into the wash-house on Monday, and saying, she had been stirring her papa's water-gruel, and eating the oatmeal out from the bottom." He said, "I find I have something not right: My head is not right as it used to be, nor has been for some time." I had before

told him, I had found the powder in the gruel. He said, "Dost thou know any thing of this powder? Didst thee ever see any of it?" I said, "No, Sir, I never saw any, but what I saw in the water-gruel." He said, "Dost know where she had this powder, nor canst not thee guess?" I said, "I cannot tell, except she had it of Mr. Cranstoun." My reason for suspecting that was, Miss Blandy had letters came oftener than usual. My master said, "And now thee mention't it, I remember when he was at my house, he mentioned a particular poison that they had in their country;" saying, "Oh! that villain! that ever he came to my house!" I told him likewise, I had shewed the powder to Mr. Norton; he asked what Mr. Norton said to it: I told him, Mr. Norton could not say what it was, as it was wet, but said, Let it be what it will, it ought not to be there; and said, he was fearful there was foul play somewhere. My master said, "What, Norton not know! that is strange, and so much used to drugs." Then I told him, Mr. Norton thought proper he should search her pockets, and take away her keys and papers. He said, "I cannot do it, I cannot shock her so much; canst not thee, when thou goest into her room, take out a letter or two, that she may think she dropped them by chance?" I told him, "I had no right to do it: She is your daughter, and you have a right to do it, and nobody else." He said, "I never in all my life read a letter that came to my daughter, from any person." He desired, if possible, if I could meet with any powder any where, that I would secure it.

Do you remember when Ann Emmet was sick (the char-woman)?—I do, but cannot say how long, or how little a time before this; I remember she was ill some time before my master's death.

What did the prisoner order the old woman to eat at that time?—She sent her some sack-whey, and some broth: I believe to the value of a quart or three pints at twice, about once a day, or every other day, for four or five days.

Have you been ill from what you eat yourself?—I was ill after drinking a dish of tea one Sunday morning, which I thought was not well relished, and I believed somebody had been taking salts in the cup before.

Who was it poured out for?—I believe it was poured out for my master.

Why do you believe that?—Because he used to drink in a different dish from the rest of the family, and it was out of his dish.

When was this?—This was about six weeks and three days before his death.

How did you find yourself, after drinking it?—I found no ill effect till after dinner: I then had a hardness in my stomach, and apprehended it was from eating plentifully of beans for dinner.

What symptoms had you afterwards?—My stomach seemed to have something in it that could not digest, and I had remarkable trem-

bling for three days, and after that for three mornings was seized with a reaching.

Have you since that time been ill, from what you eat or drank?—I tasted the water-gruel twice, once on the Tuesday evening, when I was mixing it for my master; and on Wednesday, when I was going to pour it away, I put the pan to my mouth and drank a little of it.

How did you find yourself after that?—I did not find any remarkable disorder till the Wednesday morning about two o'clock, before my master's death; then I was seemingly seized with convulsions. My throat was very troublesome for five or six weeks after, and seemed a little soreish and a little swelled. I continued very ill for three weeks and upwards after my master's death, which was on the Wednesday. I went to bed sick at two that morning, and applied to Dr. Addington.

Do you remember any thing besides letters coming from Mr. Cranston?—I remember she had once a large box of table-linen, and some Scotch pebbles in it; she said, they came from him.

What time was this?—This was early in the spring, before my master's death.

Had she more than one box sent to her?—She had a small box sent afterwards of Scotch pebbles; that might be about three months before his death, or less, I cannot say.

Did she use to shew the pebbles to any body?—She used to shew them to any person of her acquaintance; but I never heard of any powder to clean them.

[Cross-examined.]

Prisoner's Counsel. For a year before the 6th of August last, had any thing ailed your master, so as to call in the apothecary?—*Gunnell.* About a year before he had had a violent cold.

Was he, or was he not, in good health for a year before?—He was frequently complaining of the gravel and heart-burn, which he was subject to for years.

Did he make any other complaints?—He used to have little fits of the gout.

Was there any other complaint for seven, eight, nine, or ten years?—Nothing particular, but that of the heart-burn; which I cannot tell whether I ever heard him complain of before or not.

Can you take upon you to say, that he made any particular complaint of the heart-burn, more than he had done at any other time?—I cannot say positively; because I have not continued these things in my memory. He ordered me to give him some dry oatmeal and water for the heart-burn.

Is that good for the heart-burn?—I have been told, it is very good for it.

How was her behaviour to her father?—Her general behaviour was dutiful, except upon any passion, or a hasty word from her father.

When did she call her father, old villain?—She would use expressions of that kind when she was in a passion.

Pris. Counsel. Upon what account?

Gunnell. For using her ill.

King's Counsel. Were these expressions made use of before his face, or behind his back?—*Gunnell.* I have heard her before his face, and behind his back.

Pris. Counsel. When have you heard it?—*Gunnell.* I believe in the last twelve months; but cannot be sure.

King's Counsel. Recollect on what occasion.—*Gunnell.* It has been, I believe, on little passions on both sides, and that generally from trifles.

Pris. Counsel. When did you first communicate your suspicion to Mr. Blandy about his being poisoned?—*Gunnell.* On the Saturday morning before his death, from what I saw on the Wednesday before.

Why did you keep this suspicion of yours from Wednesday to Saturday?—The reason I did not tell my suspicions to Mr. Blandy sooner than Saturday, was, because I stayed for Mr. Stevens, the prisoner's uncle, who did not come till Friday night; I told him then, and he desired me to tell Mr. Blandy of it.

Did you ever say any thing of it to Miss Blandy?—No, I did not.

Pray, what conversation passed between her father and her down upon her knees, &c.?—She said, "Sir, how do you do?" He said, "I am very ill."

Was any thing said about Mr. Cranston's addresses to her?—Yes, there was. That conversation was occasioned by a message, that Mr. Blandy had sent to his daughter by me on Monday morning.

What was that message?—That he was ready to forgive her, if she would but endeavour to bring that villain to justice.

Did she say, with what intent the powder was given to her?—She said, it was given her with another intent.

Did she say, upon what intent?—She did not say that. He did not ask that.

Was not that explained?—It was no ways explained.

Did he treat her, as if she herself was innocent?—He did, Sir.

Then all he said afterwards was as thinking his daughter very innocent.—It was, Sir.

As to the ruin of his daughter, did he think it was entirely owing to Cranston?—Mr. Blandy said, he believed his daughter entirely innocent of what had happened.

By what he said to you, do you think that the father thought his daughter was imposed upon by Cranston, when he used that expression, "She must hate the man," &c.?—I do think so; he said, "Where is Polly?" I answered, in her room; he said, "Poor unfortunate girl! That ever she should be imposed upon and led away by such a villain to do such a thing!"

Do you imagine, from the whole conversation that passed between her father, and her, that she was entirely innocent of the fact, of the powder being given?—I do not think so; she said, she was innocent.

What was your opinion, did the father think her wholly unacquainted with the effect of the powder?—I believe he thought so; that is as much as I can say.

When you told Miss Blandy that the washer-woman was extremely ill, having eat some water-gruel, was any thing more said with relation to the father's having eat some of the same water-gruel before?—I don't remember there was a word said about the father's having eat any of it.

During the time of his illness, was not Miss Blandy's behaviour to her father, with as much care and tenderness as any daughter could shew?—She seemed to direct every thing as she could have done for herself, or any other person that was sick.

Do you know that she was guilty of any neglect in this respect?—No, I do not, Sir.

King's Counsel. What did he mean when he said, "Poor unfortunate girl! That ever she should be imposed upon, and led away by such a villain, to do such a thing!" What do you imagine he meant by such a thing?—*Gunnell.* By giving him that, which she did not know what it was.

Court. When she told you, that water-gruel would serve for her father on the Wednesday, did she know that her father had been ill, by taking water-gruel on the Monday and Tuesday nights?—*Gunnell.* She knew he was ill, but I cannot tell whether she knew the cause of it; and knew that the char-woman was ill, before she proposed my giving him the same gruel; but did not oppose my making fresh, for any other reason, than that it would hinder my ironing.

Elizabeth Binfield sworn.

Binfield. I was a servant to Mr. Francis Blandy at Henley, and had been almost three years.

Counsel. When did you first discover his illness, and hear him complain of unusual prickings in his stomach?—*Binfield.* About a fortnight before he died.

Did you ever hear Miss Blandy talk of something in the house, which she said presaged his death, or something like it?—I have often heard her talk of walkings and music in the house that she had heard; she said, she thought it to be her mother; saying, the music foretold her father's death.

Whom has she said so to?—She has told me so.

How long ago?—For some time before her father's death; I believe for three quarters of a year.

How long did she continue talking in this manner?—She did till his death; I have often heard her say, he would die before October.

What reasons did she give for that?—By the music; saying, she had been informed that music foretels death within a twelve-month.

Who did she say had informed her so?—She said Mr. Cranstoun had been to some famous

woman who had informed him so, and named one Mrs. Morgan, who lived either in Scotland, or London; I cannot say which.

Did she express herself glad or sorry?—Glad; for that then she should soon be released from all her fatigues, and soon be happy.

Did she talk of the state of health in which he was?—Sometimes she has said, he has been very well, sometimes ill. I remember I heard her say that my master complained of a ball of fire in his guts: I believe it was before the Monday he eat the water-gruel; I cannot particularly say; I believe a fortnight before he died; then she said, Mr. Cranstoun had told her of that famous woman's opinion about music.

Do you remember the first time one Ann Emmet was taken ill?—It was about a month or six weeks before.

Do you know what Miss Blandy ordered her in that illness?—I do. She ordered her some white-wine whey, and broth several times. I made it two or three times, two quarts at a time.

Do you remember a paper being taken out of the fire?—I do. It was on the Saturday before my master died, I took it out myself.

Should you know it again, if you see it?—I believe I should (she is shewn a paper). I really believe this is it, which I took out of the fire, and delivered it to Susan Gunnell; after which I had it again from her, and I delivered it to Dr. Addington, and Mr. Norton.

Do you remember Miss Blandy's saying any thing about Susan Gunnell's eating the water-gruel?—I do. When Susan was ill she asked me, how Susan did? I said, "Very ill." Said she, "Do you remember her ever drinking her master's water-gruel?" I said, "Not as I know of." She said, "If she does, she may do for herself, may I tell you."

Did she bid you tell Susan so?—She did not bid me tell Susan, but I did tell her.

What time was this?—It might be about a month or six weeks before Mr. Blandy's death.

Do you remember any expressions she made use of about her father?—I heard her say, "Who would grudge to send an old father to hell for 10,000*l.*?" Exactly them words.

When was this?—It was about a month before his death, or it may be more, I cannot justly tell.

How was this conversation introduced?—She was speaking of young girls being kept out of their fortunes.

Who was with you at this time?—It was to me and nobody else.

Have you heard her use him with bad language?—I have heard her curse him, call him rascal and villain.

What was she so angry with her father about?—Mr. Cranstoun was at our house about three quarters of a year before Mr. Blandy's death. He came in August, 1750, and stayed there till near Christmas. It was not agreeable to my master; we used to think by his temper, that he did not approve of his

being so much with his daughter; but I do not believe he debarred his daughter from keeping him company.

Did you ever hear him say any thing to her, of his having been once like to be poisoned?—I was in the kitchen when my master came in to be shaved. I stayed there till he went out again. Miss Blandy was there, and he said, that once he had like to have been poisoned.

When was it that he said so?—It was on the 10th of August, saying, he was once at the coffee-house, or the Lion, and he and two other gentlemen had like to have been poisoned by what they had drank. Miss Blandy said, "Sir, I remember it very well;" she said, it was at one of those places; and he said No, it was the other. He said, "One of the gentlemen died immediately, the other is dead now, and I have survived them both; but it is my fortune to be poisoned at last." He looked very hard at her, during the time he was talking.

What did he say was put into the wine?—I remember he said it was white arsenic.

When he looked hard at her, how did she look?—She looked in great confusion, and all in a tremble.

Did you sit up with Miss Blandy the night after her father died?—I did till three o'clock, she went to bed about one. She said to me, "Betty, will you go away with me? If you will go to the Lion or the Bell, and hire a post-chaise, I will give you fifteen guineas when you get into it, and ten guineas more when we come to London." I said, "Where will you go then, into the north?" She said, "I shall go into the west of England." I said, "Shall you go by sea?" she said, "I believe some part of the way." I said, "I will not go." Then she burst into a laughter, and said, "I was only in a joke, did you think I was in earnest?" "Yes," said I. "No," said she, "I was only joking."

Did you ever hear Miss tell Dr. Addington, that she had given your master some of that powder?—I heard Miss Blandy tell the doctor, she had given my master some of that powder before in a dish of tea, which, she said, he did not drink, and she threw into the street out of the window, fearing she should be discovered, and filled the cup again; and that Susan Gunnell drank it, and was ill for a week after.

When was this?—This was on the Monday before my master died.

Do you remember what happened on Monday, the 5th of August?—Yes. On that day I and two washer-women were in the wash-house. Miss Blandy came in, and said, "Betty, I have been in the pantry eating some of the oatmeal out of your master's water-gruel." I took no notice of it; but the same day, in the afternoon, I went into the pantry, and Miss Blandy followed me, and took a spoon and stirred the water-gruel, and taking some up in the spoon, put it between her fingers and rubbed it.

What was it in?—It was in a pan. When my master was taken ill on the Tuesday in the afternoon, Miss came into the kitchen, and said, "Betty, if one thing should happen, will you go with me to Scotland?" I said, "Madam, I do not know." "What," says she, "you are unwilling to leave your friends?" Said I, "If I should go there, and not like it, it will be expensive travelling back again."

Did she say, "If one thing should happen?" What thing?—I took no farther notice of it then; but those were the words. On the Monday morning, before he died, she said to me, "Betty, go up to your master, and give my duty to him, and tell him, I beg to speak one word with him." I did; she went up; I met her when she came out of the room from him; she clasped me round the neck, and burst out a-crying, and said, "Susan and you are the two honestest servants in the world; you ought to be imaged in gold for your honesty; half my fortune will not make you amends for your honesty to my father."

[Cross-examined.]

Prisoner's Counsel. Had Mr. Blandy at any time, and when, previous to the 5th of August been ill?—*Binfield.* About a twelve-month before, he had been ill some time; but I cannot tell how long.

What was his illness?—He had a great cold.

Did he take any physic?—I believe he did once or twice.

Can you tell the time?—I believe it was the latter end of July, or beginning of August.

Who made the whey and broth that were sent to the washer-woman?—My fellow-servant made the whey, I made the broth.

Was she a kind mistress to the washer-woman?—She was; she had a greater regard for her than any other woman that came about the house.

About this music, who did she say heard it?—She mostly mentioned herself hearing that.

Was this talk when Cranston was there?—I heard her talk so, when he was there, and in his absence.

Was it when she was in an angry temper only, that she used those words to her father?—I have heard her in the best of times curse her father.

Was Susan Gunnell very ill after drinking that tea?—She was, and continued so for a week.

King's Counsel. Was it at the time Susan was ill, from drinking of the tea, that Miss Blandy asked you about her taking the gruel, and said, it would do for her? And did she say any thing else?—*Binfield.* Miss Blandy said, she poured it out for my master; but he went to church, and left it.

Prisoner's Counsel. Have you had any ill will against her?—*Binfield.* I always told her, I wished her very well.

Did you ever say, "Damn her for a black bitch, I should be glad to see her go up the ladder, and be hanged?"—No, Sir, I never did in my life.

King's Counsel. Did you and the rest of the family observe, that Mr. Blandy's looks were as well the last six months as before?—*Bisfield.* Miss Blandy has said to me, "Don't you think my father looks faint?" Sometimes I have said, He is; sometimes not. I never observed any alteration at all.

Here Dr. Addington is appealed to by the Counsel for the Prisoner.

Prisoner's Counsel. Do you, Dr. Addington, remember Miss Blandy's telling you on Monday night, August the 12th, that she had on a Sunday morning, about six weeks before, when her father was absent from the parlour, mixed a powder with his tea; and that Susan Gunnell had drank that tea?

Dr. Addington. I remember her telling me that Monday night, that she had on a Sunday morning, about six weeks before, when her father was absent from the parlour, mixed a powder with his tea; but do not remember her saying, that Susan Gunnell had drank that tea. I have several times heard Susan Gunnell say, that she was sure she had been poisoned by drinking tea out of Mr. Blandy's cup that Sunday morning.

Prisoner's Counsel. Did not Miss Blandy declare to you, that she had always thought the powder innocent?—Yes.

Did she not always declare the same?—Yes.

The *King's Counsel* then interposed, and said, that he had not intended to mention what had passed in discourse between the prisoner and Dr. Addington; but that now, as her own counsel had been pleased to call for part of it, he desired the whole might be laid before the Court.

Dr. Addington. On Monday night, August the 12th, after Miss Blandy had been secured, and her papers, keys, &c. taken from her, she threw herself on the bed and groaned; then raised herself, and wrung her hands, and said, That it was impossible for any words to describe the horrors and agonies in her breast; that Mr. Cranstoun had ruined her; that she had ever, till now, believed him a man of the strictest honour; that she had mixed a powder with the gruel, which her father had drank on the foregoing Monday and Tuesday nights; that she was the cause of his death, and that she desired life for no end, but to go through a painful penance for her sin. She protested at the same time, that she had never mixed the powder with any thing else that he had swallowed; and that she did not know it to be poison, till she had seen its effects. She said, that she had received the powder from Mr. Cranstoun, with a present of Scotch pebbles; that he had wrote on the paper that held it, "The powder to clean the pebbles with;" that he had assured her it was harmless; that he had often taken it himself; that if she would give her father some of it now and then, a little and a little at a time, in any liquid, it would

make him kind to him and her; that accordingly, about six weeks before, at breakfast-time, her father being out of the room, she had put a little of it into his cup of tea, but that he never drank it; that part of the powder swimming at top of the tea, and part sinking to the bottom, she had poured it out of the window; and filled up the cup with fresh tea; that then she wrote to Mr. Cranstoun, to let him know that she could not give it in tea without being discovered; and that, in his answer, he had advised her to give it in water-gruel for the future, or in any other thickish fluid. I asked her, whether she would endeavour to bring Mr. Cranstoun to justice? After a short pause, she answered, That she was fully conscious of her own guilt, and was unwilling to add guilt to guilt; which she thought she should do, if she took any step to the prejudice of Mr. Cranstoun, whom she considered as her husband, though the ceremony had not passed between them.

King's Counsel. Was any thing more said by the prisoner or you?—*Dr. A.* I asked her, whether she had been so weak as to believe the powder, that she had put into her father's tea and gruel, so harmless as Mr. Cranstoun had represented it? Why Mr. Cranstoun had called it a powder to clean pebbles, if it was intended only to make Mr. Blandy kind? Why she had not tried it on herself, before she ventured to try it on her father? Why she had flung it into the fire? Why, if she had really thought it innocent, she had been fearful of a discovery, when part of it swam on the top of the tea? Why, when she had found it hurtful to her father, she had neglected, so many days, to call proper assistance to him? And why, when I was called at last, she had endeavoured to keep me in the dark, and hide the true cause of his illness?

What answers did she make to these questions?—I cannot justly say; but very well remember, that they were not such as gave me any satisfaction.

Prisoner's Counsel. She said then, that she was entirely ignorant of the effects of the powder.

Dr. Addington. She said, that she did not know it to be poison, till she had seen its effects.

Prisoner's Counsel. Let me ask you, Dr. Addington, this single question: whether the horrors and agonies, which Miss Blandy was in at this time, were not, in your opinion, owing solely to an hearty concern for her father?—*Dr. Addington.* I beg, Sir, that you will excuse my giving an answer to this question. It is not easy, you know, to form a true judgment of the heart; and I hope a witness need not deliver his opinion of it.

I do not speak of the heart: you are only desired to say whether those agitations of body and mind, which Miss Blandy shewed at this time, did not seem to you to arise entirely from a tender concern for her father?—Since you oblige me, Sir, to speak to this particular, I must say, that all the agitation of body and

mind, which Miss Blandy shewed at this time, or any other, when I was with her, seemed to me to arise more from the apprehension of unhappy consequences to herself, than from a tender and hearty concern for her father.

Did you never then observe in her any evident tokens of grief for her father?—I never thought I did.

Did she never wish for his recovery?—Often.

Did not you think that those wishes implied a concern for him?—I did not; because I had before told her, that if he died soon, she would inevitably be ruined.

When did you tell her this?—On Sunday morning, August the 11th, just before I left Henley.

Did not she desire you that morning, before you quitted his room, to visit him again the next day?—Yes.

And was she not very solicitous that you should do him all the service in your power?—I cannot say that I discovered any solicitude in her on this score, till Monday night, August the 12th, after she was confined, and her keys, and other things, had been taken from her.

King's Counsel. Did you, Dr. Addington, attend Susan Gunnell in her illness?—Yes, Sir; but I took no minutes of her case.

Did her symptoms agree with Mr. Blandy's?—They differed from his in some respects; but the most material were manifestly of the same kind with his, though in a much less degree.

Did you think them owing to poison?—Yes.

Did you attend Ann Emmet?—Yes, Sir.

To what cause did you ascribe her disorder?—To poison: for she told me, that on Wednesday morning, August the 7th, very soon after drinking some gruel at Mr. Blandy's, she had been seized with prickings and burnings in her tongue, throat, and stomach, which had been followed by severe fits of vomiting and purging. And I observed that she had many other symptoms, which agreed with Mr. Blandy's.

Did she say, that she thought she had ever taken poison before?—On my telling her that I ascribed her complaints to poison, which she had taken in gruel at Mr. Blandy's, August the 7th, she said, that if she had been poisoned by drinking that gruel at Mr. Blandy's, she was sure that she had been poisoned there the day-time before by drinking something else.

Alice Emmet sworn.

Emmet. My mother is now very ill, and cannot attend; she was char-woman at Mr. Blandy's in June last; she was taken very ill in the night, with a vomiting and reaching, upwards and downwards. I went to Miss Blandy in the morning, by her desire, to see if she would send her something, as she wanted something to drink, saying she was very dry; Miss said, she would send something, which she did in about two hours.

Did you tell her what your mother had eat

or drank?—No, I did not; only said, my mother was very ill and very dry, and desired something to drink.

Mr. Robert Littleton sworn.

Littleton. I was clerk to Mr. Blandy almost two years; the latter end of July last I went to my father's in Warwickshire, and returned again August the 9th, and breakfasted with Mr. Blandy and his daughter the next morning, which was on a Saturday; he was in great agony, and complained very much; he had a particular dish to drink his tea in; he tasted his tea, and did not drink it; saying, it had a gritty bad taste, and asked Miss, whether she had not put too much of the black stuff in it? meaning Bohea tea. She answered, it was as usual; he tasted it again and said, it had a bad taste; she seemed to be in some sort of a tremor; he looked particular at her, and she looked very much confused and hurried, and went out of the room. Soon after, my master poured it out into the cat's bason, and set it to be filled again; after this, when he was not there, Miss asked me what he did with the tea? I said, he had not drunk it, but put it into the cat's bason in the window; then she looked a good deal confused and hurried. The next day Mr. Blandy of Kingston came about half an hour after nine in the morning; they walked into the parlour, and left me to breakfast by myself in the kitchen; I went to church; when I returned, the prisoner desired me to walk with her cousin into the garden; she delivered a letter to me, and desired me to seal and direct it as usual, and put it into the post.

Had you ever directed any letter for her before?—I have a great many; I used to direct her letters to Mr. Cranstoun. [He is shewn a letter.] This is one.

Did you put it into the post?—I did not; I opened it, having just before heard Mr. Blandy was poisoned by his own daughter; I transcribed it, and took it to Mr. Norton's the apothecary at Henley, and after that I shewed it, and read it to Mr. Blandy.

What did he say?—He said very little; he smiled and said "Poor love-sick girl! What won't a girl do for a man she loves?" (or to that effect.)

Have you ever seen her write?—I have very often.

Look at this letter, is it her own hand-writing?—I cannot tell; it is wrote worse than she used to write, but it is the same she gave me.

Do you remember Mr. Cranstoun coming there in August 1750?—I do. It was either the latter end of July, or the beginning of August.

Did you hear any talk about music about that time?—After he was gone, I heard the prisoner say, she heard music in the house; this I heard her say very often, and that it denoted a death in the family; sometimes she said, she believed it would be herself; at other

times, it might be her father, by reason of his being so much broken; I heard her say once, she thought she heard her mother.

Did she say when that death would happen?—She said that death would happen before October, meaning the death of her father, seeming to me.

Have you heard her curse her father?—I have heard her several times, for a rogue, a villain, a toothless old dog.

How long was this before her father's death?—I cannot justly tell that, but I have heard her a great many times within two months of his death, and a great while before; I had used to tell her he was much broken latterly, and would not live long; she would say, she thought so, too, and that the music portended his death.

[Cross-examined.]

Prisoner's Counsel. When you breakfasted with them in the parlour, who was there first?—*Littleton.* She was.

Did you see the tea made?—No, Sir.

Did you see it poured out?—No; but he desired me to taste the tea; I did mine, and said, I fancied his mouth was out of taste.

Did not this hurry you say Miss Blandy was in, arise from the displeasure of her father, because the tea was not made to his mind?—I cannot say that, or what it was from.

What became of that he threw into the cat's bason?—He left it there.

Robert Harman sworn.

Harman. I was servant to Mr. Blandy at the time of his death; that night he died, the prisoner asked me, where I should live next? I said, I did not know; she asked me to go with her; I asked her, where she was going? she said, It would be 500*l.* in my way, and no hurt to me, if I would; I told her, I did not choose to go.

Did she tell you to what place she was going?—She did not.

Did she want to go away at that time of night?—Then, immediately.

[Cross-examined.]

Prisoner's Counsel. Did she give any reason why she desired to go away?—*Harman.* No, she gave none.

How long had you lived there?—A twelve-month.

What has been her general behaviour to her father, during the time you were there?—She behaved very well, so far as ever I saw, and to all the family.

Did you ever hear her swear about her father?—No, I never did.

Mr. Richard Fisher sworn.

Fisher. I was one of the jury on the coroner's inquest, that sat on Mr. Blandy's body on Thursday, August the 15th. As I was going up street to go to market, I was told, Miss Blandy was gone over the bridge. I went, and found her at the sign of the Angel,

on the other side of the bridge. I told her, I was very sorry for her misfortune, and asked her what she could think of herself to come from home, and if she would be glad to go home again? She said, "Yes; but what must I do to get there for the mob?" I said, I would endeavour to get a close post chaise, and carry her home. I went out through the mob, and got one, and carried her home. She asked me, whether she was to go to Oxford that night or not? I said, I believed not. When I came to her father's house, I delivered her up to the constables. When we were upon the enquiry before the coroner, a gentleman was asking for some letters, which came in the time of Mr. Blandy's illness; I went to her uncle Stevens to see for them. She then asked me again, What the gentlemen intended to do with her, or how it would go? I said, I was afraid very hard, unless she could produce some letters to bring Mr. Cranstoun to justice. She said, "Dear Mr. Fisher, I am afraid I have burnt some that would have brought him to justice." She took a key out of her pocket, and said, "Take this key, and see if you can find such letters in such a drawer." There was one Mrs. Minn stood by, I desired her to go with the key, which she did; but no letters were found there; then Miss Blandy said, "My honour to him will prove my ruin."

What did she mean by the word "him"?—Mr. Cranstoun: when she found there were no letters of consequence to be found.

Mrs. Lane sworn.

Mrs. Lane. I was with my husband at Henley, at the sign of the Angel on the other side the bridge; there was Miss Blandy. The first word I heard Mr. Lane my husband say, was, if she was found guilty, she would suffer according to law; upon which she stampt her foot upon the ground, and said, "O! that damn'd villain!" then paused a little, and said, "But why should I blame him? for I am more to blame than he, for I gave it him, and knew the consequence."

Did she say, I knew, or I know?—I really cannot say, Sir; for I did not expect to be called for to be examined here, and will not take upon me to swear positively to a word; she was in a sort of an agony, in a very great fright.

Mr. Lane sworn.

Lane. I went into the room where the prisoner was before my wife, the day after Mr. Blandy's death; she arose from her chair, and met me, and looked hard at me; she said, "Sir, I have not the pleasure of knowing you." Said I, "No, I am a stranger to you." She said, "Sir, you look like a gentleman, what do you think they will do with me?" Said I, "you will be committed to the county-gaol, and be tried at the assizes, and if your innocence appears, you will be acquitted; if not, you will suffer accordingly." She stampt with her foot, and said, "O! that damn'd

villain! But why do I blame him? I am more to blame." Then Mr. Littleton came in, which took off my attention from her, that I did not bear so as to give an account of the whole.

(The letter which Littleton opened, read in court.) Directed to the hon. William Henry Cranston, esq.:

"Dear Willy; My father is so bad, that I have only time to tell you, that if you do not hear from me soon again, do not be frightened. I am better myself; and lest any accident should happen to your letters, take care what you write. My sincere compliments. I am ever, yours."

THE PRISONER'S DEFENCE.

My lords; It is morally impossible for me to lay down the hardships I have received—I have been aspersed in my character. In the first place, it has been said, that I have spoke ill of my father; that I have cursed him, and wished him at hell; which is extremely false.—Sometimes little family affairs have happened, and he did not speak to me so kind as I could wish. I own I am passionate, my lords, and in those passions some hasty expressions might have dropt: but great care has been taken to recollect every word I have spoken at different times, and to apply them to such particular purposes, as my enemies knew would do me the greatest injury. These are hardships, my lords, extreme hardships! such as you yourselves must allow to be so. It is said too, my lords, that I endeavoured to make my escape. Your lordships will judge, from the difficulties I laboured under. I had lost my father—I was accused of being his murderer—I was not permitted to go near him—I was forsaken by my friends—affronted by the mob—insulted by my servants. Although I begged to have the liberty to listen at the door where he died, I was not allowed it. My keys were taken from me, my shoe-buckles and garters too—to prevent me from making away with myself, as though I was the most abandoned creature. What could I do, my lords? I verily believe I must have been out of my senses. When I heard my father was dead, and the door open, I ran out of the house, and over the bridge, and had nothing on but an half-sack and petticoat, without a hoop—my petticoats hanging about me—the mob gathered about me. Was this a condition, my lords, to make my escape in? A good woman beyond the bridge seeing me in this distress, desired me to walk in till the mob was dispersed; the town-serjeant was there, I begged he would take me under his protection to have me home; the woman said, it was not proper, the mob was very great, and that I had better stay a little. When I came home, they said I used the constable ill. I was locked up for 15 hours, with only an old servant of the family to attend me. I was not allowed a maid for the common decencies of my sex. I was sent to gaol, and was in hopes,

there, at least, this usage would have ended. But was told, it was reported I was frequently drunk; that I attempted to make my escape; that I never attended the chapel. A more abstemious woman, my lords, I believe, does not live.

Upon the report of my making my escape, the gentleman who was high-sheriff last year, (not the present) came and told me, by order of the higher-powers, he must put an iron on me; I submitted, as I always do to the higher powers. Some time after he came again, and said he must put a heavier upon me, which I have worn, my lords, till I came hither. I asked the sheriff, why I was so ironed? He said, he did it by the command of some noble peer, on his bearing that I intended to make my escape. I told them, I never had such a thought, and I would bear it with the other cruel usage I had received on my character. The Rev. Mr. Swinton, the worthy clergyman who attended me in prison, can testify that I was very regular at the chapel, whenever I was well; sometimes I really was not able to come out, and then he attended me in my room.—They likewise have published papers and depositions, which ought not to have been published, in order to represent me as the most abandoned of my sex, and to prejudice the world against me. I submit myself to your lordships, and to the worthy jury. I can assure your lordships, as I am to answer it before that grand tribunal, where I must appear, I am as innocent as the child unborn of the death of my father. I would not endeavour to save my life at the expence of truth. I really thought the powder an innocent, inoffensive thing, and I gave it to procure his love.—It has been mentioned, I should say I was ruined: my lords, when a young woman loses her character, is not that her ruin? Why, then, should this expression be construed in so wide a sense? Is it not ruining my character to have such a thing laid to my charge? And whatever may be the event of this trial, I am ruined most effectually.

Ann James sworn, for the prisoner.

James. I live at Henley, and had use to wash for Mr. Blandy; I remember the time Mr. Blandy grew ill; before he was ill, there was a difference between Elizabeth Binfield and Miss Blandy, and Binfield was to go away.

Counsel. How long before Mr. Blandy's death?—*James.* It might be pretty near a quarter of a year before: I have heard her curse Miss Blandy, and damn her for a bitch; and said she would not stay. Since this affair happened, I heard her say "Damn her for a black bitch, I shall be glad to see her go up the ladder, and swing."

How long after?—It was after Miss was sent away to gaol.

[Cross-examined.]

King's Counsel. What was this quarrel about?—*James.* I do not know; I heard her

say she had a quarrel, and was to go away, several times.

Who was by at this time?—Mary Banks was by, and nurse Edwards, and Mary Seymour; and I am not sure whether Robert Harman was there, or not.

How was it introduced?—It happened in Mr. Blandy's kitchen; she was always talking about Miss.

Were you there on the 5th of August?—I cannot say I was.

Do you remember the prisoner's coming into the wash-house, and saying, she had been doing something with her father's water-gruel?—No, I do not remember it.

Elizabeth Binfield was called up again.

King's Counsel. Did you, Elizabeth Binfield, ever make use of such an expression as this witness has mentioned?—*Binfield.* I never said such words.

Did you ever tell this witness Miss and you had quarrelled?—To the best of my knowledge, I never told her about a quarrel.

Have you ever had a quarrel?—We had a little quarrel some time before.

Did you ever declare you were to go away?—I did.

Mary Banks sworn.

Banks. I remember being in Mr. Blandy's kitchen in company with Ann James.

Counsel. Who was in company?—*Banks.* I do not remember.

Do you remember a conversation between Elizabeth Binfield and Ann James?—I do not remember any thing of it.

Do you remember her aspersing Miss Blandy's character?—I do not recollect.

Did you hear her say, "she should be glad to see the black bitch go up the ladder to be hanged"?—She did say, "she should be glad to see the black bitch go up the ladder to be hanged."

When was this?—It was the night Mr. Blandy was opened.

Are you sure it was that day?—I am sure it was.

Where was Miss Blandy then?—She was then in the house.

Edward Herne sworn.

Herne. I formerly was a servant in Mr. Blandy's family; I went there eighteen years ago, and left them about twelve years ago last November; but have been frequently at the house ever since; that is, may be once, twice, thrice, or four times in a week.

Counsel. What was Miss's general behaviour to her father, and in the family?—*Herne.* She behaved, according to what I always observed, as well to her father and the family, as any body could do, an affectionate, dutiful daughter.

Did you see her during the time of Mr. Blandy's illness?—I did. The first time I went into the room, she was not able to speak to me, nor I to her, for ten minutes,

What was that owing to?—It was owing to the greatness of her grief.

When was this?—It was the 12th of August, at night.

How did her father seem to be satisfied with her behaviour and conduct?—She was put into my custody that night; when I went into the room, (upon hearing the groans of her father) she said, at my return, "Pray, Ned, how does he do?"

Did you ever hear her speak ill of her father?—I never heard her swear an oath all the time I have known her, or speak a disrespectful word of her father.

[Cross-examined.]

King's Counsel. What are you?—*Herne.* I am sexton of the parish.

On what night did Mr. Blandy die?—On the Wednesday night.

How came you, as she was put under your care, to let her get away?—I was gone to dig a grave, and was sent for home; they told me she was gone over the bridge.

Had you any talk with her about this affair?—She declared to me, that captain Cranstoun put some powder into tea one morning for Mr. Blandy, and she turned herself about when he was stirring of it in the cup.

When did she tell you this?—In August 1750.

Have you seen her since she has been in Oxford gaol?—I have. When the report was spread that the captain was taken, I was with her in the gaol; a gentleman came in, and said, he was taken; she wrung her hands, and said, "I hope in God it is true, that he may be brought to justice as well as I, and that he may suffer the punishment due to his crime, as she should do for her's."

Prisoner. Give me leave to ask the last witness some questions.

Court. You had better tell your questions to your counsel; for you may do yourself harm by asking questions.

Prisoner's Counsel. Did not the prisoner at the same time declare, that as to herself, she was totally innocent, and had no design to hurt her father?—*Herne.* At that time she declared, That when Cranstoun put the powder into the tea, upon which no damage at all came, and when she put powder afterwards herself, she apprehended no damage could come to her father.

When she spoke of her own suffering, did she not mean the same misfortune that she then laboured under?—She said, she should be glad Cranstoun should be taken, and brought to justice; she thought it would bring the whole to light, he being the occasion of it all; for she suffered (by being in prison) and was innocent, and knew nothing that it was poison; no more than I, or any one person in the house.

Thomas Cawley sworn.

Cawley. I have known Miss Blandy twenty

years and upwards, and her father likewise ; I was intimate in the family, and have frequently drunk tea there.

Counsel. What was her behaviour to her father, during your knowledge of her?—*Cawley.* I never saw any other than dutiful.

Thomas Staverton sworn.

Staverton. I have lived near them five or six-and-twenty years, and upwards, and was always intimate with them ; I always thought they were two happy people, he happy in a daughter, and she in a father, as any in the world : the last time she was at our house, she expressed her father had had many wives laid out for him, but she was satisfied he never would marry till she was settled.

[Cross-examined.]

King's Counsel. Did you observe for the last three or four months before his death, that he declined in his health?—*Staverton.* I observed he did ; I do not say as to his health ; but he seemed to shrink, and I have often told my wife, my old friend Blandy was going.

Had he lost any teeth latterly?—I do not know as to that ; he was a good-looking man.

Prisoner's Counsel. How old was he?—*Staverton.* I think he was sixty-two.

Mary Davis sworn.

Davis. I live at the Angel at Henley-bridge ; I remember Miss Blandy coming over the bridge the day that Mr. Blandy was opened ; she was walking along, and a great crowd of people after her. I seeing that, went and asked what was the matter ; I asked her where she was going? She said, to take a walk for a little air, for they were going to open her father, and she could not bear the house. The mob followed her so fast was the reason I asked her to go to my house, which she accepted.

Counsel. Did she walk fast, or slowly?—*Davis.* She was walking as softly as foot could be laid to the ground ; it had not the least appearance of her going to make her escape.

Robert Stoke sworn.

Stoke. I saw the prisoner with Mrs. Davis the day her father was opened ; I told her, I had orders from the mayor to detain her ; she said, she was very glad, because the mob was about.

Counsel. Did you think, from her dress and behaviour, she was about an attempt to make her escape?—*Stoke.* No, it did not appear to me at all.

[Cross-examined.]

King's Counsel. Were you there when Mr. and Mrs. Lane came in?—*Stoke.* I was.

Did you hear the words she said to Mr. Lane?—I heard nothing at all.

Mr. Ford. As very unjustifiable and illegal methods have been used to prejudice the world

against Miss Blandy ; such as, it is to be hoped, no man will have the boldness to repeat, I mean the printing and publishing the examination of witnesses before her trial ; and as very scandalous reports have been spread concerning her behaviour, ever since her imprisonment ; it is desired, that the reverend gentleman who has attended her as a clergyman, may give an account of her conduct whilst in gaol, that she may at least be delivered of some of the infamy she at present lies under.

To which he was answered by the Court, that it was needless to call a witness to that, as the jury was only to regard what was deposed in court, and entirely to disregard what papers had been printed, and spread about, or any report whatsoever.

The Honourable Mr. Bathurst's Reply.

Your lordships will, I hope, indulge me in a very few words by way of reply ; and after the length of evidence which has been laid before the jury, I will take up but little of your lordship's time.

Gentlemen, you observe it has been proved to a demonstration, that Mr. Francis Blandy did die of poison. It is as clearly proved, that he died of the poison put into his water-gruel upon the 5th of August ; and that the prisoner at the bar put it in. For so much appears, not only from her own confession, but from a variety of other evidence.—The single question, therefore, for your consideration is, Whether she did it knowingly or ignorantly?

I admit, that in some of the conversations which she has had at different times with different persons, she has said she did it without knowing it to be poison, or believing it to be so.—At the same time I beg leave to observe, (as you will find when their lordships sum up the evidence to you) that she did not always make the same pretence.

Examine then, gentlemen, whether it is possible she could do it ignorantly.

It has appeared in evidence, that she owned she saw Mr. Cranstoun put some powder into her father's tea in the month of August preceding ; that she had herself afterwards done the same ; but she said she saw no ill effect from it, and therefore concluded it was not hurtful.—Her own witness, Thomas Staverton, says, that for a year past Mr. Blandy used to shrink in his clothes ; that he made the observation to his wife, and told her his friend Blandy was going.—Our witnesses have said, that she herself made the same observation ; told them, her father looked very ill, as though he would not live ; and said, he would not live till October.

And here let me observe one thing. She says, she gave her father this powder to make him love her. After having heard the great affection with which the poor dying man behaved towards her, can you think she wanted any charm for that purpose? After having heard what her own witnesses have said of the

father's fondness for the daughter, can you believe she had occasion for any love-powder?

But one thing more. She knew her father had taken this powder in his water-gruel upon the Monday night, and upon the Tuesday night; saw how violently he was affected by it; and yet would have had more of the same gruel given to him upon the Wednesday.

Yet one thing more. When she must have been fully satisfied that it was poison, and that it would probably be the occasion of his death; she endeavoured to burn the paper in which the rest of the powder was contained, without ever acquainting the physicians what she had given him, which might have been the means for them to have prescribed what was proper for his relief.

Still one thing more. She is accused upon the Saturday; she attempts to burn the powder upon the Saturday; and yet upon the Sunday she stays from church, in order to write a letter to Mr. Cranstoun. In that letter she styles him her Dear Willy;—acquaints him, her father is so bad that he must not be frightened, if he does not soon hear from her again;—says, she is herself better;—then cautions him to take care what he writes, lest his letters should fall into a wrong hand. Was this such a letter as she would have wrote, if she had been innocent? if she had not known the quality of the powder? if she had been imposed upon by Mr. Cranstoun?

I will only make one other observation, which is, that of all our witnesses she has attempted to discredit only one. She called two persons to contradict Elizabeth Binfield in regard to a scandalous expression (which she was charged with, but which she positively denied ever to have made use of) in saying, "She should be glad to see the prisoner go up the ladder, and swing."—They first called Ann James; she swore to the expression, and said, It was after Miss Blandy was sent to Oxford gaol. The next witness, Mary Banks, who, at first, did not remember the conversation, and, at last, did not remember who were present, said (upon being asked about the time) that she was sure the conversation happened upon the Thursday night on which Mr. Blandy was opened, and during the time that Miss Blandy was in the house. These two witnesses, therefore, grossly contradict one another; consequently ought not to take away the credit of Elizabeth Binfield. And let me observe, that Elizabeth Binfield proved nothing (besides some few expressions used by Miss Blandy), but what was confirmed by the other maid-servant, Susan Gunnell.

I will, in justice to the prisoner, add (what has already been observed by Mr. Ford), that the printing what was given in evidence before the coroner, drawing odious comparisons between her and former parricides, and spreading scandalous reports in regard to her manner of demeaning herself in prison, was a shameful behaviour towards her, and a gross offence against public justice. But you, gentlemen,

VOL. XVIII.

are men of sense, and upon your oaths; you will therefore totally disregard whatever you have heard out of this place. You are sworn to give a true verdict between the king and the prisoner at the bar, according to the evidence now laid before you: It is upon that we (who appear for the public) rest our cause.—If, upon that evidence, she appears to be innocent, in God's name let her be acquitted: But if, upon that evidence, she appears to be guilty, I am sure you will do justice to the public, and acquit your own consciences.

Prisoner. It is said, I gave it my father to make him fond of me.—There was no occasion for that,—but to make him fond of Cranstoun.

Mr. Baron Legge. Gentlemen of the jury; Mary Blandy, the prisoner at the bar, stands indicted before you for the murder of Francis Blandy, her late father, by mixing poison in tea and water-gruel, which she had prepared for him. To which she has pleaded, that she is Not Guilty.

In the first place, gentlemen, I would take notice to you of a very improper and a very scandalous behaviour towards the prisoner, by certain people, who have taken upon themselves very unjustifiably to publish in print what they call depositions, taken before the coroner, in relation to this very affair, which is now brought before you to determine. I hope you have not seen them; but if you have, I must tell you, as you are men of sense and probity, that you must divest yourselves of every prejudice that can arise from thence, and attend merely to the evidence that has now been given before you in court, which I shall endeavour to repeat to you, as exactly as I am able after so great a length of examination.

In support of the indictment, the Counsel for the Crown have called a great number of witnesses. In order to establish, in the first place, the fact, that Mr. Blandy died of poison, they begin with Dr. Addington, who tells you, that he did attend Mr. Blandy in his last illness; that he was first called in upon Saturday evening, the 10th of August last; that the deceased complained, that after drinking some water-gruel on Monday night, the 5th of August, he perceived a grittiness in his mouth, attended with a pricking burning, especially about his tongue and throat; that he had a pricking and burning in his stomach, accompanied with sickness; a pricking and griping in his bowels; but that afterwards he purged and vomited a good deal, which had lessened those symptoms he had complained of; that on Tuesday night, the 6th of August, he took more gruel, and had immediately a return of the same symptoms, but more aggravated; that he had besides hiccups, cold sweats, great anxieties, prickings in every external as well as internal part of his body, which he compared to so many needles, darting at the same time into all parts of him; but the doctor tells you, at the time he saw him, he said he was easy, except in his mouth,

his nose, lips, eyes, and fundament, and some transient pinchings in his bowels, which the doctor then imputed to the purgings and vomitings, for he had had some bloody stools; that he imputed the sensations upwards to the fumes of something he had taken the Monday and Tuesday before; that he inspected the parts affected, and found his tongue swelled, his throat excoriated and a little swelled, his lips dry, and pimples on them, pimples on the inside of his nostrils, and his eyes blood-shot; (that next morning he examined his fundament which he found surrounded with ulcers) his pulse trembled and intermitted, his breath was interrupted and laborious, his complexion yellowish, and he could not with the greatest difficulty swallow a tea-spoonful of the thinnest liquid; that he then asked him, if he had given offence to any person whatever. His daughter the prisoner was then present, and she made answer, that her father was at peace with all the world, and all the world with him. He then asked, if he had been subject to this kind of complaint before: the prisoner said, that he was subject to the heart-burn and colic, and she supposed this would go off as it used to do; that he then told them, that he suspected that by some means or other he had taken poison: to which the deceased replied, he did not know but he might, or words to that effect; but the prisoner said it was impossible. He returned to visit him on Sunday morning, and found him something relieved; that he had some stools, but none bloody, which he took for a spasmodic; that afterwards Norton the apothecary gave him some powder, which he said had been taken out of gruel, which the deceased had drank on Monday and Tuesday; this powder he examined at leisure, and believes it to be white arsenic; that the same morning a paper was put into his hands by one of the maids, which she said had been taken out of the fire, and which she saw Miss Blandy throw in; there was a superscription on the paper "powder to clean the pebbles;" there was so little of it, that he can't say positively what it was, but suspects it to be arsenic, for he put it on his tongue, and it felt like arsenic, but some burnt paper mixed with it had discoloured and softened it. He tells you, that on Monday morning the deceased was worse; all the symptoms returned, and he complained more of his fundament than before: he then desired the assistance of some skilful physician, because he looked upon him to be in the utmost danger, and apprehended this affair might come before a court of judicature: he asked the deceased, if he really thought he was poisoned: to which he answered, that he really believed so, and thought he had taken it often, because his teeth rotted faster than usual; he had frequent prickings and burnings in his tongue and throat, violent heart-burn and frequent stools, that carried it off again by unaccountable fits of vomiting and purging; that he had had these symptoms, especially after his daughter had received a present of Scotch pebbles from Mr. Cran-

ston. He then asked the deceased who he suspected had given the poison to him; the tears then stood in his eyes, but he forced a smile, and said, "A poor love-sick girl! I forgive her: I always thought there was mischief in those cursed Scotch pebbles."

Dr. Lewis came that evening, and Miss Blandy was sent into her chamber, under a guard, and all papers in her pocket, and all instruments with which she might hurt herself, or any other person, and her keys, were taken from her, that nothing might be secreted; for it was not then publicly known that Mr. Blandy was poisoned, and they thought themselves accountable for her forth-coming. On Monday night the deceased mended again, and grew better and worse, unaccountably, as long as he lived. On Tuesday morning every thing growing worse, he became excessively weak, rambled in his discourse, and grew delirious; had cold clammy sweats, short cough, and a deep way of fetching his breath; and he observed, upon those occasions, that an ulcerous matter issued from his fundament. In the midst of all this, whenever he recovered his senses, he said he was better, and seemed quite serene, and told him, he thought himself like a man hit by a mad dog. "I should be glad to drink, but I can't swallow." About noon his speech faltered more than before; he grew ghastly; was a shocking sight; and had a very bad night. On Wednesday morning he recovered his senses a little, and said he would make his will in a few days; but soon grew delirious again, sunk every minute, and about two in the afternoon he died.

The doctor tells you, he then thought, and still thinks, that he died of poison; that he had no symptoms while he lived, nor after he was dead, but what are common in people who have taken white arsenic. He then read some observations which he had made on the appearances of his body after he was dead; that his back, and the parts he lay on, were livid; the fat on the muscles of his belly was loose in texture, and approached fluidity; the muscles of the belly were pale and flaccid; the cawl yellower than natural; the side next the stomach and intestines brownish; the heart variegated with purple spots; there was no water in the pericardium; the lungs resembled bladders filled with air, blotched with black, like ink; the liver and spleen were discoloured, and the former looked as if it had been boiled; a stone was found in the gall-bladder; the bile was very fluid, and of a dirty yellow colour, inclining to red; the kidneys were stained with livid spots; the stomach and bowels were inflated, and looked as if they had been pinched, and blood stagnated in the membranes; they contained slimy bloody froth; their coats were thin, smooth and flabby; the inside of the stomach was quite smooth, and, about the orifices, inflamed, and appeared stabbed and wounded, like the white of an eye just brushed by the beards of barley; that there was no appearance of any natural decay at all in him,

and therefore he has no doubt of his dying by poison; and believes that poison to have been white arsenic; that the deceased never gave him any reason why he took the same sort of gruel a second time, nor did he ask him. He tells you, as to the powder that was given him by Norton, he made some experiments with it the next day, and some part of it he gave to Mr. King, an experienced chemist in Reading, who, upon trial, found it to be arsenic, as he told him; that he twice had powder from Norton; and that what he had the second time he kept entirely in his own custody, and made experiments with it a month afterwards; that he never was out of the room, while those experiments were making, and he observed them to tally exactly with other arsenic which he tried at the same time. I need not mis-spell your time in repeating the several experiments which the doctor has told you he made of it; he has been very minute and particular in his account of them; and, upon the whole, concludes the same to have been arsenic.

Dr. Lewis, the other physician, who has likewise been sworn, stood by all the while, and confirms Dr. Addington's evidence; tells you he observed the same symptoms, and gives it absolutely as his opinion, that Mr. Blandy died by poison, of which he has not the least doubt.

The next witness that is called on the part of the crown is Benjamin Norton, who is an apothecary at Henley; he tells you, he was sent for to Mrs. Mounteney's in Henley, on Thursday morning, the 31st of August; that there was a pan brought thither by Susan Gunnell, Mr. Blandy's maid-servant, with some water-gruel in it; that he was asked, what that powder was in the bottom of the pan: to which he replied, That it was impossible to say, whilst it was wet in the gruel, but that he would take it out; that accordingly he did take it out, and laid it upon paper, and gave it to Mrs. Mounteney to keep, which she did till the Sunday following, when it was delivered to him, and he shewed it to Doctor Addington, to whom he gave some of it twice, and, by the experiment made upon it with a hot poker, he apprehended it to be of the arsenic kind; that the powder he gave Dr. Addington was the same that he received from Mrs. Mounteney; that he has some of it still by him, which he now produces in court. He tells you, that he was sent for to Mr. Blandy on Tuesday the 6th of August; that he was very ill, as he imagined, of the cholic, and complained of a violent pain in his stomach, attended with reaching and purging, and swelling of the bowels; that he took physic on Wednesday morning, for which he found himself better: that on Thursday he went there in the morning, but did not then see him, but went again about twelve o'clock, and then saw him; he desired to have more physic, which he sent him to take on the Friday morning; that he has been used to attend Mr. Blandy, but that he never saw him thus out of order; that the last illness that he had had was thirteen months before.

He tells you, that he has heard the prisoner say, that she had heard music in the house, which portended something, and that Cranstoun had seen her father's apparition; and this was some months before her father's death; he says, that he can't tell who it was sent for him, but that, when he came, he found Mr. Blandy and the prisoner together; that he asked, if he had eat any thing that had disagreed with him; to which the prisoner made answer, nothing that she knew of, except some peas on the Saturday night before: That, at that time, he did not apprehend any thing of poison, nor did Mr. Blandy mention any thing of taking the gruel to him: That on Saturday the prisoner desired he would take care of her father, and, if there were any danger, call for help; he told her, he thought he was in great danger; and then she begged Dr. Addington might be sent for. Mr. Blandy himself would have deferred it till the next day, but she, notwithstanding, sent for him immediately: He tells you, that as to the powder he found it to be gritty, and had no smell; at first he could not tell what it was, till he took notice of the old woman's symptoms to be the same as Mr. Blandy's; then he suspected foul play, and, from what he heard in the family, suspected Miss Blandy.

Mrs. Mounteney is then called, who tells you, that she remembers Susan Gunnell bringing a pan to her house, with water-gruel, and powder at the bottom of it, on Thursday; that she sent for Norton the apothecary, who took the powder out, and laid it on white paper, which he gave to her to keep till it was called for; that she locked it up, and delivered the same to Norton on the Sunday following: she tells you, that the prisoner always behaved dutifully to her father, as far as ever she saw, when in his presence; that she did not mention the paper left with her to any body, till it was fetched away on Sunday morning, the 11th of August; that she was not at Mr. Blandy's in that time, and neither saw him, nor the prisoner; but she was there on the Sunday afternoon, though she did not then mention any thing of it.

The next witness is Susan Gunnell, who tells you, that she carried the pan of water-gruel to Mrs. Mounteney's from Mr. Blandy's, which had been made at his house, the Sunday se'nnight before his death, by herself; that she set it in the common pantry, where all the family used to go, and observed nobody to be busy there afterwards; but on Monday the prisoner told her she had been stirring her papa's water-gruel, and eating the oatmeal out of the bottom; that she gave him a half-pint mug of it that Monday night, before he went to bed; that she saw the prisoner take the tea-spoon that was in the mug, stir it about, and then put her fingers to the spoon, and rub them together, and then he drank some part of it; that on Tuesday morning she did not see him when first he came down stairs, and the first time she saw him was between nine and

ten o'clock, when Miss Blandy and he were together; that he then said he was not well, and going to lie down; that on Tuesday evening Robert Harman bid her warm her master some water-gruel, for he was in haste for supper; that she warmed him some of the same, which Miss Blandy carried into the parlour, and she believes he eat of it, for there was about half left in the morning; that she met him that night, after the water-gruel, as he was going up to bed; as soon as he got into the room, he called for a basin to reach, and seemed to be very sick, by reaching several times; the next morning, about six o'clock, she carries him up his physic, when he told her he had had a pretty good night, and was better; but he had vomited in the night, as she judges by the basin, which she had left clean, and was then about half full; that on Wednesday the prisoner came into the kitchen, and said to her, that as her master had taken physic, he might want water-gruel, therefore she might give him the same again, and not leave her work to make fresh, as she was busy ironing; to which she answered, that it was stale, if there was enough of it; that it would not take much time, and she would make fresh, and accordingly did so; that she had the evening before taken up the pan, and disliked the taste, and thought it stale, but was now willing to taste it again; that she put the pan to her mouth, and drank some of it, and then observed some whiteness at the bottom, and told Betty Binfield, that she never saw any oatmeal settlement so white before, whereupon Betty Binfield looked at it, and said, Oatmeal this! I think it looks as white as flour; she then took it out of doors, where there was more light, and putting her finger to the bottom of the pan, found it gritty; upon which she recollected, that she had heard that poison was white and gritty, which made her fear this might be poison; she therefore locked it up in a closet, and on Thursday morning carried it to Mrs. Mounteney's, where Mr. Norton saw it. She tells you, that about six weeks before Mr. Blandy's death, she was not very well herself, and Miss Blandy then asked her what was the matter with her, and what she had eat or drank; to which she answered, That she knew not what ailed her, but she had taken nothing more than the rest of the family; upon which the prisoner said to her, "Susan, have you eat any water-gruel? for I am told it hurts me, and may hurt you." To which she answered, "Madam, it cannot affect me, for I have eat none." She then mentions a conversation, that Betty Binfield told her she had with the prisoner on the same subject; but that you will hear from Betty Binfield herself. She then tells you, that on the Wednesday morning, after she had given her master his physic, she saw Ann Emmet the char-woman; and said to her, "Dame, you used to be fond of water-gruel, here's a fine mess for you, which my master left last night;" and thereupon warmed it, and gave it her; that the

woman sat down on a bench in the kitchen, and drank some of it, but not all; and said the house smelt of physic, and every thing tasted of physic, and she must go out and reach before she could finish it; that she went out to the wash-house, as she believes; that in about half an hour she followed her, and then found her in the necessary-house reaching, and, as she said, purging; that the old woman stayed there an hour and a half, during which time she went frequently to her, and carried her surfeit-water; she said she was no better, and desired some fair water; upon that she persuaded her to come into the house; but she said she was not able without help; that then she led her in, and put her in a chair by the fire, where the coughing and reaching continued; that she stayed in the house about half an hour, and grew worse; and she thought her in a fit, or seized with death; that about nine of the clock that morning, she went up to Miss Blandy, and acquainted her, that her dame had been very ill, and complained that the smell of physic had made her sick, and at the same time told her, that she had eat nothing but a little of her master's water-gruel, which could not hurt her; to which the prisoner said, "that she was glad she was not below stairs, for she should have been shocked to have seen her poor dame so ill." She tells you, that sometimes the prisoner talked affectionately of her father, and at other times but middling, and called him an old villain for using an only child so. Sometimes she wished for his long life, and sometimes for his death; and would often say, "that she was very unkind; and that if her father was dead, she would go to Scotland, and live with lady Cranstoun." That by her father's constitution he might live twenty years; but sometimes would say, she did not think he looked so well. She remembers Dr. Addington being sent for on Saturday evening; and tells you, that the prisoner was not deburred going into her father's room till Sunday night, when Mr. Norton brought her down with him, and told this witness not to suffer any person to go into her master's room, except herself, who looked after him. That about ten of the clock, on Monday morning, the prisoner came into the room after Mr. Norton; that she then fell on her knees to her father, and said, "Sir, banish me where you please, do with me what you please, so you do but forgive me; and as for Cranstoun, I will never see him, speak to him, or write to him more, as long as I live, if you will forgive me:" To which the deceased made answer, "I forgive thee, my dear, and I hope God will forgive thee; but thee shouldst have considered better, before thee attemptedst any thing against thy father; thee shouldst have considered I was thy own father:" That the prisoner then said, "Sir, as to your illness I am entirely innocent:" To which the witness replied, "Madam, I believe you must not say you are entirely innocent, for the powder left in the water-gruel, and the

paper of powder taken out of the fire, are now in such hands, that they must be publicly produced." The witness then told her, that she believed she had herself taken, about six weeks before, a dose in tea, that was prepared for her master: To which the prisoner answered, "I have put no powder in tea, I have put powder in water-gruel; if you have received any injury, I am entirely innocent; it was given me with another intent." The deceased hearing this, turned himself in his bed, and said, "Oh, such a villain! Come to my house, eat of the best and drink of the best my house could afford, should take away my life, and ruin my daughter. Oh! my dear, thee must hate that man; thee must hate the ground he goes on; thee can'st not help it." That the prisoner replied, "Sir, your tenderness to me is like a sword to my heart: every word you say is like swords piercing my heart, much worse than if you were to be ever so angry; I must down on my knees, and beg you will not curse me." To which her father answered, "I curse thee, my dear! how shouldst think I could curse thee! No; I bless thee, and hope God will bless thee, and amend thy life. Do, my dear, go out of the room; say no more, lest thee shouldst say any thing to thy own prejudice: Go to thy uncle Stevens, take him for thy friend: Poor man! I am sorry for him." And that then the prisoner went directly out of the room. This witness further tells you, that on the Saturday before, she was in the kitchen about twelve o'clock at noon, when the prisoner having wrote the direction of a letter to her uncle Stevens, and going to the fire to dry it, she observed her put a paper or two into the fire, and saw her thrust them down with a stick; that Elizabeth Binfield then putting some fresh coals on, she believes kept the paper from being consumed; soon after which the prisoner left the kitchen, and she herself acquainted Betty Binfield that the prisoner had been burning something; that Betty Binfield asked where; and the witness pointed to the corner of the grate; whereupon Betty Binfield moved a large coal, and took out a paper, and gave it to her; that it was a small piece of paper, with writing upon it, viz. "The powder to clean the pebbles," to the best of her remembrance. She did not read it herself, but Betty Binfield did, and told her what it was; that about 11 or 12 o'clock that night she delivered this paper to Betty Binfield again, but it had never been out of her pocket till that time. She tells you, that before this, upon the same Saturday morning, she had been in her master's room about 7 o'clock, to carry him something to drink, and when he had drank it, she said to him, "Sir, I have something to communicate to you, which nearly concerns your health and your family; I believe you have got something in your water-gruel that I am afraid has hurt you, and I believe Miss Blandy put it in, by her coming into the wash-house on Monday, and saying, that she had been stirring her

papa's water-gruel, and eating the oatmeal out of it;" Upon which he said, "I find I have something not right, my head is not right as it used to be, nor has been for some time." This witness told him, that she had found a powder in the pan; upon which he said to her, "Dost thee know any thing of this powder? didst thee ever see any of it?" To which she answered, "No, none but what she saw in the water-gruel;" he then asked her, "Dost know where she had this powder, or canst guess?" To which she replied, "I cannot guess any where, except from Mr. Cranstoun; my reason to suspect that is, Miss Blandy has lately had letters oftener than usual." Her master then said, "Now you mention it, I remember, when he was at my house, he talked of a particular poison they had in his country; Oh! that villain! that ever he came into my house." She likewise told him, that she had shewn the powder to Mr. Norton, but he could not tell what it was, as it was wet; but whatever it was, it ought not to be there; her master expressed some surprize, and said, "Mr. Norton not know! that's strange! a person so much used to drugs." She told him, Mr. Norton thought it would be proper for him (her father) to seize her pockets, with her keys and papers. To which he said, "I cannot do it; I cannot shock her so much. But canst not thee take out a letter or two, which she may think she has dropped by chance?" The witness told him, "No, Sir, I have no right, she is your daughter; you may do it, and nobody else." She tells you, she cannot say how long before this it was, that Ann Emmet had been sick with the tea; that Miss Blandy then sent her whey and broth, a quart or three pints at a time, once a day, or every other day; that she herself once drank a dish of tea on a Sunday morning, out of her master's dish, which was not well relished, and she thought somebody had been taking salts in that cup; and this was about six weeks and three days before her master's death; that she found no ill effect from it till after dinner that day; she had then a hardness at her stomach, which she apprehended was from eating plentifully of beaus at dinner; that afterwards she seemed to have some indigestion, and had a remarkable trembling upon her; that she had no other symptoms for three days, but afterwards, for about three days more, she was troubled with a reaching every morning. She says, she tasted the water-gruel twice; once on the Tuesday when she was mixing it for her master, and again on the Wednesday, but found no remarkable disorder till about two o'clock on the Wednesday morning before her master's death, when she was seized with convulsions. She says, that her throat continued troublesome for six or seven weeks after she had drank the tea, and continued ill for three weeks after her master's death; she remembers once that the prisoner had a large box of linen and some pebbles from Mr. Cranstoun, in the spring, before her master's death, and a

small box of Scotch pebbles afterwards, about three months before his death; that the prisoner shewed the pebbles to many of her acquaintance, but the witness never heard of powder to clean them; she tells you, that about a year before his death, her master had a cold, but she does not remember he was so ill as to send for the apothecary: that he used to be equally complaining of the gravel, gout, and heart-burn for twelve years; knows nothing particular of any complaint but the heart-burn, and that he may have complained of all the time she has lived in the house; but she is not positive.

She says, the prisoner's behaviour to her father, in general, seemed to be dutiful, but she used undutiful expressions in her passions; that there had been no conversation between her master and the prisoner, before her asking forgiveness, but a message sent by him to her, that he was willing to forgive her, if she would bring that villain to justice; in all he said afterwards, he seemed to speak of his daughter, as if he believed her innocent of any intention to hurt him, and looked on Cranstoun as the first mover and contriver of all, and had said, "Poor unfortunate girl! that ever she should be led away by such a villain to do such a thing!" She believes he thought his daughter unacquainted with the effects of the powder; that the prisoner, during his illness, kept him company, and directed every thing for him as for herself; the prisoner knew her father was ill on Monday and Tuesday nights, but won't take upon her to say, that she knew what was the cause of it; but she knew that the char-woman had been ill on the Wednesday morning, before she told the witness that the old water-gruel would serve for her father.

The next witness is Elizabeth Binfield, who tells you, that she was a servant to the deceased almost three years before his death; that he first complained of unusual pains and prickings, about a fortnight before his death; that she has often heard the prisoner mention walkings, and music, that she had heard in the house; that she thought it to be her mother; and three quarters of a year before her master's death, the prisoner told her that the music pre-saged his death, and continued talking in the same way to the time of it; that she has often heard her say, he would die before October; that the prisoner told her, that Mr. Cranstoun had informed her, that a famous woman, one Mrs. Morgan, who lived in Scotland, or London, but which the witness cannot say, had said so; that the prisoner used to appear glad when she spoke of the prospect of her father's death, for that then she should be released from all her fatigues, and be happy. She tells you, she heard the prisoner say, that her father complained of a ball of fire in his guts, before the Monday on which he took the water-gruel; she tells you, that she remembers that Ann Emmet, the char-woman, was ill about five or six weeks before this time, and that the prisoner ordered her white-wine whey and

broth; that she herself made the broth two or three times, two quarts at a time; she says, that on Saturday, the 10th of August, the paper was taken out of the fire by herself, which she looks upon, and says, she really believes it to be the same which she gave to Susan Gunnell, had again from her, and then delivered to Dr. Addington and Mr. Norton. She tells you, that when Susan Gunnell was ill, the prisoner asked this witness, "If Susan had taken any of her father's water-gruel;" and upon her answering, "Not that I know," the prisoner said, "If she does, she may do for herself, may I tell you:" with this conversation she acquainted Susan Gunnell about a month or six weeks before her master's death, in which particular she is confirmed by Susan Gunnell. She says further, that she heard the prisoner say, "Who would grudge to send an old father to hell for 10,000l.?" And this she introduced by talking of young girls being kept out of their fortunes. She has heard the prisoner often curse her father, and call him rascal and villain; she says, that Mr. Cranstoun had been at her master's about three quarters of a year before his death, and she believes her master did not approve of his being so much with his daughter, as she judged by his temper; but she does not believe he debarred his daughter from keeping him company. She says, that upon Saturday, the 10th of August, she was in the kitchen when her master was shaving, and the prisoner was there; and her master said he had once like to have been poisoned at a public house; to which the prisoner answered, That she remembered it very well: her master said, that one of the company died immediately, the other is now dead, but it is my fortune to be poisoned at last; and then looked hard at the prisoner, who appeared in great confusion, and seemed all in a tremble; her master said further, that it was white arsenic that was put into their wine. This witness then tells you, that she sat up with the prisoner the night her father died, till three o'clock, but the prisoner went to bed about one; that they had no discourse at all of her father; but the prisoner asked her if she would go away with her, and offered, if she would go to the Bell, or the Lion, and hire a post-chaise, she would give her fifteen guineas at getting into the chaise, and ten guineas more when they got to London; that on the witness refusing to comply with this request, the prisoner burst into a laughter, and said she was only joking. She tells you further, that she heard the prisoner tell Dr. Addington that she had given the powder to her father before, and then it was in tea; that she was afraid of a discovery, so flung it away, and filled the cup up again, which Susan Gunnell drank, and was ill for a week after. She says, that upon Monday, the 5th of August, the prisoner came into the wash-house, and said that she had been in the pantry, eating oatmeal out of her father's gruel, which she little regarded then; but the same day in the afternoon she saw the prisoner in the pan-

try take a tea-spoon, and stir the water-gruel which was in a pan, and then rubbed it between her fingers; that on the Tuesday evening the prisoner came into the kitchen to her, and said, "Betty, if one thing should happen, will you go into Scotland with me?" To which she said, "Madam, I do not know." "What," says the prisoner, "you are unwilling to leave your friends?" To which the witness replied, that if she should go there, and not like it, it would be expensive travelling. She says, that on Monday morning, the 12th of August, she went on a message from the prisoner, to beg of her father that she might speak one word with him, which being granted, the prisoner went up; and that she afterwards met the prisoner coming out of her father's room, when she clasped the witness round the neck, burst out a-crying, and said to her, "Susan and you are the two honestest servants in the world; you deserve to be imaged in gold for your honesty; half my fortune will not make you amends for your honesty to my father." She tells you, that her master had been out of order about twelve months before this time; and that it was at the time when Susan Gunnell was ill by drinking the tea, that the prisoner cautioned her about Susan's drinking her father's water-gruel.

Dr. Addington having been appealed to by the last witness, in the course of her evidence, is again called up, and confirms all that this witness has said, except he does not remember the circumstance of Susan Gunnell's being ill with the tea.

He says, that the prisoner always told him she thought it an innocent powder, but said, it was impossible to express her horror, that she was the cause of her father's death; though she protested that she thought it innocent when she gave it; for Mr. Cranstoun had assured her that he used to take it himself, and called it a love-powder; that she had a letter from him, directing her to give it in gruel, as she had informed him it did not mix in tea; that "for her own part she desired life for no other purpose, than only to go through a severe penance for her sins;" that on her being pressed by him to discover all she knew relating to Cranstoun, her answer was, that "she was fully conscious of her own guilt, and would not add guilt to guilt, for she looked on Cranstoun as her husband, though the ceremony had not passed between them." He tells you further, that he does not remember that she gave him any satisfactory answer to any of the questions which he put to her, which he has repeated to you, and which are very material ones, but always persisted that she was entirely ignorant of the effects of the powder, till she saw them on her father: and often said, "Pray God send it may not kill him," after he had told her, and her father too, the danger of her father, and that he apprehended her to be undone: he then tells you he attended Susan Gunnell, who had the same symptoms with the deceased, but in a less de-

gree; he also attended Ann Emmet, who had the same symptoms, and told her that she was poisoned.

Alice Emmet is then called, who is daughter to Ann Emmet the old char-woman, who gives you an account that her mother was char-woman at Mr. Blandy's in June last, in the time of hay-harvest; that she was then taken sick, was seized in the night-time with a vomiting and purging, and this witness went in the morning to the prisoner, by her mother's desire, and acquainted her with the condition she was in; that the prisoner said she was sorry, and would send her something to drink, which she did in about an hour or two afterwards.

The next witness is Mr. Littleton, who had been clerk to the deceased about two years, and tells you he came home from his father's in Warwickshire, upon the 9th of August last; that the next morning the prisoner, her father, and himself, were at breakfast together; that they stayed for the deceased some time; that when he came, he appeared to be ill and in great agony: that he had always a particular cup to himself; that he tasted his tea, and did not like it, but said it had a gritty bad taste, and asked the prisoner if she had not put too much of the black stuff in it (meaning bohea tea); the prisoner said, it was as usual; he then tasted it again, and said it had a bad taste, and looked very particularly at her; she seemed in a hurry, and walked out of the room; the deceased then poured the tea into the cat's bason, and went away. Soon after the prisoner came into the room again, when he told her that he thought the deceased was very ill, for that he could not eat his breakfast; on which she asked what he had done with it; and upon his acquainting her that it was poured into the cat's bason, she seemed a good deal confused. That the next day, being Sunday morning, Mr. Blandy of Kingston came to their house, and went to church along with him; that after they returned from church, the prisoner desired this witness to walk with her and Mr. Blandy in the garden, when she put a letter into his hand, and bid him direct it as usual, which he understood to be to Mr. Cranstoun, (having been used to direct others before) to seal it, and put it in the post. He tells you, he had then heard so much, that he opened the letter, transcribed it, carried it to Mr. Norton, and read it to the deceased, who only said, "Poor love-sick girl! what won't a girl do for a man she loves?" This letter he has now looked at; tells you, that it is wrote worse than usual, therefore he cannot swear whether it is her hand or no, but he can swear it is the same she gave him; the letter itself has been read to you, and I will make no remarks upon it. He tells you, that after Mr. Cranstoun was gone from Henley in August 1750, he has often heard the prisoner say, that she heard music, which portended death in the family, and sometimes thought it might be herself, sometimes her father, because he

was so much broken ; that he has heard her say, death would happen before October ; that he has often heard her curse her father, damn him for a rogue and a toothless old dog, within two months of his death, and a great while before ; that he has told her himself, that he thought Mr. Blandy seemed broken ; upon which she said she thought so too, and that the music portended his death.

Robert Harman is called next, who tells you, that he was servant to Mr. Blandy at the time of his death ; that the night his master died, the prisoner asked him where he should live next ; on which he told her he did not know ; and she then asked him if he would go away with her ; and upon his saying he did not care to do so, she told him no hurt would come to him, but it would be 500*l.* in his way, and wanted him to go away then immediately. He says, the prisoner behaved well to her father, and all the family, as far as he knows, and never heard her swear about her father.

The next witness is Richard Fisher, who was one of the jury on inspection of the body of the deceased. On Thursday, the 15th of August, he was informed that Miss Blandy was gone over Henley-bridge, and went to her at the Angel ; when he came into the room, he told her he was sorry for her misfortune, and asked her, if she would not be glad to go home again ? She said she should, but could not get through the mob ; upon which he got a covered post-chaise, and carried her home. As they were going, she asked him, if she was to go to Oxford that night ; that he told her he believed not ; when he brought her to her father's house, he delivered her up to the constable ; that after this he was upon the jury, and when he went to her again, she asked him how it was likely to go with her ; upon which he told her, he was afraid very hardly, unless she could produce letters or papers of consequence to bring Cranstoun to justice. Upon which she said, " Dear Mr. Fisher, I have burnt those letters that would have brought him to justice," and gave a key out of her pocket to search a drawer for letters ; but none being found, she said, " My honour to him (meaning Cranstoun) will prove my ruin."

Mrs. Lane is then called, who says, she went to the Angel along with her husband, when the prisoner was there ; the first word she heard her husband say was, if she was guilty, she would suffer according to law ; upon which the prisoner stamp'd on the ground, and the first thing she heard her say was, " O that damned villain !" then paused a little, and went on again, " But why do I blame him ? I am more to blame myself, for it was I gave it him, and knew the consequence." Upon being asked, whether she said, " I knew," or " I know," the witness tells you, that she will not be positive which, but the prisoner was in a sort of agony ; whichever way it was, it may make some little difference, but nothing material.

Mr. Lane, the husband of the last witness, is

then called, and tells you, that he went into the room before his wife ; that the prisoner rose and met him, told him he was a stranger to her, but as he appeared like a gentleman, she asked him what they would do with her ? That he told her, she would be committed to the county gaol, and tried at the assizes ; if her innocence appeared, she would be acquitted ; if not, she would suffer accordingly. Upon which she stamp'd with her foot, and said, " O that damned villain ! But why do I blame him ? I am more to blame."—That then Mr. Littleton came in, which took off his attention ; that he did not hear what followed, so as to be able to give an account of it.

The letter from the prisoner to captain Cranstoun, without any date to it, which was opened by Littleton, has then been read to you, and with that the counsel for the crown conclude their evidence.

The prisoner in her defence complains of hard usage she has met with, denies her ever speaking ill of her father, owns herself to be passionate, and complains that words of heat, upon family-affairs, have been mis-constructed and applied to an ill intention in her ; that she was not in her senses when she lost her father, nor in a proper dress to make her escape when she went over Henley-bridge ; that she was taken in at the Angel by the woman of the house out of mere compassion, and was then desirous to put herself under the protection of the town-serjeant ; that, during her confinement, she was not suffered to have decent attendance for a woman ; that she was affronted by her own servants, cruelly traduced, and heavily ironed, without any reasonable cause ; that she thought the powder innocent, and never had a thought of hurting her father ; but her own ruin is effected by such an insinuation upon her, and her appearance here, without her being convicted. She then calls her witnesses ; and the first is

Ann James, who tells you she lives at Henley, and used to wash at Mr. Blandy's house ; that she remembers that some time before Mr. Blandy's illness, there was a difference between the prisoner and Elizabeth Binfield, and that the latter was to go away ; and that she has heard Elizabeth Binfield curse the prisoner, and damn her for a bitch, and say, she would not stay ; that since this affair happened, she heard her say (speaking of the prisoner), " Damn her for a black bitch, she should be glad to see her go up the ladder, and swing." She tells you, that when this conversation happened, the prisoner was gone to gaol ; that it was in Mr. Blandy's kitchen ; and that nurse Edwards, Mary Seymour, and Mary Banks, were present.

Elizabeth Binfield is then called up again, and absolutely denies the words she is charged with : she says, she never acquainted the witness with any quarrel she had had, to the best of her remembrance, but that she had some few words of difference with the prisoner, and had said, that she was to go away.

Mary Banks is then called, who says, that she was in Mr. Blandy's kitchen while he was dead in the house; but she does not remember who was in company, nor any conversation that passed between Elizabeth Binfield and Ann James, till the words are directly put into her mouth, and then she recollects that Elizabeth Binfield said, "she should be glad to see Miss Blandy, that black bitch, go up the ladder to be hanged;" but she tells you, this was on the night that Mr. Blandy was opened, and that the prisoner was then in the house.

These two witnesses are called to impeach the credit of Elizabeth Binfield, as having a prejudice against the prisoner; but I see no great stress to be laid on their evidence, for they manifestly contradict one another, but do not falsify her in any one thing she has said.

The next witness that she calls is Edward Heroe, who was a servant to Mr. Blandy 18 years ago, and has left his place about 12 years; but he has been very seldom without going three or four days a-week to his house ever since; that the prisoner's general behaviour to her father and the family was as well as any body could do, with affection and duty, as far as ever he saw; that on the Monday night before Mr. Blandy died, he went to the house, and that neither the prisoner nor he could speak for some minutes, which he attributed to her great concern; that she was put into his custody that night; that on hearing the groans of her father, he went into him, at her desire, to enquire how he did; that he never heard her swear, or speak disrespectfully of her father: he says, he was not in the way when she went over Henley-bridge (being sent for to dig a grave, he being the sexton); that he has seen her since her confinement at Oxford, and she told him, that captain Cranstoun had before put some powder in her father's tea; that she turned about, and when she turned again he was stirring it in; that on a report that captain Cranstoun was taken, she wrung her hands, and said, "She hoped in God it was true, that he might be brought to justice as well as herself; that as she was to suffer the punishment due to her crime, he might do so too;" but at the same time she declared, that when Cranstoun put the powder in to the tea, and she herself did so afterwards, she knew no ill effects of it, or saw any harm from it; but if he were taken, it would bring the whole to light; for she was innocent, and knew no more of its being poison than any person there.

Thomas Cawley, the next witness, says, that he has known the prisoner twenty years and upwards; that he was intimate in the family, and never saw any other than the behaviour of a dutiful daughter from her.

Thomas Staverton, that he has known the prisoner five or six-and-twenty years; that he has lived near the family, and always thought that her father and she were very happy in each other. He has observed that Mr. Blandy was declining in his health; for four years or

more he seemed to shrink, and believes he was about 62 years of age.

Mary Davis is the next witness; she lives at the Angel by Henley-bridge, and remembers the prisoner coming over, the day her father was opened; that she was walking along with a great crowd after her; that she went to her, and asked her what was the matter, and where she was going? The prisoner said, she was going to walk for the air, for that they were going to open her father, and that she could not bear the house; the mob followed so close, that she invited the prisoner into her house, which she accepted, and was walking gently; and had not the appearance of making an escape.

Robert Stoke tells you, he knows the last witness Mrs. Davis, and saw the prisoner with her in her house the day her father was opened; that he was ordered by the mayor to take care of the prisoner, which she said she was very glad of, because the mob was about; and he did not observe any inclination or attempt whatsoever to make an escape.

This, gentlemen, is the substance of the evidence on both sides, as nearly as I can recollect it. I have not wilfully omitted or misstated any part of it; but, if I have, I hope the gentlemen who are of counsel on either side, will be so kind as to set me right.

A very tragical story it is, gentlemen, that you have heard, and upon which you are now to form your judgment, and give your verdict.

The crime with which the prisoner stands charged, is of the most heinous nature, and blackest dye, attended with considerations that shock human nature, being not only murder, but parricide—the murder of her own father.—But the more atrocious, the more flagrant the crime is, the more clearly and satisfactory you will expect that it should be made out to you.

In all cases of murder, it is of necessity, that there should be malice aforethought, which is the essence of, and constitutes the offence: but that malice may be either express, or implied by the law: express malice must arise from the previous acts or declarations of the party-offending; but implied malice may arise from numbers of circumstances, relating either to the nature of the act itself, the manner of executing it, the person killing, or the person killed, from which the law will as certainly infer malice, as where it is express.

Poison, in particular, is in its nature so secret, and withal so deliberate, that wherever that is knowingly given, and death ensues, the so putting to death can be no other than wilful and malicious.

In the present case, which is to be made out by circumstances, great part of the evidence must rest upon presumption, in which the law makes a distinction: a slight or probable presumption only has little or no weight: but a violent presumption amounts in law to full proof, that is, where circumstances speak so

strongly, that to suppose the contrary, would be absurd: I mention this to you, that you may fix your attention on the several circumstances that have been laid before you, and consider whether you can collect from them such a presumption, as the law calls a violent presumption, and from which you must conclude the prisoner to be guilty: I would observe further, that where that presumption necessarily arises from circumstances, they are more convincing and satisfactory, than any other kind of evidence, because facts cannot lie.

I cannot now go through the evidence again, but you will consider the whole together, and from thence determine what you think it amounts to. Thus far is undeniably true, and agreed on all sides, that Mr. Blandy died by poison; and that that poison was administered to him by his daughter, the prisoner at the bar. What you are to try, is reduced to this single question, Whether the prisoner, at the time she gave it to her father, knew that it was poison, and what effect it would have?

If you believe, that she knew it to be poison, the other part, viz. that she knew the effect, is consequential, and you must find her guilty: On the other hand, if you are satisfied, from her general character, from what has been said by the evidence on her part, and from what she has said herself, that she did not know it to be poison, nor had any malicious intention against her father, you ought to acquit her. But if you think she knowingly gave poison to her father, you can do no other than find her guilty.

The Jury consulted together about five minutes, and then turned to the Court.

Cl. of Arr. Gentlemen, are you all agreed on your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall say for you?

Jury. Our foreman.

Cl. of Arr. Mary Blandy, hold up thy hand (Which she did). Gentlemen of the jury, look upon the prisoner: How say you, is Mary Blandy Guilty of the felony and murder whereof she stands indicted, or Not Guilty?—*Jury.* Guilty.

Cl. of Arr. What goods or chattels, lands or tenements, had she at the time of the same felony and murder committed, or at any time since, to your knowledge?—*Jury.* None.

Cl. of Arr. Harken to your verdict as the Court hath recorded it. You say that Mary Blandy is guilty of the felony and murder whereof she stands indicted; and that she has not any goods or chattels, lands or tenements, at the time of the said felony and murder committed, or at any time since, to your knowledge; and so you say all.

Cl. of Arr. Mary Blandy, hold up thy hand. You have been indicted of felony and murder. You have been thereupon arraigned, and pleaded thereto Not Guilty, and for your trial you have put yourself upon God and your country, which country have found you Guilty. What have you now to say for yourself, why

the Court should not proceed to give judgment of death upon you according to law?

Cryer. Oyez! My lords the king's justices do strictly charge and command all manner of persons to keep silence, whilst sentence of death is passing on the prisoner at the bar, upon pain of imprisonment.

Mr. Baron Legge:

Mary Blandy, you have been indicted for the murder of your father, and for your trial have put yourself upon God and your country: That country has found you Guilty.

You have had a long and a fair trial, and sorry I am, that it falls to my lot to acquaint you, that I am now no more at liberty to suppose you innocent, than I was before to presume you guilty.

You are convicted of a crime so dreadful, so horrid in itself, that human nature shudders at it—The wilful murder of your own father!—A father, by all accounts, the most fond, the most tender, the most indulgent that ever lived:—That father with his dying breath forgave you:—May your heavenly father do so too!

It is hard to conceive, that any thing could induce you to perpetrate an act so shocking, so impossible to reconcile to nature or reason. One should have thought, your own sense, your education, and even the natural softness of your sex, might have secured you from an attempt so barbarous and so wicked.

What views you had, or what was your intention, is best known to yourself: With God and your own conscience be it. At this bar, we can judge only from appearances, and from the evidence produced to us: But do not deceive yourself; remember you are very shortly to appear before a much more awful tribunal, where no subterfuge can avail; no art, no disguise can screen you from the Searcher of all hearts: "He revealeth the deep and secret things, he knoweth what is in the darkness, and the light dwelleth with him."

Let me advise you to make the best and wisest use of the little time you are likely to continue in this world: Apply to the throne of grace, and endeavour to make your peace with that power, whose justice and mercy are both infinite.

Nothing now remains but to pronounce the sentence of the law upon you; which is,

'That you are to be carried to the place of execution, and there hanged by the neck until you are dead: And may God of his infinite mercy receive your soul.'

The Prisoner then addressed herself to the Judge in this manner:

"My lord, as your lordship has been so good to shew so much candour and impartiality in the course of my trial, I have one favour more to beg, which is, that your lordship would please to allow me a little time, till I can settle my affairs, and make my peace with God."

To which his lordship replied,
 "To be sure, you shall have a proper time allowed you."

Miss Blandy having received sentence of death, was re-conducted to the Castle, from whence she came. Many people believed, that she behaved not only through the whole course of her trial, but afterwards, with such a decent resolution, as does not often attend a consciousness of guilt; though great part of mankind (it must be owned) seem fully convinced of even her intention to destroy her father. Be that as it will, her conduct before the judges was not only uncensured, but even applauded, by a majority of the spectators who were witnesses of it. Nor did any material alteration discover itself in the tenor of her behaviour, though her spirits sometimes a little failed her, betwixt the day of her trial and that of her execution.

It would be endless, however, notwithstanding this undoubted truth, to recite the palpable falsehoods, and inhuman calumnies, industriously propagated of her, and dispersed throughout the nation, in almost every part of that interval. Sometimes it was reported that she had poisoned herself, and sometimes that she had laid upon herself violent hands in a different manner; though she discovered, on all occasions, to the minister who attended her, the most perfect abhorrence of suicide, and of every thing that had but even the least tendency to it. Several persons affirmed, that she was so perfectly hardened, that she would not acknowledge herself guilty of any crime; the reverse of which is true, as can be attested both by the aforesaid minister, and other persons of character and reputation. She has frequently said, that she deserved death for destroying her father, though she did not think herself so guilty as if she had designedly and intentionally perpetrated so black a crime. This declaration she constantly persisted in; though that point of conduct gave uncommon offence to vast numbers of people.

During the aforesaid interval, Miss Blandy attended divine service in the chapel as often as her health would permit; and the crowds of people, who flocked thither to gaze upon her, did not drive her from thence; and when any thing of that kind happened, as well as at all other proper seasons, the minister of the Castle attended her in her own apartment. She often professed herself a sincere penitent, and said she was covered with contrition for every sin she had committed, and particularly that which occasioned the loss of her dear father's life. When such professions as these were made, she pretty frequently shed tears, and discovered the most apparent emotions of grief. This can be attested by several, as well as the aforesaid minister, whose testimony will be deemed authentic in all other cases. Notwithstanding which, the contrary to this has been asserted by many persons; but then some of them have been such as have not only had little regard to

truth, but been incapable of all tender sentiments.

She always professed a full persuasion of the truth and excellency of the Christian religion in general, and a close attachment to the tenets, doctrines, and usages of the church of England in particular. Nor did any thing, during the whole course of her confinement, so extremely shock her as the charge of infidelity, which some uncharitable persons, a little before her death, brought against her, on account of her intimacy with Craustoun. That Craustoun was an infidel, there may be reason enough to believe; but that she was so, because she had placed her affections upon him, will by no means follow. It appears, that he was a man of infinite art and design; and therefore may very naturally be supposed to have adapted himself entirely to her genius and disposition, in order the more effectually to carry into execution his wicked designs: And that this was really the case, with her dying breath she positively affirmed. He never, as to the minister attending her a little before her death she declared, uttered any thing in her company, through the whole course of her acquaintance with him, that could be deemed shocking to pious ears, or that in the least savoured of infidelity. On the contrary, if she may be credited in some of her last moments, he gave her many instructive lessons, and talked perfectly in the style of a Christian. And this he might do, because he found it agreeable to her. It is but charitable, therefore, considering her education, to believe, that she never openly professed any dislike to the principles of Christianity.

She could discourse pertinently and clearly upon all the common, and some other theological topics: From whence it may be rationally inferred, that she had not only been in a tolerable degree conversant with the scriptures; but likewise read, with some attention, the works of several of our most celebrated divines. And this she owned herself to have done. This point would not have been so copiously insisted upon here, had she not desired it might be cleared up in a particular manner; and had not the imputation of infidelity, in some of her last moments, given her infinite uneasiness and concern.

She was visited by several clergymen, besides the minister of the Castle who constantly attended her, one of whom was a person of superior rank and character in the university. To all of these she expressed herself much in the same manner, and constantly persisted in her first declaration. She was pressed by them in the strongest terms, to confess the truth, and not go out of the world with a lie in her mouth. But this she said she should do, if she affirmed that she had a design to destroy her father when she gave him the fatal powder, or that she then knew there was any poisonous quality lodged in it. She talked in such a plausible, or rather pathetic strain, and gave such convincing reasons for the truth of what

she affirmed, that some of her enemies themselves, after one or two visits, became greatly prejudiced in her favour.

Some attempts were made to procure her a short respite; for it was never believed, that a pardon could be obtained, at least before the apprehension of the villain Craustoun. But all the avenues to the royal clemency were shut up; so that every measure pursued on this occasion proved ineffectual. Nor did she ever entertain any hopes of success, though a lady of great interest and distinction, whose innate goodness renders her one of the brightest ornaments of the present age, made several efforts in her favour. The prejudices she had to struggle with had taken too deep root in some men's minds, to be effaced by any sentiments of tenderness and compassion.

She herself observed, and spoke with great commendation of them, that the judges, as well as the worthy sheriff and his deputy, behaved towards her with great candour and moderation.

On Monday, April the 6th, 1752, the day destined for her execution, the under-sheriff, attended by one of Miss Blandy's friends, visited her a little after eight o'clock in the morning. She then discovered some anxiety and apprehensions, in relation to her future state, that had never before appeared. She said, that many sins, both of omission and commission, which she had formerly considered as trifles, seemed at that time to be very black and enormous to her. The minister, who was then also present, took a fresh opportunity from hence to press her once more to declare the truth, in relation to her intention and knowledge of the noxious quality of the fatal powder, by urging that a failure herein would be a crime of a much deeper dye, than those which filled her with such terrible apprehensions. But to this she immediately replied, That she should persist in her former declaration to the moment of her death; and that this she would impart to the people attending her execution. The under-sheriff, and the gentleman attending him, also begged, that she would not impose upon herself, as well as upon the world, in these her last moments. To which she answered much in the same terms as she had done before. She likewise appeared after this to be something more calm and composed. And the minister, in order still more to comfort her, told her, that the devil frequently presented former sins as much more heinous than they really were, to even some of the best Christians themselves, when they were upon the confines of eternity, in order to ruffle and discompose them; and that therefore, probably, the scene that at present seemed to disturb her, was nothing more than one of his illusions: But however that might be, she had no reason to be afraid of any of her sins, if she sincerely repented of them, as she had always assured him she did, and placed an unshaken

confidence in the mercy of God, through the merits of Christ; and neither those merits, nor that mercy, to sincere penitents, would admit of any limits. This gave her great consolation, inasmuch that she soon resumed her former calmness, and declared herself not only willing, but even inclinable to die.

About nine o'clock she came out of her bed-chamber, and was attended by the minister to the place of execution. Here he read some of the commendatory forms of prayer, and she joined most fervently with him. After this was ended, he said to her, "Madam, you may now, if you think proper, and have a sufficient flow of spirits, speak to the people." She then addressed herself to them, with a clear and audible voice, in the following terms:

"Good people, give me leave to declare to you, that I am perfectly innocent, as to any intention to destroy, or even hurt my dear father; that I did not know, or even suspect, that there was any poisonous quality in the fatal powder I gave him; though I can never be too much punished for being even the innocent cause of his death. As to my mother's and Mrs. Pocock's deaths, that have been unjustly laid to my charge, I am not even the innocent cause of them, nor did I in the least contribute to them. So help me God in these my last moments! And may I not meet with eternal salvation, nor be acquitted by Almighty God, in whose awful presence I am instantly to appear, if the whole of what is here asserted be not true! I from the bottom of my soul forgive all those concerned in my prosecution; and particularly the jury, notwithstanding their fatal verdict."

She then ascended the ladder, and spoke again to the following effect: "Good people, take warning by me to be on your guard against the sallies of any irregular passion; and pray for me, that I may be accepted at the throne of grace."

After which she was turned off; and, in about half an hour's time, cut down. The body was then carried to a neighbouring house, and put into a coffin; from thence it was conducted, about five o'clock in the afternoon, in a hearse, to Henley; and interred about eleven o'clock in the chancel of the church there; where the bodies of her father and mother had been deposited. Miss Blandy suffered in a black bombazine short sack and petticoat, with a clean white handkerchief drawn over her face. Her hands were tied together with a strong black ribband, and her feet, at her own request, almost touched the ground. The number of people attending her execution was computed at about 5,000; many of whom, and particularly several gentlemen of the university, were observed to shed tears. She behaved with such serenity and composure, and with such a decent resolution, as greatly surprised many of the spectators; and such as some there present thought nothing but a consciousness of the truth of what she had asserted, and a well-

grounded hope of future felicity, could inspire. Contrary to what is observed at other executions, there was almost a profound silence during the time of this. In fine, the whole was so well conducted, and made such a deep impression upon the minds of the people present, that the circumstances attending Miss Blandy's execution will not soon be forgotten at Oxford.

Copy of Miss BLANDY's DECLARATION delivered at the place of Execution in Oxford, April 6th, 1752.

I Mary Blandy do declare, That I die in a full persuasion of the truth and excellency of the Christian religion, and a sincere, though unworthy member of the Church of England. I do likewise hope for a pardon and remission of my sins by the mercy of God, through the merits and mediation of our most blessed Lord and Saviour Jesus Christ. I do also farther declare, that I did not know or believe that the powder, to which the death of my dear father has been ascribed, had any noxious or poisonous quality lodged in it; and that I had no intention to hurt, and much less to destroy him, by giving him that powder. All this is true, as I hope

for eternal salvation, and mercy from Almighty God, in whose most awful and immediate presence I must soon appear. I die in perfect peace and charity with all mankind, and do from the bottom of my soul forgive all my enemies, as also those persons who have in any manner contributed to, or been instrumental in bringing me to the ignominious death I am soon to suffer. This is my last declaration, as to the points contained in it; and I do most earnestly desire that it may be published after my death. Witness my hand,

MARY BLANDY.

From what was said by Mr. Justice Buller, in the Case of George Barrington (Mich. 30 Geo. 3, reported 3 Term Rep. 499), it appears that Cranston, for his concern in the killing of Mr. Blandy, was prosecuted to outlawry. It may be useful to add, that in that Case of Barrington, the same very able judge, after noticing a particular in the form of that outlawry, subjoined, "it was natural to suppose great care had been taken in settling it, because some of the most eminent gentlemen in the profession were employed in it."

524. The Case of JOHN SWAN and ELIZABETH JEFFERYS, for the Murder of Joseph Jefferys: 25 GEORGE II. A. D. 1752.

Q. Whether the Prisoners should be tried on the first or second Indictment found against them?*

THE CASE.

JOHN SWAN, servant to Mr. Joseph Jefferys, of Walthamstow in Essex, and Elizabeth Jefferys his niece, were indicted at the assizes held at Chelmsford in Essex, in the summer 1751, for the murder of the said Joseph Jefferys; Swan for giving the mortal wound, and Elizabeth Jefferys for aiding and assisting, &c. therein. To which indictment they both pleaded Not Guilty: But their trial was then put off to the following assizes.

In March 1752, at the following assizes held at Chelmsford, before the hon. sir Martin Wright and sir Michael Foster, the following indictment was found against Swan for petty treason,† and Elizabeth Jefferys for murder, viz.

* John Swan, late of the parish of Waltham-

* See East's Pleas of the Crown, c. 5, s. 103.

† The law respecting petit treason is much discoursed of in Foster Disc. 2, ch. 9, and the doctrines concerning it are exhibited in East's Pl. Cr. ch. 5, sects. 3, 98—104, which and the authorities there referred to see. See also in this Collection the Case of Coke and Woodburn, vol. 16, p. 54. That a charge of petit treason against one person, and a charge of murder against another person, may be joined in one

indictment, see East, chap. 5, sect. 103. Foster, Disc. 2, chap. 9, s. 5, says (with some faultiness of expression), "A wife or servant joining with a stranger in the same murder may be charged in one indictment, which could not be if their offences were not substantially the same; and such indictment concluding, that they 'felonice, proditorie et ex malitia premeditata murderaverunt,' is good for both, 'reddendo singula singulis.'"

indictment, see East, chap. 5, sect. 103. Foster, Disc. 2, chap. 9, s. 5, says (with some faultiness of expression), "A wife or servant joining with a stranger in the same murder may be charged in one indictment, which could not be if their offences were not substantially the same; and such indictment concluding, that they 'felonice, proditorie et ex malitia premeditata murderaverunt,' is good for both, 'reddendo singula singulis.'"

ously, wilfully, and of his malice aforethought, did shoot and discharge; and that he the said John Swan, with the leaden bullets aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, shot and sent forth, as aforesaid, him the said Joseph Jefferys, his then master, in and upon the left side of his head, then and there feloniously, traitorously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Joseph Jefferys then and there, with the leaden bullets aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid, by the said John Swan, in and upon the said left side of the head of him the said Joseph Jefferys, one mortal wound of the width of half an inch, and of the depth of four inches; of which said mortal wound the aforesaid Joseph Jefferys then and there instantly died. And Elizabeth Jefferys, late of the said parish, spinster, was indicted, for that she, then and there feloniously, wilfully, and of her malice aforethought, was present, aiding, helping, abetting, comforting, assisting, and maintaining the said John Swan, the felony and murder aforesaid, in manner and form aforesaid, to do and commit; and that he the said John Swan, then and there, in manner and form aforesaid, feloniously, traitorously, wilfully, and of his malice aforethought; and that she the said Elizabeth Jefferys, then and there, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder the said Joseph Jefferys, against the peace of our said lord the king, his crown and dignity.

When they were arraigned upon this indictment, an objection was taken by the counsel for the prisoners to their being tried on the above indictment, as another had been found against them at the last assizes; against Swan for the murder of the said Joseph Jefferys, and Elizabeth Jefferys for aiding, assisting, &c. the said Swan in the said murder; and to which indictment they had both pleaded Not Guilty: that if they were tried on this indictment, and were acquitted, they must be a second time tried for their lives on the former indictment for the same offence, which was contrary to law.—After near three hours debate between the counsel on both sides, the Court were of opinion, that the prisoners must be tried on the last indictment found against them, and the former indictment quashed: whereupon they both pleaded Not Guilty. The fact was plainly proved against them; and they making little or no defence, Swan was found guilty of petty treason, and Jefferys of murder.—The printed trial contains nothing remarkable in it, no arguments of the counsel on either side on the point of law, on which of the two indictments the prisoners should be tried, nor any speeches or arguments, only the examining the witnesses, and is a plain narrative of the evidence, and how the murder happened: the substance of which is acknowledged, and contained in the

Confession of Elizabeth Jefferys and John Swan, as followeth.

THE CONFESSION OF ELIZABETH JEFFERYS, concerning the Murder of her Uncle JOSEPH JEFFERYS.

I Elizabeth Jefferys do freely and voluntarily confess, That I first enticed and persuaded John Swan and Thomas Mathews to undertake and perpetrate the murder of my deceased uncle; which they both consented to do the first opportunity: that, on the 3d day of July 1751, myself and John Swan (Mathews, to my knowledge, not being in the house) agreed to kill my said uncle; and accordingly, after the maid was gone to bed, I went into John Swan's room, and called him, and we went down together into the kitchen; and having assisted Swan in putting some pewter and other things into a sack, I said I could do no more: and then I went up into my room; and afterwards Swan came up, as I believe, and went into my uncle's room, and shot him; which done, he came to my door, and rapped. Accordingly I went out in my shift, and John Swan opened the street-door and let me out: that done, I alarmed the neighbourhood. And I do solemnly declare, That I do not know that any person was concerned in the murder of my deceased uncle, but myself, and John Swan; for that Mathews did not come to my uncle's house the day before, or night in which the murder was committed, as I know of.

ELIZABETH JEFFERYS.

Miss Jefferys further confessed, That her uncle took her from her father when she was five years old; and that, when she was sixteen, her said uncle debauched her: that she lived in a continued state of incest with him (having had two miscarriages by him,) till about a year before his death, when he slighted her in favour of another woman. His repeated neglects of her, and his threatening to alter his will, which she knew had been made entirely in her favour, were the motives that induced her to perpetrate the murder for which she is sentenced to die.

Swan confessed, That he alone murdered his master Mr. Jefferys, by shooting him with a pistol loaded with pieces of bullets: that there was no stab given; but that the several wounds were given by the pieces of the bullets, and by the splinters of the pistol, that burst when it was fired off: and that Mathews was not at the house for five days before the murder was committed: but owned, that both he and Miss Jefferys had offered Mathews 5 or 600*l.* to shoot Mr. Jefferys, but that he refused to do it; and that they called him villain for declining to commit the murder: upon which he resolved to do it himself, and agreed with Miss Jefferys what time to commit it.

Thus much is inserted to let the reader into the case, and as an introduction to Mr. Justice Foster's opinion, upon which of the two indictments the prisoners should be tried; with the

determination of the Court thereon, and his lordship's observations on indictments for murder and petty treason.

THE CASE OF JOHN SWAN AND ELIZABETH JEFFERYS.*

"At Chelmsford assizes, in the summer 1751, John Swan and Elizabeth Jefferys were indicted for the murder of Joseph Jefferys; Swan for giving the mortal wound, and Jefferys for being present, aiding and abetting; and they both pleaded Not Guilty: but their trial was postponed to the next assizes.

"In the mean time the attorney general, who had received orders to prosecute at the expense of the crown, was satisfied from the evidence laid before him, that Swan was in the actual service of the deceased at the time the murder was committed, or at least when the design was first laid. He therefore thought it advisable to prefer another bill against them for the parts they respectively took in the same murder, charging Swan with petty treason, and Jefferys with murder. Accordingly at the next assizes such bill was preferred and found, and the prisoners were arraigned upon it.

"The prisoners pleaded in abatement *ore tenus*, that another indictment was depending for the same offence; and pleaded over to the treason and felony. The counsel for the crown did not insist upon drawing up the plea in form (as was done in *Layer's Case*, vol. 16, p. 94,) but demurred *ore tenus*; and the counsel for the prisoners joined in demurrer.

"Mr. Justice Wright, who sat on the crown side, desiring the company of Mr. Just. Foster, who went that circuit with him, at the arguing the plea, he went into court, and sat there till that matter was determined, and the jury sworn.

"The prisoner's counsel insisted, that they ought not to have been arraigned on this new bill, pending the former indictment, on which issue is already joined: because, if they plead to issue on this indictment, they may be liable to be tried twice for one and the same fact. It will be in the option of the crown, after issue is joined upon both indictments, to proceed to trial upon either of them; and if the prisoners should be acquitted upon one, they may still be tried upon the other. For though *autrefois acquit* of murder may be a good bar to an indictment of petty treason for the same fact, or *autrefois acquit* of petty treason, to an indictment of murder; yet the prisoners having pleaded to issue on both indictments, they may be told they come too late with their plea in bar, issue being already joined on the fact.

"They therefore pressed that the trial on the first indictment might go on, before the prisoners should be called upon to plead to the second; for said they, if the prisoners should be found guilty on that indictment, the ends of

public justice will be fully answered. And if they should be acquitted, and the counsel for the crown should think proper to proceed on this new bill, the prisoners ought to be left at liberty to avail themselves of that acquittal, as they shall be advised.

"The Court was of opinion, that the charge in the bill last found must be answered, notwithstanding the pendency of the former; for *autrefois arraign* is no plea in this case. Perhaps the bill last found is better adapted to the nature of the case than the former, and the king's counsel must be at liberty to prosecute in such manner as may best answer the ends of public justice. But at the same time the Court must take care, that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact.

"With regard to the prisoner Jefferys, the offence charged in both indictments is exactly the same, as well in consideration of law as in point of fact; with regard to Swan, the fact in both is the same; and so is the substantial part of the charge, wilful murder of malice *pre-pense*: but falling under a different consideration in the second indictment, mercy from the relation the prisoner is supposed to stand in to the deceased. And if that relation should not be made out in proof, yet still he may be found guilty of murder upon that indictment.

"And therefore, as the ends of public justice would be fully answered with regard to both the prisoners, by trying them on the indictment for petty treason and murder, the Court proposed to the king's counsel that the first indictment should be quashed by consent, to which they agreed; which was accordingly done, and the Court proceeded to the trial of the prisoners on the second indictment, on the issue of Not Guilty.

"The Court in this case followed the precedent in *Cro. Car.* 147, *sir William Withypole's Case*. Only they took in the consent of the king's counsel, which I think they needed not to have asked; the justice of the case was sufficient warrant for what they did.

"Before the jury was called, the judges agreed between themselves, that if the prisoners should not think fit to challenge at all, they might be tried together; but if they should insist on their challenges, they must be tried separately:* because they cannot join in their challenges, the number of their peremptory challenges being differently limited, Swan's to 35, and Jefferys's to 20.

"The Court informed them of this; and the prisoner Swan declaring that for his part he waived all benefit of challenging, the prisoner Jefferys challenged (one) two or three, and a jury was sworn. The prisoners were found guilty, Swan of petty treason, and Jefferys of murder.

"While the case of the king against Swan was depending, and before the second bill was

* From Mr. Justice Foster's Reports, p. 104—107, and 326—328. Former Edition.

* Vide Noble's Trial, vol. 15, p. 731, for a different opinion.

preferred, a question was made, Whether Swan could be convicted on the indictment for murder, if it should come out in evidence that he was servant to the deceased at the time the fact was contrived or committed; and consequently that his offence was petit treason.

"There is a Case cited in the printed trial of Coke and Woodburne, [See vol. 16, p. 54] which, if such case there ever was, hath, as far as the authority of it goeth, determined that question. 'At the summer assizes at Dorchester 1712, a woman was indicted before Mr. Justice Eyre* for the murder of another woman; upon evidence it appeared that the person murdered was her mistress, which made the crime petit treason. The judge directed this matter to be specially found; and upon conference with the judges it was held she ought to be acquitted upon this indictment, as she accordingly was, and was afterwards indicted for petit treason, and convicted and executed.' This case is not to be found in any report printed or MS. that I have met with, or heard of. Nor have I, upon a strict inquiry, met with any footsteps of such case among the minutes of proceedings on the crown-side in the county where the case is supposed to have arisen; though the minutes from 1708 to 1722 have been carefully searched. For these reasons, and what is suggested in the note, I conclude that no such case ever existed.

"Lord Chief Justice Hale, 1 Hale 373, is very full and express on the other side of the question. 'A person who is guilty of petit treason may be indicted of murder; for it is a species of murder, and a pardon of murder pardoneth petit treason.'

"Lord Chief Justice Coke having cited the opinion in Dyer 235, saith, 'That petit treason is murder and more.' 6 Co. 13. b. And from thence it hath been inferred that petit treason and murder are in consideration of law different offences, or that the crime of murder is merged in petit treason. But this inference will not hold, however true the chief justice's doctrine may be. There is undoubtedly, in consideration of law, a greater degree of malignity in the one than in the other, arising from that degree of allegiance, however low, which the murderer owed to the deceased at the time the fact was committed or conceived in his heart. But certainly the difference, in point of malignity, between murder and manslaughter is infinitely greater; and consequently in that respect it may with equal propriety be said, that murder is manslaughter and more. And yet in judgment of law they are the same offence, differing only in the degree of malignity, 4 R. 46. Keil. 103, 104, when considered in relation to one and the same fact.

* Justice Eyre did not go the Western Circuit in the summer 1712. Ward and Price went at that time. This information I (Mr. Justice Foster) have from Mr. Maddock, clerk of assize of the Western Circuit. *Former Edition.*

And by a parity of reason lord chief justice Hale, 2 Hale 251, concludeth, that petit treason and murder are to be considered in the same light, as one offence, differing only in degree.

"But though I am satisfied that the law considereth petit treason and murder as one offence, differing only in circumstance and degree; yet whether it may be advisable to proceed upon an indictment for murder against a person plainly appearing to be guilty of petit treason, is a matter that deserveth great consideration; and probably determined the attorney-general to prefer a fresh bill for petit treason in Swan's case. For though the offences are to most purposes considered as substantially the same, yet as there is some difference between them with regard to the judgment that is to be pronounced upon a conviction, and a very material one with regard to the trial, a person indicted for petit treason being intitled to a peremptory challenge of 35, I think if the prosecutor be apprised of the true state of the case, as he may be if he useth due diligence, he ought to adapt the indictment to the truth of the fact.

"But if, through a mistake on the part of the prosecutor, or through the ignorance or inattention of the officer, a bill be preferred as for murder, and it should come out in evidence that the prisoner stood in that sort of relation to the deceased which rendereth the offence petit treason, I do not think it by any means advisable to direct the jury to give a verdict of acquittal. For a person charged with a crime of so heinous a nature ought not to have the chance given him by the court of availing himself of a plea of *autrefois acquit*. In such a case I should make no sort of difficulty of discharging the jury of that indictment, and ordering a fresh indictment for petit treason. In this method the prisoner will have advantage of his peremptory challenges, and the public justice will not suffer. And on the other hand, in case of an indictment for petit treason, if it be proved that the defendant killed the deceased with such circumstances of malice as amount to murder, but the relation of servant, &c. is not proved, I have no sort of doubt that on such an indictment, the defendant may be found guilty of murder, and acquitted of the treason. For murder, 1 Hale, 378, 2 Hale, 184, is included in every charge of petit treason, 'felonice, proditoriè, et ex malitià præcogitatà murdravit.'

"The treason is a circumstance of aggravation, of which the defendant may be acquitted, and yet found guilty of the substantial part of the charge; just as a man, upon an indictment of murder, may be acquitted of that, and found guilty of manslaughter. "Because," say the books, "manslaughter is included in the charge of murder."

"I will go one step further, I offer it as my private opinion, which is submitted to the judgment of the learned. Put the case, that a person is brought to his trial upon an indictment for petit treason, and that one witness only can

be produced, or that the prosecutor is not furnished with any evidence except the depositions taken before the coroner, or informations taken on oath before justices of the peace pursuant to the statutes; and let it be supposed, that those witnesses are living, but unable to travel, or kept out of the way by the procurement of the defendant. 1, 2 Phil. and M. 13. 2, 3 Ph. and M. 10. Vid. Keil. 55. 1 Hale, 305. 2 Hale, 284. What is to be done in this case? Is the defendant to be acquitted of the whole charge? I think not. I think this evidence, though not sufficient to convict of petit treason, is still admissible evidence, and proper to be left to the jury, as upon a charge of murder; and the jury, if they are satisfied, may find the defendant guilty of the murder, and acquit him of the treason, for the reasons just now given, 2 Hale, 184. *Interest reipublice ne maleficia remaneant impunita.*"

The prisoners were both executed March 28, 1752, at Bucket's-Hill, near the Bald-faced Stag, on Epping-Forest, near the place where the fact was committed; and Swan was hanged in chains.

"At a meeting of the judges at the lord chief justice Lee's chambers, in June 1752, to consider of the act of the last session, for the better preventing the horrid crime of murder, it was agreed by much the greater part of the judges, that the judgment for dissecting and anatomizing, and touching the time of execution, ought to be pronounced in cases of petty treason, though murder is only mentioned, except in the case of women.* And in that case too, the time of execution may be a part of the judgment.

"There was some doubt, whether hanging in chains might ever be made part of the judgment;† but on debate it was agreed by nine

* Though the 1 E. 6, c. 12, enacteth, that wilful poisoning shall be deemed murder of malice prepensed, and that the offender shall suffer and forfeit as in other cases of wilful murder; yet if the wife or servant poison husband or master, they are constantly indicted for petty treason, and suffer the pains peculiar to that offence. Petty treason is considered in no other light than as an aggravated murder. *Former Edition.*

† Before this time, there was some difficulty about hanging in chains.

For in the year 1741, when James Hall pleaded guilty to the indictment of petty treason, for the murder of his master, John Penny, of Clement's-Inn, gent. the Rev. Dr. Penny, dean of Litchfield, his brother, and the rela-

judges, that in all cases within the act, the judgment for dissection and anatomizing only should be part of the sentence: And if it should be thought advisable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the power given for that purpose in the proviso."

tions, applied to the Court at the Old-Bailey, before sentence was passed, that they would be pleased to make an order, That James Hall might be hung in chains.—Sir Daniel Lambert, then lord-mayor, spoke to sir John Strange, the recorder of London, about it; when the Recorder told the relations, "The Court never made any order in such cases; that they must apply to the king, the body being at his majesty's disposal."—The king was then at Hanover; and the relations applied by petition to the regency, at their first sitting (at Whitehall) after the sessions, about it, when they were told by Mr. Sharpe, clerk to the council, "That the regency, or the council, never made any order in such cases; and that the Court who tried the prisoner should have done it." Under this difficulty, dean Penny, who was acquainted with the archbishop of Canterbury, and with his grace the duke of Newcastle, (to whom he had been chaplain) sent in to the regency, and begged as a favour to speak to those two noble lords; who were pleased to come out to the dean, who then told them what the Court at the Old-Bailey had said; whereupon their graces went in, and acquainted the regency with the difficulty the relations were in; upon which an order was made for hanging him in chains, and Mr. Sharpe came out and told them of it; but said, it was inserted therein, That it was on the petition of the relations of the deceased: And Hall was executed at the end of Catherine-street, in the Strand, on Mouday Sept. 14, 1741, and hanged in chains at Sheppard's-Bush, just beyond Kensington Gravel-pits, on the Acton road, in Middlesex. *Former Edition.*

With the account given in the text, agrees serjeant Forster's MS. as cited by Mr. East, (Pleas of the Crown) c. 5, § 136, where it is said the judges agreed that this should be the sentence or judgment:

'That you be taken from hence to the prison
'from whence you came, and that you be
'taken from thence on the day of
'instant (or next) to the place of execution, and
'that you be there hanged by the neck till your
'body be dead, and that your body when dead
'be taken down, and be dissected and anatomi-
'mized.'

525. The Trial* of WILLIAM OWEN, Bookseller, for Printing and Publishing a Libel, intituled, "The Case of Alexander Murray, esq." on an Information tried at Guildhall, London, Monday, July 6, before the Right Hon. the Lord Chief Justice Lee: 26 GEORGE II. A. D. 1752.

THE House of Commons, on Wednesday, November 20, 1751, Resolved, That the hon. Alexander Murray, esq., who on the 6th day of February, in the last session of parliament, was, for dangerous and seditious practices, in violation and contempt of the authority and privileges of this House, and of the freedom of elections, ordered by this House to be committed close prisoner to his majesty's gaol of Newgate, and was also at the same time ordered by this House, to be brought to the bar thereof, to receive his said sentence there upon his knees; and before the said sentence was received by him, did, by a high and most dangerous contempt in him of the authority and privileges of this House, and by persisting in the same, avoid the execution of the said sentence, during the remainder of the said session of parliament, be now committed close prisoner to his majesty's gaol of Newgate, for the said dangerous and seditious practices, in violation and contempt of the authority and privileges of this House, and of the freedom of elections.

Ordered, That Mr. Speaker do issue his warrants accordingly.

Resolved, That the said Alexander Murray do receive the said sentence, for his now being committed close prisoner to his majesty's gaol of Newgate, at the bar of this House, upon his knees.

Ordered, That the Serjeant at Arms attending this House, do take the said Alexander Murray into his custody, in order to his being brought to the bar of this House, to receive the said sentence.

A complaint being made to the House, of a printed pamphlet, entitled, "The Case of the Hon. Alexander Murray, esq. in an Appeal to the People of Great Britain; more particularly

* Lord Mansfield (Nov. 16th 1784.) in delivering the judgment of B. R. on a motion for a new trial in the Case of the dean of St. Asaph (see it in this Collection) says that this report is incorrect; but he does not specify any particulars of incorrectness, and I know not of any better published report of the case.

"July 6, 1752. Owen tried, and acquitted, for publishing Mr. Murray's Case. This is the third great case, where the juries have insisted on judging the matter of law, as well as of fact. The first was of Bushell, the Quaker, reported by lord chief justice Vaughan: the second, was that of the Bishops in the reign of James the 2d." Dodington's Diary.

the Inhabitants of the City and Liberty of Westminster;"

The said Pamphlet was brought up to the table, and read.

Resolved, *nem. con.* That the said Pamphlet is an impudent, malicious, scandalous, and seditious libel, falsely and most injuriously reflecting upon, and aspersing the proceedings of this House, and tending to create misapprehensions of the same in the minds of the people, to the dishonour of this House, and in violation of the privilege thereof.

Resolved, *nem. con.* That an humble Address be presented to his majesty, humbly to desire his majesty, that he will be graciously pleased to give directions to his Attorney General to prosecute the authors or author, the printers or printer, and the publishers or publisher, of the said scandalous libel, in order that they may be brought to condign punishment for the same.

Ordered, That the said Address be presented to his majesty, by such members of this House as are of his majesty's most honourable privy council.

The day following, Mr. Comptroller reported to the House, that their Address of yesterday had been presented to his majesty, and that his majesty had commanded him to acquaint the House, that he had given directions accordingly.

Accordingly he was tried on the following Information, July 6, 1752.

Of Michaelmas Term, in the 23th Year of King George the 2nd.

London. Be it remembered, That sir Dudley Ryder, knight, attorney general of our present sovereign lord the king, who for our said present sovereign lord the king in this behalf prosecuteth, in his proper person cometh here into the Court of our said present sovereign lord the king, before the king himself at Westminster, on Wednesday next after three weeks from the feast day of St. Michael in this same term, and for our said present sovereign lord the king, giveth the Court here to understand and be informed, that John Owen,* late of London, bookseller,

* Memorandum. He is called all the way in the information John Owen, whereas his name is William Owen. His counsel at the trial took no notice of the misnomer, intending if he had been found guilty (as I am informed) to have moved this misnomer in arrest of judgment. *Former Edition.*

being a wicked, seditious, and ill-disposed person, and having no regard for the laws of this realm, nor for the public peace and tranquillity of this kingdom, and well knowing that one Alexander Murray, late of the parish of St. George, Hanover-square, in the county of Middlesex, esquire, had been most justly and deservedly committed to his majesty's gaol of Newgate, in the city of London, by virtue of an order of the honourable House of Commons of this kingdom then assembled in parliament, for a most gross and flagrant misbehaviour and contempt committed by him the said Alexander Murray, against the said House, in refusing to submit to the rules and orders of the said House, and for acting in open defiance of the authority of the said House; but most unlawfully, wickedly, and maliciously, devising, contriving, and intending to asperse, scandalize, and vilify the whole body of the Commons of this kingdom in parliament assembled, and most wickedly and audaciously to represent their proceedings in parliament as cruel, arbitrary, and oppressive; and to make it be believed and thought, as if the Commons in parliament assembled were a most wicked, base, and degenerate set of persons, and had acted in their legislative capacity in open violation of the constitution of this kingdom, and had most daringly prostituted their power, and acted in defiance of those laws which had been made and provided for the security and welfare of the subjects of this kingdom; and also most unlawfully, wickedly, and audaciously to represent the said House of Commons as a court of inquisition; and most impudently to insinuate, as if the commitment of the said Alexander Murray to his majesty's said gaol of Newgate was founded in violence and oppression, and by that means to arraign the public justice and proceedings of the said House, and to bring all the Commons of this kingdom in parliament assembled into an ill and bad opinion, and into the utmost hatred and contempt, with all the subjects of this kingdom; and to raise, excite, and create most groundless and unreasonable fears and apprehensions in the minds of all the said subjects, as if the rights and liberties of all the subjects of this kingdom, and the very constitution of the kingdom itself, were in the utmost peril and danger of being totally subverted and overturned, from an excessive and wanton exercise of power claimed by the said Commons; and thereby to move, incite, and stir up all the subjects of this kingdom in a most unwarrantable manner to vindicate, maintain, and assert their said rights and liberties, without the least reason, colour, or pretence for the same; and also by that means to molest and disturb the happy state, and the public peace and tranquillity of this kingdom, at present so firmly and well established under the mild and gentle government and administration of our said present sovereign lord the king; upon the 29th day of June, in the 25th year of the reign of our said present sovereign lord George the 3d, by the grace of God, of

Great Britain, France and Ireland, king, defender of the faith, and so forth, with force and arms at London aforesaid, (that is to say) at the parish of St. Dunstan in the West, within the ward of Farringdon Without, in London aforesaid, a certain wicked, false, scandalous, seditious, and malicious libel, entitled, 'The Case of the Hon. Alexander Murray, esq. (meaning the said Alexander Murray, esq. herein above mentioned,) in an Appeal to the people of Great Britain; more particularly, the inhabitants of the city and liberty of Westminster;" did most unlawfully, wickedly, seditiously, and maliciously print and publish, and did cause and procure to be printed and published: in which said libel, of and concerning the House of Commons of this kingdom in parliament assembled, and also of and concerning the said Alexander Murray, are contained (amongst other things) divers wicked, false, feigned, scandalous, seditious, and malicious matters, (that is to say) in one part thereof according to the tenor following, (to wit) 'Whatever air of importance a person may appear to assume by thinking his particular hardships a proper object of the public attention; yet there are instances, wherein the public and private interests are so intimately connected, that to let the latter pass unnoticed, would imply a tacit resignation of the former. Upon this principle, the case of Mr. Murray (meaning the said Alexander Murray) may, without any imputation of vanity, be deemed worthy the consideration of his fellow-subjects (meaning the subjects of this kingdom); for though he alone may, hitherto, have felt the weight of the punishment, it is not known how soon they may experience the fatal effects of the precedent,—a precedent founded on the most open violation of the constitution, the most daring prostitution of power, and in defiance of those laws provided for the security and welfare of a free people (again meaning the subjects of this kingdom). But what renders this appeal, from a sentence of the representatives, (meaning the said order * of this kingdom so assembled in parliament as aforesaid, by virtue of which he the said Alexander Murray was so committed to his majesty's said gaol of Newgate as aforesaid, for the reasons aforesaid) to the candid judgment of their constituents (meaning the subjects of this kingdom having a right to vote in the election of members to serve in the parliament of this kingdom) still more necessary, is the peculiar industry that has been practised, to impose upon the public a false representation of the offence, (meaning the said misbehaviour and contempt for which he the said Alexander Murray was so committed as aforesaid) in order, if possible, to justify the unexampled barbarity of the prosecution: for whatever may have been the pretence

* Q. Whether it should not be "the said order of the House of Commons of this kingdom," &c. *Former Edition.*

of vindicating the honour and dignity of a particular house, (meaning the House of Commons of this kingdom so assembled in parliament as aforesaid) it will very plainly appear, that greater regard has been had to support the private pique and personal resentment of a certain turbulent statesman; whose ambition impatient of controul, and whose avarice abhorrent of expence, determined him to offer up some exemplary sacrifice to his devoted thousands, and an impious opposition to his all-sovereign command:—and in another part thereof, according to the tenor following, (to wit) 'The inhabitants of Westminster, alarmed at the unconstitutional proceedings carried on during the late election (meaning the late election of a member to serve in the present parliament of this kingdom for the city and liberty of Westminster, in the said county of Middlesex), and exasperated to find a representative imposed on them by the dictatorial authority of one man in opposition to a scrutinized majority, had recourse to the House of Commons (meaning the House of Commons of this kingdom then assembled in parliament), flattering themselves that august assembly would vindicate their invaded rights and liberties, nor suffer the invaders to escape with impunity; accordingly a petition (meaning a petition of the burgesses and inhabitants of the said city and liberty) was presented, complaining of a false return (meaning the return of the member at the said election to serve in the present parliament of this kingdom for the said city and liberty).—The D—l Faction, conscious of their illegal practices, and apprehending a detection of them would inevitably be the consequence of a free inquiry into the merits of the election, (again meaning the said election of a member to serve in the present parliament of this kingdom for the said city and liberty) determined at all events to put a stop to the prosecution of it (meaning the said petition); and, in order to strike the petitioners with terror, prevailed on their trusty friend the high-bailiff (meaning one Peter Leigh, esq. the then high-bailiff of the said city and liberty, who was the proper returning officer at the said election), to assume the laudable character of informer, and complain of some high crimes and misdemeanours committed against his sacred person; but the more effectually to answer the purpose, took especial care that the objects of this complaint should be some principal witnesses in support of the petition (again meaning the said petition of the said burgesses and inhabitants of the city and liberty aforesaid, against the said return so made as aforesaid). However, as the accusation against the high-bailiff (again meaning the said Peter Leigh, then high-bailiff of the said city and liberty) was antecedent to his complaint, it was thought, in point of regularity and justice, that the consideration of the latter should be postponed till the determination of the former; more particularly as

the offences alledged to have been committed against this magistrate, (again meaning the said Peter Leigh) must necessarily appear upon hearing the merits of the petition. This having produced a debate, and the Speaker (meaning Speaker, that is to say, meaning the right honourable Arthur Onslow, esq. then Speaker of the House of Commons of this kingdom), being called upon to give his opinion in point of form and order, he (again meaning the said Speaker) declared, that, to begin by inquiry into the complaint of the high-bailiff, (again meaning the said Peter Leigh, then high-bailiff of the said city and liberty as aforesaid) was not only contrary to the order and method of proceeding in that House (again meaning the said House of Commons), but of every other court of justice, and inconsistent with justice itself. Though these reasons might have some prevalence with part of the House (again meaning the said House of Commons so assembled in parliament as aforesaid); nevertheless a majority determined, that the high-bailiff's complaint (again meaning the said complaint of the said Peter Leigh, then high-bailiff of the said city and liberty as aforesaid) should be first heard, which, if not sufficient to terrify the petitioners (again meaning the said burgesses and inhabitants of the said city and liberty) from their pursuit of justice, would at least produce the convenient effect (to speak in the phrase of an inferior court) of sinking some material evidence. Thus, by a kind of parliamentary legerdemain, the accused became the accuser, and the witness had the mortification to find himself conjured into the place of the culprit. This equitable determination brought Mr. Murray (again meaning the said Alexander Murray) to the bar (meaning the bar of the said House of Commons then assembled in parliament as aforesaid); where, in support of the grievous charge exhibited against him by the high-bailiff, (again meaning the said Peter Leigh, then high-bailiff of the said city and liberty) the following witnesses were produced; and first, Mr. Baldwin (deputy-bailiff) and his son appeared, who declared That Mr. Murray (again meaning the said Alexander Murray) came to their house, and said, that he was resolved that the high-bailiff should not smuggle an election; and that he and a thousand more had sworn, he (again meaning the said Peter Leigh, then high-bailiff as aforesaid) should make the declaration in the middle of Covent-garden (meaning Covent-garden in the parish of St. Paul Covent-garden, in the said county of Middlesex, and within the city and liberty aforesaid). The truth of the former part of this accusation Mr. Murray (again meaning the said Alexander Murray) was ingenious enough to confess;—and indeed, if this species of parliamentary smuggling was found necessary to be encouraged for any private reasons of state, no wonder an actual

attempt to prevent it should be deemed culpable by those at the helm : But as in our days this cannot even be supposed, surely the mere saying a man should not do what he ought not to do, is a crime of such a nature, to which no legislators have even yet thought proper of annexing a penalty. With respect to the other part, Mr. Gascoigne, and Mr. Carne the high constable, gentlemen entirely disinterested, testified, that they were present, and heard the former words, yet they never heard the latter expression ; and what afforded the strongest presumptive evidence against such a declaration, was, that it evidently appeared no such purpose was ever intended to be executed ; or how easy would it have been for Mr. Murray (again meaning the said Alexander Murray) with his thousand volunteers, to have secured the person of this magistrate, (again meaning the said Peter Leigh, then high-bailiff as aforesaid) when he met him (again meaning the said Peter Leigh) going to the hustings unsupported by a single peace-officer or any other attendant ? But in order to turn the scale entirely in favour of Mr. Murray's innocence, the high-bailiff himself was candid enough to acknowledge at the bar, (again meaning the bar of the said House of Commons so assembled in parliament as aforesaid) that meeting Mr. Murray (again meaning the said Alexander Murray) in his way from Baldwin's to the hustings, upon being asked the question, he (again meaning the said Peter Leigh) did then declare, That no man could behave with more good manners towards him (again meaning the said Peter Leigh) than Mr. Murray (again meaning the said Alexander Murray). Behold the next witness coming forth in the character of a journeyman button-trimmer, and declaring, That he saw Mr. Murray (again meaning the said Alexander Murray,) at the head of a great mob, who meeting a chimney-sweeper asked him, Whom he was for ?—The chimney-sweeper answering, For sir George, (meaning sir George Vandeput, baronet, then a candidate at the said election of a member to serve in the present parliament for the said city and liberty) Mr. Murray (again meaning the said Alexander Murray) replied, Then you are an honest fellow, but lord Trentham (meaning the honourable Granville Leveson Gower, esquire, commonly called lord viscount Trentham, the other candidate at the said election) and the high-bailiff (again meaning the said Peter Leigh, then high-bailiff of the said city and liberty as aforesaid) are two great villains, or two great damned villains and rascals. What delectable dialogue !—Evidence how suited to the solemnity of a senatorial inquiry !—Must not the people (meaning the people of this kingdom) entertain the highest opinion of their legislative deputies, (meaning the Commons of this kingdom in this present parliament assembled) when they see them seriously attending, *curibus*

erectis, to such important discoveries ?—But unluckily, had this heinous article of accusation the sanction of truth to enforce it, what matter does it afford for the cognizance of this judicature ? (meaning the said House of Commons so assembled in parliament as aforesaid.) Especially, as it is allowed to have passed long after the declaration (meaning the declaration of the said Peter Leigh, the said high-bailiff, by which the said Granville Leveson Gower, esquire, commonly called lord viscount Trentham, was declared duly elected a member to serve in the present parliament for the said city and liberty) was made ? Persuaded I am, had the noble lord himself (again meaning the said Granville Leveson Gower, esquire, commonly called lord viscount Trentham) given the least credit to it, his punctilious delicacy in point of honour would have expected a personal explication from the author of so scandalous an indignity ; nor is it to be imagined, a person (again meaning the said Granville Leveson Gower, esquire, commonly called lord viscount Trentham) who so valiantly manifested his heroism in a late French affair, would meanly buckle on the armour of privilege, and adopt a public persecution in the place of a private resentment. The next authority produced was that of a tripe-man, who passing along Henrietta-street, at the same time the high-bailiff was going to the Cross-Keys, heard somebody behind him say, Is there nobody will knock the dog's (meaning the said Peter Leigh, then high-bailiff as aforesaid, his) brains out ; when clapping the high-bailiff's footman on the shoulder, he told him, That is he who uttered those terrible words, and then the footman informed him that person's name was Murray (meaning the said Alexander Murray). What a Janus-headed witness is here ! who from hearing words uttered behind him in a crowd, could identify the person who spoke them ? Did his ears furnish him with a knowledge of the personal figure of Mr. Murray, whom he does not pretend to know before the footman's information ? Or what kind of inspiration enabled him to discover, that the particular dog's brains meant by this exclamation belonged to the high-bailiff ? But were it possible to pay any regard to such inconsistent evidence, still the commission of this horrid offence must have been at least two hours after all business relating to the *sanctum sanctorum* of St. Stephen's chapel was finished ; consequently subject to the notice of some less sacred tribunal.—However ridiculous the matter contained in these two last articles of impeachment may appear, it cannot be denied, but that it must have received a very notable weight of authority from the eminent characters of the witnesses, who from their situation in life must be concluded to have understandings not to be imposed upon, and principles of honour not to be violated. What then will it avail the cause of Mr. Murray with the public, any

' more than with the Senate, (again meaning
' the said House of Commons so assembled
' in parliament as aforesaid) to oppose the un-
' questionable testimony of our button-trimmer
' and tripe-man, with that of a noble lord, an
' honourable baronet, and a worthy barrister?
' Nevertheless, as the same convincing motives
' of condemnation may not possibly influence the
' verdict without doors, I shall take the liberty
' to produce the authority of lord Carpenter,
' who was pleased to declare at the bar, (again
' meaning the said bar of the said House of
' Commons so assembled in parliament as afore-
' said) that his lordship and Mr. Murray (again
' meaning the said Alexander Murray) were
' together from the time the declaration (again
' meaning the said declaration of the said Peter
' Leigh, the said high bailiff, by which the
' said Granville Leveson Gower, esq., com-
' monly called lord viscount Trentham, was
' declared duly elected as aforesaid) was made
' till dinner; that they were in Bedford-street,
' where this great mob was, by the button-
' trimmer, said to be assembled, but he never
' heard Mr. Murray (again meaning the said
' Alexander Murray) say any thing scurrilous
' of lord Trentham (again meaning the said
' Granville Leveson Gower, esq., commonly
' called lord viscount Trentham) to a chimney-
' sweeper, or any other person whatever. His
' lordship farther said, that he was arm-in-
' arm with Mr. Murray (again meaning the
' said Alexander Murray) when the high-bailiff
' passed close by them through the church-
' yard to the Cross-Keys, (meaning the said
' tavern, commonly called or known by the
' name of the Cross-Keys tavern) which was
' near two hours after the declaration, (again
' meaning the said declaration so made by the
' said Peter Leigh, the said high-bailiff as afore-
' said) but that he never heard Mr. Murray
' utter the exclamation laid to his charge by
' the tripe-man; and that if he had made use
' of any such expressions, he apprehended they
' could not have passed unnoticed by him;
' that so far from inciting the people to knock
' the high-bailiff's (again meaning the said
' Peter Leigh, then high bailiff of the said
' city and liberty as aforesaid, his) brains out,
' his lordship declared, Mr. Murray (again
' meaning the said Alexander Murray) advised
' them, to leave him (again meaning the said
' Peter Leigh) to the remorse of his own con-
' science; assuring them, that would be a more
' severe punishment than any they could in-
' flict. Sir John Tyrrell and Mr. Gascoigne,
' who were likewise close by lord Carpenter
' and Mr. Murray (again meaning the said
' Alexander Murray) when the high-bailiff
' passed from the church to the tavern, were
' called to corroborate this evidence; which,
' in an assembly where most of its members
' were so well acquainted with his lordship's
' veracity and honour, may seem an act of
' supererogation. In the course of this exa-
' mination, lord Carpenter having said, that he
' and Mr. Murray were together all the time,

' from the declaration till dinner, and sir John
' Tyrrell being asked, if his lordship was with
' Mr. Murray when he first saw him, and an-
' swering he believed not, one of the members
' (meaning one of the members of the said
' House of Commons so assembled in parlia-
' ment as aforesaid) (remarkable for his insu-
' perable modesty) exulted on his sagacity, in
' having, as he imagined, detected a notorious
' contradiction in the evidence; but when it is
' considered that sir John Tyrrell never saw
' lord Carpenter till that day, it will require no
' great stretch of credulity, to believe that sir
' John might talk a minute or two with Mr.
' Murray in a crowd, without particularly re-
' marking a person who was with him, and
' who at that time was an absolute stranger
' to him. Lo! from this mountain of con-
' tradiction, *ridiculus mus nascitur*; which
' however, was scandalously urged as suffi-
' cient to invalidate the testimony of two such
' honourable persons! To what pitiful shifts
' must this faction be reduced, when obliged to
' have recourse to a quibble, the most con-
' temptible legal pettyfogger would blush to be
' guilty of? The reason of lord Carpenter's
' and Mr. Murray's staying so long was, to use
' their endeavours to prevent any insult being
' offered to the high bailiff; not perhaps out of
' any regard to the extraordinary merits of that
' worthy gentleman, but being sensible that
' they should be made the victims to expiate
' any unlucky accident that might happen;
' and that this apprehension was not ill-ground-
' ed, evidently appears from the fate of Mr.
' Murray, even when no accident happened at
' all. Now appears the celebrated Mr. Pond,
' who is to give the *coup de grace*.—Hear
' him then alarm the House (again meaning
' the said House of Commons so assembled in
' parliament as aforesaid) by declaring, That
' he heard Mr. Murray say in the Mount coffee-
' house some days after the declaration (again
' meaning the said declaration so made by the
' said Peter Leigh, the said high-bailiff as
' aforesaid) was made, that if his advice had
' been taken, and the rails of the portico cut
' down, the high-bailiff (again meaning the
' said Peter Leigh, then high-bailiff of the
' said city and liberty as aforesaid) durst not
' have returned lord Trentham. Heavy charge!
' Nor can the truth of it admit of any dispute,
' when authenticated by the declaration of so
' worthy a person, honoured with the confi-
' dence of the highest-born gamblers, and con-
' stantly employed by them in the commenda-
' ble quality of bet-broker; nay, who during
' the time of the election (meaning the said
' late election of a member to serve in the
' present parliament of this kingdom for the
' said city and liberty) is said to have very
' industriously exercised his profession, by
' laying considerable sums for the noble can-
' didate himself on the event of his return
' (meaning his return as a member to serve
' in the present parliament of this kingdom.)
' But how atrocious the matter contained in

' this accusation! to suppose (so long after) that
 ' to have happened which did not happen, cer-
 ' tainly justifies the extremity of punishment, as
 ' the supposition of a fact is doubtless more cri-
 ' minal than the execution of it. Had the iron
 ' rails been cut down, what ought to have been
 ' the consequence? Mr. Murray ought to have
 ' been punished. But the iron rails were not
 ' cut down; what is the consequence? Mr.
 ' Murray (again meaning the said Alexander
 ' Murray) is punished. Excellent reasoning!
 ' righteous determination! Could the bare in-
 ' timation that he was the adviser of such a
 ' curious stratagem be sufficient to condemn
 ' him (again meaning the said Alexander Mur-
 ' ray,) when it does not appear that he ever
 ' actually gave this advice to any person what-
 ' ever, or that the least attempt was made in
 ' consequence of it? Who knows not that an
 ' overt-act is required to the conviction of a
 ' person for high-treason against the king
 ' himself? Yet behold! no such legal nicety
 ' is thought necessary to constitute a *lesa ma-
 ' jestas* against the honourable house (again
 ' meaning the said House of Commons so as-
 ' sembled in parliament as aforesaid.) It is
 ' observable throughout the whole course of
 ' the evidence, that not so much as any one
 ' act whatever is pretended to have been com-
 ' mitted by Mr. Murray, not even any oral
 ' offence, (except that at Baldwin's, with
 ' which the high-bailiff (again meaning the
 ' said Peter Leigh, then high-bailiff of the said
 ' city and liberty as aforesaid) was not, till long
 ' after, acquainted) which was not subsequent
 ' to the declaration. How then could the re-
 ' turning officer (again meaning the said Peter
 ' Leigh) produce it in support of a charge,
 ' founded on delaying the election, (again
 ' meaning the said election of a member to serve
 ' in the present parliament of this kingdom for
 ' the said city and liberty) by obstructing him
 ' in the execution of his office? (meaning the
 ' office of the said Peter Leigh as high-bailiff
 ' of the said city and liberty.) Did he (again
 ' meaning the said Peter Leigh) cunningly dis-
 ' cover obstructions after the completion of his
 ' duty, which he was not sensible of during the
 ' exercise of it? Or by what kind of logic does
 ' it follow, that the treasonable words against
 ' the noble lord's honour, the terrifying excla-
 ' mation against the high-bailiff's brains, or the
 ' coffee-house supposition concerning the rails,
 ' could occasion this criminal delay in the elec-
 ' tion (again meaning the said election of a
 ' member to serve in the present parliament of
 ' this kingdom for the said city and liberty,) when
 ' all must have happened long after the
 ' arbitrary fiat had passed the hollowed lips of
 ' our member-making magistrate? Such is the
 ' charge, and such is the proof of it, that in-
 ' duced the protectors of British liberty (again
 ' meaning the said House of Commons so as-
 ' sembled in parliament as aforesaid) to con-
 ' demn a British subject (again meaning the
 ' said Alexander Murray) to close confinement
 ' in a leathsome prison, appropriated for the

' reception of thieves and murderers, with every
 ' other species of the meanest and most profligate
 ' offenders. But even this severe exertion
 ' of power was deemed too favourable, and
 ' must be embittered by the additional cruelty
 ' of some still more mortifying circumstances.
 ' Mr. Murray (again meaning the said Alex-
 ' ander Murray) must receive this hard sen-
 ' tence (meaning the order of the said House
 ' of Commons so assembled in parliament as
 ' aforesaid, by virtue of which he the said
 ' Alexander Murray was so committed and sent
 ' to his majesty's said gaol of Newgate as
 ' aforesaid) upon his knees. Though his reso-
 ' lution might enable him to support the former
 ' part of the judgment, (again meaning the
 ' order aforesaid) his spirit would by no means
 ' suffer him to pay a slavish submission to the
 ' latter; for had this reverential token of sub-
 ' mission been made the price of his acquittal,
 ' he would have thought the penalty at least
 ' equalled the degree of his guilt; much less
 ' could he think of making so humble an ac-
 ' knowledgment of so extraordinary a condem-
 ' nation. However, this refusal being held a
 ' high insult on the dignity of the house (again
 ' meaning the said House of Commons so as-
 ' sembled in parliament as aforesaid,) a fresh
 ' article of pains and penalties was invented,
 ' and the use of pen, ink, and paper prohibited;
 ' which, though in cases of conspiracy and
 ' treason, had been practised by way of precau-
 ' tion, was seldom known to have been inflicted
 ' by way of punishment. The D——l Faction,
 ' finding the vengeance they had procured far
 ' from being justified by the sense of the pub-
 ' lic, industriously endeavoured to propagate
 ' an erroneous belief, that the severity pro-
 ' ceeded merely from Mr. Murray's obstinacy,
 ' when on the face of the proceedings it ap-
 ' pears, that every part of this tremendous sen-
 ' tence (again meaning the order aforesaid)
 ' except what relates to pen, ink, and paper,
 ' was resolved two hours before it could possi-
 ' bly be known that Mr. Murray (again mean-
 ' ing the said Alexander Murray) would be
 ' guilty of so sacrilegious a contumacy, as to
 ' refuse knee-worship to the assumed divinity
 ' of his judges (again meaning the Commons
 ' of this kingdom so assembled in parliament as
 ' aforesaid.) While Mr. Murray (again mean-
 ' ing the said Alexander Murray) (in custody
 ' of a messenger) waited the determination of
 ' the House, (again meaning the said House of
 ' Commons so assembled in parliament as afore-
 ' said) some friends came to him, and, with a
 ' generous concern, acquainted him with the
 ' former part of his judgment (again meaning
 ' the order aforesaid.) And though he (again
 ' meaning the said Alexander Murray) might
 ' possibly entertain some reliance on the equity
 ' of those (again meaning the Commons of this
 ' kingdom so assembled in parliament as afore-
 ' said) who were chosen by the people (mean-
 ' ing the people of this kingdom, having a right
 ' to vote in the election of members to serve in
 ' the parliament of this kingdom) to defend

their liberties and properties; yet he was the less surprized, having been informed, that his fate was determined some weeks before at White's; where very large sums had been laid upon his commitment, (meaning his the said Alexander Murray's commitment to his majesty's said gaol of Newgate as aforesaid) and was advised to fly his country, in order to evade the fury of these sporting legislators; who it was apprehended might not pay the most conscientious regard to their public trust, when placed in competition with their private advantage. With what indignation must this sentence inspire every reader, who has imbibed the least spark of public spirit! And how much more will he be alarmed when acquainted with the rancorous execution of it! Let us then attend this injured gentleman (again meaning the said Alexander Murray) to his dungeon; at which arriving at about four o'clock in the morning, the 6th day of February, notwithstanding he had been ill for several days before, he was conducted into a room, (meaning a room in his majesty's said gaol of Newgate) the windows of which were shattered, and the walls plentifully bedewed with moisture proceeding from the unwholesome situation of the place, and not having had an unhappy tenant in it during some years. These unsalutary circumstances soon increased his indisposition, and, the third day, brought on a violent fever. Mr. Murray (again meaning the said Alexander Murray) sent the person who looks after the convicts (and was likewise the only attendant allowed) to procure him (again meaning the said Alexander Murray) the assistance of an apothecary or surgeon; but this benefit, which was never refused the most flagitious offender, was not to be indulged him. Mr. Akerman (meaning one Richard Akerman, keeper of his majesty's said gaol of Newgate) pleaded the peremptory orders he had received from the House (again meaning the said House of Commons so assembled in parliament as aforesaid) in excuse of his refusal:—and in another part thereof according to the tenor following, (to wit,) 'Ten weeks did Mr. Murray (again meaning the said Alexander Murray) support this rigorous treatment, debarred the sight of any face he had ever seen before, except that of his doctor's, while (though in this condition) treble doors were thought necessary to secure him, the numerous locks and bolts of which furnished a sound, not much less entertaining than would have seemed that of his passing bell. About the middle of April, Mr. Murray (again meaning the said Alexander Murray) was again seized in such a manner, that his attendant, or rather guardian, who had been tried for his life, and whose employment consisted in locking up the convicts in their cells (meaning the cells in his majesty's said gaol of Newgate), an occupation not very apt to inspire the tenderest sentiments, yet, I say, even this very fellow was so melted with pity and compas-

sion, to behold Mr. Murray's (meaning the said Alexander Murray his) agonies, occasioned by an inflammation in his bowels, that he would not stir from him that night. Lord Elibank calling next morning to enquire after his brother's (meaning the said Alexander Murray his) health, our press-yard valet expressed his apprehensions that he (again meaning the said Alexander Murray) could not live; but being informed the doctor (meaning one doctor Lamont, physician to the said Alexander Murray) had been there as soon as the prison gates were opened, his lordship immediately went to him, and requested he would acquaint the House (again meaning the said House of Commons so assembled in parliament as aforesaid) with his brother's (meaning the said Alexander Murray his) imminent danger. Upon Dr. Lamont's representation, Mr. Palmer, deputy-serjeant, attended by a messenger, came to Newgate (meaning his majesty's said gaol of Newgate) in the evening with an order to move Mr. Murray (again meaning the said Alexander Murray) directly. At their entrance they found him (again meaning the said Alexander Murray) upon the bed, and the sheets, which had been soaked through, reeking at the fire. Mr. Murray (again meaning the said Alexander Murray) inquired of Mr. Palmer the reason of so sudden a resolution? who replied, it was owing to the physician's information of his danger, and that the House, (again meaning the said House of Commons so assembled in parliament as aforesaid) from its wanted humanity, had ordered him (again meaning the said Alexander Murray) to be carried to a messenger's. And surely, removing a person from Newgate to Westminster, with an inflammation in his bowels, and in a high fever, must be allowed a very extraordinary act of humanity! However, the force of Mr. Palmer's rhetoric was not sufficient to prevail on Mr. Murray (again meaning the said Alexander Murray) to be of that opinion; who absolutely refused to accept of this unmerciful mercy; though there is reason to believe his refusal would have availed him little, had not his physician, (again meaning the said Dr. Lamont) who chanced to be present, declared his opinion, that a removal would be attended with certain death. This authority justified Mr. Palmer for not putting his warrant in execution; and upon Mr. Murray's (meaning the said Alexander Murray his) asking him what the House (again meaning the said House of Commons so assembled in parliament as aforesaid) intended to do with him (again meaning the said Alexander Murray) at the messenger's, he answered, to confine him (again meaning the said Alexander Murray) there till his recovery; but that nobody was to be admitted to him (again meaning the said Alexander Murray); and if he (again meaning the said Alexander Murray) did not then make his submission upon his knees, he (again meaning the said Alexander Murray)

‘ would be remanded back to Newgate (again meaning his majesty’s said gaol of Newgate). ‘ As the ten weeks severe sufferings had not been able to convince Mr. Murray (again meaning the said Alexander Murray) of the heinousness of his offence, he replied, that he would not consent to it upon such terms, and that he would rather die ten thousand deaths than violate his conscience by a confession of guilt; and, by a scandalous submission, give a sanction to proceedings (meaning the said proceedings of the said House of Commons against the said Alexander Murray) so manifestly founded in oppression and injustice.’ And in another part thereof according to the tenor following, (to wit,) ‘ Let us next behold this gentleman (again meaning the said Alexander Murray) appealing from the violence of power (meaning from the order aforesaid) to the protection of law, and claiming the benefit of that sacred act, (meaning the act of parliament made in the 31st year of the reign of his late majesty king Charles the second, intituled, ‘ An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas) which, however it may sometimes have been suspended for the public safety, has scarce ever been violated on private occasions. Mr. Murray (again meaning the said Alexander Murray) having determined to apply for his Habeas Corpus, counsel was first to be procured; but who would imagine, that amongst the swarm of legal orators, not one of any eminence was to be found, who had resolution enough to engage in the cause of so obnoxious a client? ‘ The British In——n (meaning Inquisition, that is to say, meaning the said House of Commons so assembled in parliament as aforesaid) had struck such a panic throughout the regions of law and justice, that even the all-powerful fee was unable to subdue the timidity of the mercenary professors; but at the request of lord Elibank, an honourable gentleman,* who had long abandoned the business of the bar, stood forth, and gloriously despising any penalty he might incur for vindicating the invaded laws and constitution of his country, moved the court of King’s-bench, that Mr. Murray (again meaning the said Alexander Murray) might be brought up and admitted to bail.’ And in another part thereof according to the tenor following, (to wit) ‘ Though by this application Mr. Murray (again meaning the said Alexander Murray) was rescued for a few hours from his confinement, it was only to hear the pious judges of that court pronounce the mortifying sentence of his return to his dungeon; founded upon this principle of law, that the House of Commons (meaning the House of Commons of this kingdom in parliament assembled) was a superior court of

judicature to the King’s-bench. Had the constitution (meaning the constitution of this kingdom) complimented that House (again meaning the House of Commons of this kingdom in parliament assembled) with such executive authority, it would certainly have been empowered to examine upon oath; a circumstance absolutely necessary in the administration of justice. What then is become of this boasted barrier of British liberty, the Habeas Corpus Act? (again meaning the act of parliament herein above-mentioned.) What shall distinguish Britons from those who groan under the most arbitrary governments, if subject to the like tyrannical acts of oppression? And what shall defend a free people (meaning the people of Great Britain) from these, whenever their representatives (again meaning the Commons of this kingdom in parliament assembled) shall think fit to constitute themselves their judges, and wantonly inflict the severest pains and penalties by virtue of their mere will and pleasure? More especially, as from this awful tribunal (again meaning the said House of Commons so assembled in parliament as aforesaid) no appeal is to be permitted, except to that only superior one of heaven; and indeed who knows but even this might be tortured into a high breach of privilege, as arraiguing the omnipotence of their terrestrial jurisdiction (meaning the jurisdiction of the said House of Commons so assembled in parliament as aforesaid)? And in another part thereof according to the tenor following, (to wit) ‘ If there lives any one so abandoned to a love of slavery, as to remain unmoved by this narrative, I shall leave him in possession of his chains, and think them the most suitable ornaments for so degenerate a member of a free country (meaning Great Britain). But satisfied I am, every uncorrupted Briton will be roused at a scene much more becoming the meridian of an oriental tyranny than the region of British liberty; and though the injury done a private subject of the community (again meaning the said Alexander Murray) should make little impression; yet, surely, the wound which the constitution itself (again meaning the constitution of this kingdom) has received through him (again meaning the said Alexander Murray) must awake the most alarming apprehensions. What has been the fate of one (again meaning the said Alexander Murray) may prove that of thousands; especially when it is considered, that the statesman is no less apt to quote the authority of precedent than the lawyer. Who then, at any future election, (meaning an election of a member to serve in the parliament of this kingdom) shall be hardy enough to exercise the rights of a free elector (meaning a subject of this kingdom having a right to vote in the election of a member to serve in the parliament of this kingdom) when even an approach to the hustings, without a ministerial passport, has been deemed so criminal? Who, hereafter, but must tamely

* Sir John Philips, bart. See a report of this, and what lord Kenyon said of it, in the Case of Benjamin Flower, A. D. 1799.

' acquiesce in the authoritative decision of a re-
' turning officer (meaning an officer having a
' right to return members to serve in the par-
' liament of this kingdom) when a regular im-
' peachment of it is held to be such a parlia-
' mentary profanation? These essentials in
' their creation once removed, must not a
' House of Commons (again meaning the
' House of Commons of this kingdom in par-
' liament assembled) become rather a Turkish
' divan than a British representative? And
' when this constitutional battery (again mean-
' ing the House of Commons so assembled in
' parliament as aforesaid) raised to defend the
' people (meaning the people of Great-Britain)
' from the attacks of arbitrary power, shall by
' the intrigues of a state-engineer, be once turned
' upon them, (again meaning the people of this
' kingdom) what remains but to surrender at
' discretion?—When one part of the legisla-
' ture (again meaning the said House of Com-
' mons so assembled in parliament as aforesaid)
' assumes a privilege peculiar to another, or
' wrests the cognizance of causes from those
' courts erected for the determination of them,
' what confusion will not arise in the system
' of government? And indeed what security
' the people (again meaning the people of Great
' Britain) are to expect in such an anarchy of
' administration, the case of Mr. Murray
' (again meaning the said Alexander Murray)
' too fatally evinces. Though the law of the
' land has provided, that every subject shall be
' tried by his jury, have we not seen a particular
' power (again meaning the said House of
' Commons so assembled in parliament as
' aforesaid) uniting the three inconsistent capa-
' cities of judge, jury, and prosecutor? And
' though an express provision has been made
' against excessive pains and penalties, have
' not the most severe been inflicted (meaning
' inflicted upon the said Alexander Murray)
' even for no offence? But to conclude in the
' words of a noble author: "This could not
' happen if there was the least spirit among us
' (again meaning the people of Great-Britain;)
' but there is none. The moderation we
' (again meaning the people of Great Britain)
' have seen practised, is pusillanimity: hence
' it comes that corruption has spread and pre-
' vails. Consider then you (again meaning the
' people of Great-Britain) owe to your country,
' (again meaning Great-Britain) to your hon-
' our, to your security, to the present and fu-
' ture ages, that no endeavours of yours be
' wanting to repair the breach that is made, and
' is encreasing daily, in the constitution (again
' meaning the constitution of this kingdom),
' and to shut up, with all the bars and bolts of
' laws, the principal entries through which
' these torrents of corruption (and oppression)
' have been let in upon us" (again meaning the
' people of Great-Britain.) To the great
scandal and dishonour of all the Commons of
this kingdom in parliament assembled, and in
high contempt of their authority, to the great
disturbance of the public peace and tranquil-

lity of this kingdom, in contempt of our said
present sovereign lord the king and his laws, to
the evil and pernicious example of all others in
the like case offending, and also against the
peace of our said present sovereign lord the
king, his crown, and dignity. Whereupon
the said attorney general of our said present
sovereign lord the king, for our said present so-
vereign lord the king, prayeth the consideration
of the Court here in the premisses, and that due
process of law may be awarded against him
the said John Owen in this behalf, to make him
answer to our said present sovereign lord the
king, touching and concerning the premisses
aforesaid.

The Counsel for the King were, sir Dudley
Ryder, Attorney-general, Mr. Murray, Soli-
citor-general, who both spoke; sir Richard
Lloyd, King's Counsel; Mr. Yorke, who
opened.

Counsel for the Defendant, William Owen.—
Mr. Ford, Mr. Pratt, who both spoke; Mr.
Williams, Mr. Davy, Mr. Norton, Mr. Gas-
coigne.

SPECIAL JURY.

Richard Barwell, of Bread-street, merchant,
Foreman.

John Horton, Old Fish-street, sugar-baker.

Thomas Smith, Watling-street, linen-draper.

Godfrey Lowe, Friday-street, draper.

Edward Berwick, ditto.

Richard Bristow, Bread-street, grocer.

William Woolley, Cheapside, hosier.

Rd. Bridgman, Aldgate High-street, grocer.

Philip Grafton, ditto, oilman.

Saml. Lloyd, Devonshire-square, merchant.

Henry Hall, St. Helens, merchant.

John Tuff, Bishopsgate-street, grocer.

After Mr. Yorke had opened, the Attorney-
General began with a detail of the Westminster
election, between lord Trentham and sir George
Vandeput, with the ill usage of the high-bailiff
in the return. He then mentioned the House
of Commons calling the rioters to account, of
whom Mr. Murray he said was the principal;
the sentence on Mr. Murray to be given at the
bar of the House; how merciful for so atrocious
a crime; his commitment to Newgate; his
impudent refusal to ask pardon, which was to
be part of his sentence; his bad state of health
in Newgate, which the House being informed
of by his friends, ordered him into the custody
of a messenger, which was more than he de-
served; his refusal to be removed till the end
of the session, when the law discharges him.
"Then appeared the most scandalous and
astonishing libel that ever appeared in the
world. 'The Case of the Hon. Alexander
' Murray, esq. in an Appeal to the People of
' Great Britain; more particularly the Inha-
' bitants of the City and Liberty of West-
' minster.' The accused now becomes the ac-
cuser. In it are stated and contained accusa-
tions of partiality, injustice, corruption, and
barbarity, of the House of Commons. It ac-

cuses the House of committing a great breach in our laws; that House which is the guardian of our liberties, and the protector of our properties. It accuses also the King's-bench, with overturning that bulwark of our liberties, the Habeas Corpus Act. Every one must be shocked that reads this wicked, diabolically wicked, pamphlet. The parliament meet again, and vote the pamphlet a libel: they vote it to be a false, malicious, infamous, scandalous, and seditious libel, tending to create confusion and rebellion; at least to sow the seeds of rebellion. And to me it is astonishing, how it could enter into the mind or heart of man to write such a libel. Now, gentlemen, I shall shew to you the nature of this libel, and begin in this order. 1. The title. 2. The introduction. 3. The state of the Case, and the evidence laid before the House of Commons. 4. How considered, and in what light he has put the sentence of the Commons. 5. How wickedly and maliciously he has insinuated the thing. And, 6. His treatment of the court of King's-bench.

"First. What!—shall a person appeal from the judgment of that court, who are the only judges of things belonging to them, the House of Commons, I mean. An Appeal! To whom? to a mob? Must justice be appealed from? To whom? to injustice? Appeal to the good people of England, particularly the inhabitants of Westminster! The House of Commons are the good people of England, being the representatives of the people. The rest are—what?—nothing—unless it be a mob. And what can be in a mob but confusion? But the clear meaning of this libel was an appeal to violence, in fact; and to stigmatize the House; but he durst not speak plain. Then the pamphlet tells you, that his case is worthy the consideration of his fellow-subjects; here he shews his virulence. He says his commitment is a precedent founded on unparalleled barbarity, striking at our laws in a most shocking manner. Then he charges the House with sinking material evidence; which in fact is accusing the House of injustice. This is a charge the most shocking, the most severe, and the most unjust and virulent, against the good, the tender House of Commons; that safeguard of our liberty, and guardian of our welfare. The next accusation the libeller brings against the House is, on their granting Mr. Murray's removal, on the application of his physicians—in saying—they had a mind to kill Mr. Murray, by removing him in the midst of a raging fever; and on Mr. Murray's refusing to go in that condition, the House, when his physician had mastered the distemper, ordered that none should see him. Next accusing another court that never injured any one; a court the most dignified by the worthiness of the members; the court of King's-bench. Gentlemen, this libel, to whosoever reads it, will be found the most pungent invective that the skill of man could invent: I will not say the skill, but the wit, art, and false contrivance of man, insti-

gated by Satan: an indirect pamphlet—though not said plain, yet understood; as being understood, is a libel: and to say that this is not a libel, is to say that there is no justice, equity, or right in the world. There can be no court of justice, if the House of Commons is not; and if the House of Commons is not to be defended, and have protection and relief at common law, yourselves, your houses, cannot have the protection of the law. The thing you, gentlemen of the jury, are to go on, is, whether the Case doth not mean the House of Commons; for we shall prove to you the publication: then you must find the House is charged by this pamphlet to have been guilty of the most daring prostitution of power. Can there be a greater charge?"

Witnesses called:

Peter Beck swore he bought the pamphlet of William Owen, the 28th of June, 1751, at Homer's Head, near Temple-Bar. Sent by Ibbot to buy it, gave 1s. 6d. for two.—John Ibbot, messenger to the press, sent Peter Beck the 28th of June, to buy the pamphlet; and on the 29th he took Owen into custody, and seized several pamphlets in his shop.—Mealin, the 27th of June, 1751, went to Owen's, by order of his master Cook, to buy them: but Owen said he had none by him, but he should have them when ready; and in the afternoon, William Owen let him have twelve.—Cook, bookseller, on the 27th of June, the first time he saw the pamphlet advertised, sent his servant to buy them.—Langford and Shorter also proved Owen's selling the pamphlet.—Frewen called to prove the writ for the election at Westminster.—Stanhope proved that there was an election.—Barwell, clerk of the House of Commons, proved the proceedings of the House in this affair.—The pamphlet read in court.—Then the Attorney-General asked Mr. Ford and Mr. Pratt, if he need trouble the Court with proving more and other things; and should be glad to know what they intended for their plea and defence, in order to give the Court as little trouble as possible. Mr. Ford answered, That in justice to his client, he could not tell him what they intended for their defence; but would be as far candid with him, as to say, he would take advantage of his want of proof; and therefore desired him to prove all he could.

Mr. Solicitor then got up and made a short speech to the following purport*: "The question is, whether the jury are satisfied that the defendant Owen published the pamphlet? The rest follows of course. If the fact is proved, the libel proves itself, sedition, disturbance, &c. Therefore the printer must be affected with

* From a word Mr. Ford dropped in asking one of the witnesses a question, Mr. Solicitor guessed what would be the scope of his argument; and thereupon endeavoured to anticipate him; of which Mr. Ford afterwards seems to take notice. *Former Edition.*

every thing in the pamphlet, if the publication is proved, and that is what lies for your [the jury's] determination; you being judges of the fact, the judge determines the law. But suppose you judges of the law, your own breasts may tell you this is a libel: It accuses the House of Commons of injustice; compares them to the Turkish divan, meant by the letters D—n; and the inquisition, meant by the letters In—n; and calls them a bribed assembly. Suppose a pamphlet were published after this trial, that you [the jury] were perjured and bribed, and this spread over the kingdom, would it not gail you?—These sort of libels can tend to nothing but sedition; for how can the mob or the people redress but by tumult and rebellion, and thereby subvert the constitution? For this is a part of the legislative power; and if a third part of the legislature is destroyed or exposed, how can that be without rising in the face of the constitution? There have been several papers, and paragraphs in the papers, printed on purpose to poison the minds of the people, and seemed calculated to influence the minds of any jury that should be on this occasion: But I dare say you, gentlemen, who are upon your oaths here to try the fact, and case, wholly as it is, will have no regard to such artful and false insinuations†. And I know very well the counsel on the other side design to take no advantage or notice of these false and malicious hints. But as you are upon your oaths, you judge of the facts we have laid before you, now in court, and only them; and like honest men bring in your verdict accordingly."

The next who spoke was Mr. Ford, for the defendant, as follows: "The doctrine laid down by the gentlemen for the king, that what a court of justice does, whether legal or not, is not to be called in question, nor any remonstrance to be made against it, is a doctrine that may be full of the most fatal consequences to all sorts of men; since every inferior court may do the same with equal justice; for there can be no court but what is legally so: Therefore, if legal courts do wrong, must our mouths be shut, and not complain or petition for redress? God forbid!—May you, gentlemen, nor I, ever be sensible of such injustice!—I say, if the case can be so.—And here the gentlemen for the king seem to endeavour to confine the counsel for the defendant, in their argument, by saying such and such arguments will not be used; which is, in fact, hinting that they should not. Why? If they have liberty to make use of any argument, thought, or fact, for the king, surely the defendant's counsel ought to have the same liberty for their client. I understand not the shutting of men's mouths. Let every man clap his hand upon his heart and examine how he would like it, was it his own case. Shall a man be

injured,—or suppose he fancies himself injured, which is the same,—shall his mouth be eternally closed, and no redress for the injury ever be given; nor no satisfaction to his own mind, for a right understanding, and clearing up of what he looked upon even as an injury? If things should come to this pass, which heaven forbid! what would be the case of us all? We may be scourged, afflicted, and wronged, and all for the want of liberty to complain, and put forth our case: The very hand that hurts us may still continue that pressure, not knowing of the grievances done to those who lie under it; and who, were this doctrine to be allowed, must suffer without hope of redress; for, unless our mouths are open to complaints, there can be no redress for poor suffering mortals: For how can that be redressed which is not known? or that known which is not allowed to be mentioned?—May never you, gentlemen, nor I, be sensible of such a maxim carried into practice! Nay, the very gentlemen who put it, cannot from their hearts consent to it. We in this case lie under disadvantages enough; our adversaries have great power; nay their power is unknown, even to themselves, at all times; few of them know the limits of it: It may be almost what they have a mind. Though great, though wise this House may be, yet they are but a body of men, and therefore fallible; for it is not in men, or bodies of men, to be infallible. By this great power of the House of Commons, we, for our client, are debarred from making use of all the means of defence we could against other people. Much might be said, but much we dare not say; I own I dare not. But let me suppose, only for argument's sake, that a House of Commons may do wrong, it is not impossible for them to err; I do not say that they do in this case: Former Houses of Commons certainly have erred, and those errors have been redressed by a future House of Commons, and that on a knowledge of the case by complaint: And if the House of Commons ever has erred, by the same rule it may err again. Therefore allow me to suppose, only for supposition, and argument's sake, that the House have done wrong in their votes on this affair (not that I say they have); they have voted this pamphlet a libel, and have turned it over to the common law, for the defendant thereby to be tried for it; then they have left the common law to be judge of it. If so, should the defendant's counsel be debarred (if it was necessary, but which in my opinion is not) from contradicting, and proving this to be no libel; which would, in fact, be contradicting and opposing the opinion and vote of the House of Commons? I only put this by way of supposition; to shew, if these arguments were necessary to be gone upon, the disadvantage we lie under. Much might be said, even on this; but much I dare not say. I know not scarce what I dare say; but I shall not go on this point, as I think it is not necessary to our present purpose; and I hope we can and shall be able to succeed with-

† This has reference to a letter in the London Evening-Post of Saturday, May 30, 1752. Former Edition.

out it. I only mentioned it, because the gentlemen on the other side seemed desirous still further to shut the mouths of the defendant's counsel, who are under difficulties enough already. The House of Commons have voted this pamphlet a libel: Great is the power of a vote of that House: and where is the man who dares find fault with, or contradict, the opinion of the House, especially when voted so? I dare not, and bold must be the man who dares; he knows not the risk he runs, by justifying or maintaining a book not to be a libel, when the House of Commons have voted it so. That man may perhaps have a vote against himself, for what cannot a House do, whose power is so great? What therefore I shall insist upon is this:

"The fact charged in the Information is, That the defendant Owen published this pamphlet, maliciously, seditiously, scandalously, and falsely, to the calumny of the House of Commons of Great Britain, and in order to disturb the peace of the nation: and this he has done wittingly, wilfully, maliciously, scandalously, &c. This is the fact laid to his charge; which the gentlemen have been very far from proving. Only proving the sale of the book, does not prove all those opprobrious and hard terms laid in the charge against him. If his selling and publishing this book maliciously, with a seditious intent, scandalously and falsely, with a design to calumniate the House of Commons, and in order to disturb the peace of the nation is not proved, then this great charge in the information fails. Let the gentlemen prove those words (the intention) if they mean any thing by them; if they do not prove these terms, this bad intent, for in that lies the crime, then it is no more than selling printed paper, in which surely there can be no fault. Then what are these words? If the gentlemen mean any thing by them, prove them; if they mean nothing but words of course and form, let the gentlemen scratch them out, they are needless; which if they do, their information will be very defective. But they will not consent to scratch them out, I am sure; why then they must mean something by them, which if they do, consequently they must prove them. These words constitute the charge, which if they do not make out, will you, gentlemen, clap your hands upon your hearts, and say this man is guilty? Guilty of what? Nothing; for nothing is proved, unless selling paper is a crime. Surely, gentlemen, your own breasts, your own consciences, must tell you, when you consider of it,—and pray consider it as your own case, fancy each of yourselves here under a rigorous prosecution, like this poor man,—there is no crime proved, no malicious intent, no seditious design; therefore not proved guilty of the crime laid against him. If a man be even a bad man, and you all know it, and is accused of a crime he is innocent of, surely none will find him guilty of a crime, when that crime is not proved, because you know him to be guilty of

other faults. These things are plain, even to a demonstration, to every man. But this defendant, whose cause you are now judges of, will appear to be a man of very fair character; well affected to the government and constitution in his principles; always was, and is a good subject; a member of the church of England, and as well affected to both church and state as any man in England. Therefore can any man believe, when we shall have made this appear by several witnesses, men of worth, substance, honour and credit, both clergy and laity, that he could be guilty of these things; that he intended this hurt laid to his charge? We shall prove that he published more papers for the government in the late rebellion, in 1745, and containing the most steadiness for government, and the most home and inveterate things against its enemies, than any printer of his time; so that I believe, if the rebels had gained the day, his zeal might have caused his punishment. Will it then appear likely that he is guilty of these charges laid against him?

"I must observe one thing, which is, the danger of your finding a verdict specially. Suppose you find him guilty of publishing and selling this book; guilty includes guilt, then guilty of what? Selling paper.—Where is the guilt?—Take care, gentlemen, of being deceived, by finding him guilty any way; by bringing in your verdict any way against him, you render him liable to the consequences of the whole; that is, to the same penalties that he would have been liable to, if he had committed the whole crime laid to his charge, and that charge fully proved against him. After you have brought in your verdict, it will be in vain for you to say, you did not intend he should be punished; you only found that he had published, but not committed the crime; it will be in vain for you to petition for mercy, mercy will then be in other hands; it will be out of your reach; and he will be at the mercy of others, who may not look with the same eyes as you: when you have found him guilty, it will be in other breasts to punish; it will then be too late for you to interfere. By finding him guilty, you do all that you can against him, and then it will be out of your power to serve him. You must therefore consider him guilty of this great crime, and consequently deserving of great punishment, or not. But if you think he is not guilty, and not deserving of great punishment, then he has not committed this great crime; then consequently they have failed in their information, and he is innocent of it; if innocent, consequently not guilty. Mr. Attorney tells you, this pamphlet means, and is writ with the intent that is laid in the information; he says, because the pamphlet compares the parliament to In———n, it must certainly mean Inquisition; and in my opinion it may, and does as likely, mean Information; and I assure you, gentlemen, I have very little love for Information, as well as Mr. Attorney for In———n; it is certain

that these things, which will bear several interpretations, must, nor can, have no weight with you; who should either put a good construction upon them, or none at all. You must consider too, that there is a great difference between the author and the printer; the author knew well what he intended, and the whole sense of the pamphlet; therefore liable to have the sense of the pamphlet interpreted against him; but a bookseller may sell a book, and not have any intent but profit; and be quite ignorant of the contents, at least the spirit of them; therefore it is well worth considering how intent makes a crime, and how far not; every man may err, and if unintentionally, he cannot be guilty of a crime before God; and if so, it would be presumptuous in man, to make any comparison of his own justice; what is not criminal with God, cannot be with man. The gentlemen on the other side have not proved the intention."

The reverend Mr. Warner, Mr. Goelling, Mr. Hawkins, and several others were called, who proved Mr. Owen to be a good subject, a true man to the church of England, zealous for the establishment; that he had printed several papers for the government, and would not have published the pamphlet, had he known or thought the contents bad, or any hurt in them, and the farthest man in England from doing such a thing.

Mr. Pratt next rose up for the defendant; and having for some time gone upon different parts of Mr. Ford's argument (which it cannot be necessary to repeat, as Mr. Ford's speech has just been given at length, and as nearly verbatim as possible), he said, "Then, gentlemen, to shew you how necessary it is to prove the intention; if there is an indictment preferred against a man for an assault, with an intention to ravish; the intention must be proved, or else the jury cannot find him guilty. The same of an assault with an intention to kill, if the intention is not proved, he must be acquitted. If he kills, and the intention is not proved, that is, if it is not proved that he killed premeditatedly and of forethought, it is but manslaughter. Therefore in the case before us, if that part of the information is not proved, that he published maliciously, &c. you must acquit him.—The privileges of parliament are not known to the common law; perhaps they may judge and punish: I know not their privileges, nor perhaps are they to be known; nay, not known to themselves wholly: they may be just what they please. But they have not punished this man; they have turned him over to the common law, therefore he must be tried by the common law. Yet, as hath been justly observed, they may take the thing again into consideration, and punish him in the House; and if so, he may be punished twice for the same fault, by two different sentences; which by the common law a man cannot. Mr. Attorney will not answer for the House of Commons, that it will not be so. Then, gentlemen, consider what injustice it would be to punish a

man here, who is at the same time liable to be punished there, if the House thinks fit.—Much might be said, more than we dare say for our client in this case: our mouths are already half shut, and the tenets the gentlemen on the other side lay down, are to shut them quite; but may you, this nation, nor I, never feel the effects of such tenets, or see them put in practice! It is a rule in law, and a principle in equity, to hear both sides; therefore we may justly complain in this case. It is a common proverb (and a very wise chancellor affirmed that proverbs were the wisdom of a people), Losers must have leave to speak. In the Scripture Job complains of the dispensations of Providence, the causes and consequences of which he did not comprehend; one would imagine, therefore, that as complaints are so natural to sufferers, they may merit some excuse where the affliction exceeds proper bounds. It may be said indeed, they are capable of raising a dangerous compassion. But to prevent this, will it be right to tell a free people, happen what will, you shall never complain? Before this is said, it should be well considered." [Mr. Pratt then went again upon different parts of Mr. Ford's excellent speech, which he enforced in a very strong and fine manner, and with which he concluded.]

The *Attorney-General* got up again and made a reply, the principal matter in which was, "That in an indictment for murder were always these words, which are words of course, and of mere form, viz. not having the fear of God before his eyes, and being instigated by the devil. Now, according to the rule laid down by the gentlemen, this must be proved, which is impossible; for the man would say, he was not so instigated, and had the fear of God before his eyes; and who could prove that it was otherwise? Now this evidently shews all those things to be merely matter of form."

The Chief Justice next summed up the evidence; and delivered it as his opinion, that the jury ought to find the defendant guilty; for he thought the fact of publication was fully proved; and if so, they could not avoid bringing in the defendant guilty.

The jury went out and stayed about two hours; when they came into the court, the foreman answered for the rest, and when the question was put, he said, Guilty; Not Guilty, Not Guilty. my lord—the first word guilty being said by mistake; upon which there was a loud buzz; and the jury went away. But, at the desire of the attorney-general, they were called into court again, and asked this leading question, viz. "Gentlemen of the Jury, do you think the evidence laid before you, of Owen's publishing the book by selling it, is not sufficient to convince you that the said Owen did sell this book?"* At which the foreman appeared a good deal fluttered; and the judge

* See the Case of the Dean of St. Asaph, A. D. 1784, the cases therein referred to, and the stat. 33 Geo. 3, c. 60.

repeated the question ; upon which the foreman, without answering the question, said, " Not Guilty, Not Guilty ;" and several of the jurymen said, " That is our verdict, my lord, and we abide by it." Upon which the Court broke up ; and there was a prodigious shout in the hall. The attorney-general desired more questions might be asked, but the judge would not, neither would the noise permit it.

Note, The Jury could not say, to the ques-

tion, that the evidence of publishing was not clear, without perjury ; and if the jury had answered Yes, and not found the defendant guilty, one does not know what might have been done to the jury, or before whom called. But they found Owen not guilty on the whole of the case, taking in that which included guilt or not, and judged as to facts, law, and justice, of the whole ; and therefore did not answer that leading question, which was so artfully put to them.

526. The Trial of JOHN BARBOT, Attorney at Law, for the Murder of Matthew Mills,* esq.; at a Court of Oyer and Terminer and General Gaol-Delivery, held at the Town of Basseterre, in and for the Island of St. Christopher, on Friday the 5th day of January, before the Hon. William Matthew Burt, esq. President of his Majesty's Council of the said Island, and others, his Majesty's Justices of Gaol-Delivery. [Published by Permission of the Judges]: 26 GEORGE II. A. D. 1753.

ON Thursday the 4th of January, 1753, a Bill of Indictment was found by the grand inquest for the island of St. Christopher, against John Barbot, gentleman, for the murder of Matthew Mills, late of the said island, esq.

On Friday the 5th of January, 1753, the Court being met, the prisoner John Barbot was set to the bar, when the Court proceeded thus :

Clerk of Arraignment. John Barbot, hold up thy hand. (Which he did.) You stand indicted by the name of John Barbot, late of the parish of St. George Basseterre, in the island of St. Christopher, gentleman ; for that you, not having the fear of God before your eyes, but being moved and seduced by the instigation of the devil, on the 19th day of November, in the 26th year of the reign of our sovereign lord the king that now is, about the hour of five of the clock in the morning of the said day, with force and arms, at a certain place called Frigate-Bay, in the parish of St. George Basseterre aforesaid, in the island aforesaid, in and upon one Matthew Mills, esq. in the peace of God, and of our sovereign lord the king that now is, then and there being, feloniously, voluntarily, and of your malice aforethought, did make an assault ; and that you the said John Barbot, with a pistol of the value of five shillings, then and there

charged and loaded with gunpowder and leaden bullets, which said pistol you the said John Barbot in your right hand then and there had and held, into and against the aforesaid Matthew Mills, then and there feloniously, wilfully, and of your malice aforethought did shoot off and discharge ; and that you the said John Barbot, with leaden bullets aforesaid, issuing and shot off out of the pistol aforesaid, then and there, by the force of the said gunpowder, the said Matthew Mills, in and upon the right side of the body of the said Matthew Mills, and between the two last false ribs, and near the back of the said Matthew Mills, then and there feloniously, voluntarily, and of your malice aforethought, struck, penetrated, and wounded ; and that you the said John Barbot, then and there feloniously, voluntarily, and of your malice aforethought, gave to the said Matthew Mills, with the leaden bullets aforesaid, out of the said pistol, then and there, by force of the said gunpowder, shot off and discharged, in and upon the right side of the body of the said Matthew Mills, and between the two last false ribs, and near the back of the said Matthew Mills, then and there one mortal wound of the breadth of one inch, and the depth of nine inches ; of which said mortal wound the said Matthew Mills at Frigate-Bay aforesaid, in the parish aforesaid, in the island aforesaid, instantly died : and so you the said John Barbot, the said Matthew Mills, in manner and form aforesaid, at Frigate-Bay aforesaid, in the parish and island aforesaid, feloniously, voluntarily, and of your malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity.

* This Mr. Mills lived some time at Richmond in Surrey, and married a daughter and coheir of colonel Soulegrave : (The other daughter and coheir married Stephen Theodore Janssen, esq. Lord-Mayor of London in 1755). He went over to St. Christopher, Antigua, &c. to look after his estates there, and was barbarously murdered. *Former Edition.*

Cl. of Arr. How sayest thou, John Barbot, art thou guilty of the felony and murder whereof thou standest indicted, or not guilty?

Prisoner. Not Guilty.

Cl. of Arr. Culprit, how wilt thou be tried?

Pris. By God and my country.

Cl. of Arr. God send thee a good deliverance.

Pris. May it please your honours, I have a motion to make, which is, that I may be allowed counsel on my defence, not only to matters of law, but also to matters of fact, and to make my defence in the fullest manner. What I ask is no new thing, it being, as I am informed, usual in England, and having been granted several times to prisoners in cases of life and death in the King's-bench of this island: which Mr. Solicitor General knows to be so; having been himself concerned in those cases on behalf of the crown.

Solicitor General. (John Baker, esq.) May it please your honours, I was indeed aware that this motion would be made by the prisoner, and in the manner it has been; and therefore beg leave to offer to the Court what has occurred to me on the matter.

It is certain that the practice in England, till a very few years ago, was, that a person indicted for a capital offence was never allowed counsel on a plea of Not Guilty, unless to matter of law only; and that to be started by the prisoner himself. And to this, besides the known practice, the authorities in law are so full and plain, that you can look into no book, which at all treats of this matter, where this doctrine does not at once stare you in the face.

It is very true, that, by the more modern practice, the rigour of this rule hath been something relaxed; but then it is proper to see how far it has been so: and I can venture to affirm, that it has gone no farther than to permit counsel to examine and cross-examine witnesses; and never to the giving them leave to make observations on the evidence; or to draw arguments or inferences from it to the point in issue; or to do any thing else in the way of a formal or full defence. And this, though at first a pure indulgence, yet now seems to be so far grown into a right, that I believe it would be thought hard to deny it to the prisoner in the present case; and I should readily consent to the granting it on behalf of the crown. But as to the allowing counsel in the full extent the prisoner has moved for it, I am confident no instance was ever yet seen of the kind in England; and I fear, for that reason, your honours can hardly be thought at liberty to allow it here.

This is a trial of great expectation, and your honours will be very careful to do what is exactly right; and to leave no part of your conduct liable to censure hereafter.

Whether it be a hardship to deny full counsel to prisoners in capital cases, I shall not pretend to say: But this is certain, that if it be one, it is of the law's making, and not of your honours; and therefore you cannot be blamed for it; though perhaps you might be so, for

allowing an indulgence which the law and the practice of England do not warrant.

For the instances alleged by the prisoner, in the Court of King's-bench in this island, they have been but two or three, and of very late years only. It was no longer ago than the year 1744, that I myself was refused by that court to be of counsel for one James Dixon, who stood indicted for the same crime that the prisoner at the bar now does: So that any instances to the contrary must have been since that time; and none in the case of murder; though I think one or two of other felonies. But these are too recent to govern the determination of the Court in the present case; which must therefore turn on this question only, how far the permitting counsel for the prisoner is in itself right, and agreeable to law.

I shall but just add, that in proof of what I have affirmed as to the present practice in England, I have here two printed trials of persons indicted for murder, the one so late as in the year 1741, and the other so very late as about ten months ago: The former is of captain Goodere, commander of one of his majesty's ships of war, for the murder of his brother sir John Dinely Goodere, bart.* and the latter of Miss Blandy, for the murder of her own father, tried at Oxford assizes no longer ago than the month of March last.† The prisoners were both persons of some rank and fortune in life, and such as both could well afford the expence, and would not have wanted advisers to move for full counsel, had it been a thing proper to have been asked or granted. And yet in neither case is there the least pretence on the part of the prisoner, of being intitled to it, or any thing like a motion for it; but (what is yet a stronger confirmation of what I have alleged, than a mere silence on the matter) it is only asked in the case of captain Goodere, to allow counsel for the prisoner to examine and cross-examine witnesses; and even that is insisted on by the counsel for the crown, to be a favour, and not a right; and it is there granted as such.

The President then put it to the Court for their opinion, whether or how far the prisoner ought to be allowed counsel to make his defence; when the Court unanimously declared it as their opinion, that he should be allowed counsel to speak to points of law to be started by himself, and also to examine his own, and cross-examine the witnesses for the crown, but no further.

Prisoner. Then I pray your honours will please to allow Mr. Frye to be of counsel for me.

The Court accordingly assigned Mr. Frye of counsel for the prisoner.

Cl. of Arr. Cryer, make proclamation for silence.

Cryer. Oyez, Oyez, Oyez! His majesty's

* See it, vol. 17, p. 1003.

† See it *ante*, p. 1118.

justices do strictly charge and command all manner of persons to keep silence, upon pain of imprisonment.

Cryer. Oyez! You good men, that are impannelled to try between our sovereign lord the king and the prisoner at the bar, answer to your names, and save your fines.

The Jury were called over, and appeared.

Cl. of Arr. You, the prisoner at the bar, these men which were last called, and do now appear, are those who are to pass between our sovereign lord the king and you, upon the trial of your life and death; if therefore you will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn: And you shall be heard.

Cl. of Arr. George Weatherill, look upon the prisoner! You shall well and truly try, and true deliverance make, between our sovereign lord the king, and the prisoner at the bar, whom you shall have in charge, and a true verdict give, according to the evidence: So help you God.

And the same oath was administered to the rest, (which weresworn) and their names are as follow: George Weatherill, Benjamin Clifton, sworn; John Wilson, Thomas Morgan, Alexander Douglas, William Jackson, challenged; William Garvey, sworn; Willet Payne, challenged; Charles Caines, sen. sworn; Archibald Thompson, challenged; Abraham Steele, sworn; Joseph King, challenged; Thomas Edmead, William Isles, John Johnson, sen. William Wells, jun. sworn; Edmund Tannat, Davis Percival, John Fahie, Crisp Molineux, Andrew Armour, challenged.

Prisoner. May it please your honours, I challenge Mr. Armour for cause: My cause of challenge is this:—Mr. Armour lately at Montserrat was heard to say, that, if he was upon my jury, he would hang me.

Mr. President. Can you prove this declaration of Mr. Armour's?

Prisoner. Yes, I pray that Mr. Frye may be sworn to prove it.

Mr. President. Swear Mr. Frye. (Which was done.)

Mr. Frye. I heard Mr. Armour say at Montserrat, that, if he was to be on Mr. Barbot's jury, he would condemn him.

Solicitor General. This is abundant cause, to be sure.*

Mr. President. Mr. Smith, go on with the jury.

Cl. of Arr. William Buckley, Thomas Wylley, challenged; Christ. Mardenborough, sworn; Peter Carew, challenged; Richard Peterson, Edward Gillard, sworn;

Cl. of Arr. Cryer, count these.

* See the objection to Mr. Raikes in the Case of O'Connor and others, at Maidstone, A. D. 1798.

Jury.

George Weatherill,	William Isles,
Benjamin Clifton,	John Johnson, sen.
William Garvey,	William Wells, jun.
Charles Caines, sen.	Christ. Mardenborough;
Abraham Steele,	Richard Peterson.
Thomas Edmead,	Edward Gillard.

Cl. of Arr. Cryer, make proclamation.

Cryer. Oyez, Oyez, Oyez! If any one can inform the king's justices, the king's solicitor-general, or this inquest now to be taken, of any treasons, murders, felonies, or misdemeanours, committed or done by the prisoner at the bar, let him come forth, and he shall be heard, for the prisoner stands now at the bar upon his deliverance; and all persons that are bound by recognizance to give evidence against the prisoner at the bar, let them come forth and give their evidence, or they will forfeit their recognizances.

Prisoner. May it please your honours, I humbly move that I may have pen, ink, and paper.

Mr. President. Ay, by all means.

Cl. of Arr. John Barbot, hold up thy hand! Gentlemen of the jury, look upon the prisoner, and hearken to his charge; he stands indicted by the name of John Barbot, late of the parish of St. George Basseterre, in the island of St. Christopher, gentleman, for that he not having (as in the indictment before set forth). Upon this indictment he hath been arraigned, and upon his arraignment hath pleaded Not Guilty; and for his trial hath put himself upon God and his country, which country you are: Your charge therefore is, to enquire whether he be guilty of the felony and murder whereof he stands indicted, or not guilty. If you find him guilty, you shall enquire what goods or chattels, lands or tenements he had at the time of the felony committed, or at any time since: If you find him not guilty, you shall enquire whether he fled for the same. If you find that he did fly for the same, you shall enquire of his goods and chattels, as if you had found him guilty: If you find him not guilty, and that he did not fly for the same, say so, and no more; and hear your evidence.

Jury. May it please your honours, we pray we may have pen, ink, and paper.

Mr. President. Mr. Smith, let the jury have pen, ink, and paper.

Mr. Kerr. May it please your honours, and you gentlemen of the jury, I am of counsel for the king on this trial: It is an indictment by which the prisoner at the bar stands accused of the murder of Matthew Mills esq. The indictment sets forth, That the prisoner at the bar, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 19th day of November, in the 26th year of the reign of his present majesty, about the hour of five of the clock in the morning, with force and arms, at a place called Frigate-Bay, in the parish of St. George Basseterre, in this island, in and upon

one Matthew Mills, esq. in the peace of God, and of our said lord the king, then and there being, feloniously, voluntarily, and of his malice aforethought, did make an assault; and that the prisoner, with a pistol then and there charged with gunpowder and leaden bullets, which he in his right hand then and there had and held, into and against the said Matthew Mills, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge; and that the prisoner with leaden bullets issuing out of the said pistol, by force of the said gunpowder, the said Matthew Mills, in and upon the right side of his body, and between the two last false ribs, and near the back of the said Matthew Mills, then and there feloniously, voluntarily, and of his malice aforethought, struck, penetrated, and wounded; and that the said prisoner then and there feloniously, voluntarily, and of his malice aforethought, gave to the said Matthew Mills in and upon the right side of his body, between the two last false ribs, and near the back of the said Matthew Mills, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound the said Matthew Mills instantly died.

To this accusation the prisoner at the bar hath pleaded not guilty; and for trial hath put himself upon you, gentlemen of the jury: it is, therefore, the duty of us, who are of counsel for the king, to prove this horrid crime upon the prisoner to your satisfaction; and I make no doubt we shall be able to support this indictment, upon the most violent presumptive proof that ever appeared on a trial of this kind. If this should be the case, I hope the jury will, under your honours' direction, find the prisoner guilty of this murder. We shall proceed to examine the witnesses for the king, as soon as the gentlemen who are to follow me have opened to your honours, and the jury, the nature of the evidence that will be produced on this occasion.

Sol. Gen. May it please your honours, and you gentlemen of the jury; The prisoner at the bar, John Barbot, stands indicted of no less a crime than that of murder; the murder of one Matthew Mills, esq. I say, of one Matthew Mills; because such is the stile and form of the indictment; and not as supposing you are, or can be any strangers to the name or character of that unfortunate gentleman: for who the deceased was, his rank and distinction in life would not permit any one in these parts to be ignorant; and as to what he was, if there were any who knew it not in his life-time, they must necessarily have learned it from the general sorrow and concern, and the many hearts that are yet bleeding for his death.

Gentlemen, as to the murder of which the prisoner stands indicted, it is perhaps the hardest to be accounted for, as to its causes and the motives to it, of any intended, any concerted event, that has ever fallen out within the compass of your knowledge and experience. The two grand and ordinary motives to the

committing of murder, are interest and malice. But, for the former of these, there does not seem to have been the least prospect of any advantage to be reaped by any one whatever, by the death of the deceased: Though how many, and in how grievous a degree, will be sufferers by it, God knows: and for the other motive, malice, one would have thought his amiable character, and most unexceptionable conduct towards every one, must have secured him against the enmity and ill-will of any person living; and even still we may venture to affirm, that no good man was, or could be, his enemy: yet that he had an enemy, (one, at least, if not more; I say, that he had, at least, one enemy) is but too apparent from the manner and circumstances of his death: and I believe your consciences will be abundantly convinced by the evidence, that that enemy was the prisoner at the bar; the consciousness of whose guilt, if that should be the case, must be greatly aggravated by this consideration, that he has robbed the world of a man, whose loss he cannot make good to it in himself; and that there is no probability, that in the course of twenty such lives as his, he should ever be able to make amends to the great number of persons whom he has rendered so unhappy, and made such sufferers by it: so diffusive a ruin, so extensive a mischief has been accomplished by a single stroke of so insignificant a hand!

Gentlemen, there are few murders committed, of which it is not with some difficulty and labour the authors are found out: for, as the more atrocious the crime, and consequently the greater the punishment attending it, so the greater the caution and secrecy used in the committing it, and the manner and means of putting it in execution the more carefully studied and concerted, in order to avoid a discovery, and escape the hand of justice.

And yet, gentlemen, in most cases of murder, (for, indeed, in some few instances, heaven has thought fit to reserve the whole of vengeance to itself; but, I say, in most cases of murder) it has pleased Providence by some mark or another to point out the guilty person; and all the care and foresight of the coolest and cunningest offenders, have not been able to guard against some token, some unthought-of circumstance, which has left a door open to a discovery, when they imagined they had barred up all access to it.

Thus, gentlemen, in the present case, though the prisoner at the bar flattered himself he had so effectually laid his measures, as perfectly to secure him against (not the knowledge and discovery of his crime, for that he knew there were those about him who could, and must, make public; but against the punishment which he knew by law was due to it; by taking care to have none present when he committed it, who could be legal witnesses against him: yet I believe all his management and precautions of that sort will stand him in very little stead; since, by evidence unquestionably

legal, so many and evident tokens of his guilt will appear; such a train of circumstances will be laid before you of various kinds, as, when taken and considered together, will give such light and strength to each other, as to convince the most incredulous persons, and satisfy the most scrupulous and tender consciences, that the prisoner at the bar was the person by whose hand the deceased was murdered.

And this, gentlemen, as it is legal evidence, so it is sufficient too, if it be such as satisfies your belief, that he committed the fact. And indeed this is the best and only evidence, which we can hope to meet with in almost all cases of murder; where the caution and secrecy which I observed to be used in the committing it, makes a necessity of investigating the truth by painful steps, and of tracing and hunting out the murderer, by following the track of circumstances, as we can find light enough to discern and pursue it. For, if the bare taking care to have no persons present at the time of committing the most execrable crimes should avail, in spite of the plainest and strongest circumstances pointing out the criminals, to screen them from public justice, it would hardly ever be possible, but by extreme accident, to convict the most flagrant offenders; and nothing were easier than to commit the worst of crimes with absolute safety and impunity.

Gentlemen, it were a thing greatly to be wished, both for your sakes and the sake of this island, that it had not been made the scene of this abominable act: so should you have been saved the disagreeable task that is now imposed on you; and the island the odium, which will perhaps unjustly, as well as unfortunately, be thereby brought upon it: I say, unjustly, because, as you will hear from the evidence, though the matter was executed here, it was conceived and concerted elsewhere. The arrow was indeed thrown in this island; but it was first dipped in the poison that was generated in another; where, as you will hear, gentlemen, the prisoner at the bar was exercising himself in rehearsing this fatal tragedy, and making himself perfect in his part of it, some days before it was acted.

Gentlemen, as I before told you, the motive to this unhappy affair is hard to be accounted for; yet all that can be conceived or imagined to have been a provocation to it, with the substance of what else you will hear in evidence in proof of the indictment, I shall relate to you; and though the provocation you will hear of was the slightest and strangest that was perhaps ever known to the committing an act of this kind, yet, I believe the prisoner will find it a difficult matter to assign a stronger or a better.

You must know, gentlemen, that on Tuesday the 7th day of November last, there being a public sale at the town of Charles-town in the island of Nevis, of an estate in that island, commonly called Bridgewater's, the prisoner at the bar offered himself as a purchaser, and accordingly bade for it the sum of 2,510*l.* ster-

ling. The deceased, who was largely interested in this sale, as having a demand for a considerable part of the purchase money, and who, as well as many others, was not only surprized to hear the prisoner bid a sum of money so far beyond what all the world must be sensible he was able to make good, but also justly offended at the prisoner's behaviour, which tended to throw every impediment in the way of the sale that he could, said, he desired that there might not be so much cavilling, and that no boy's play might be used on the occasion; for that this estate had once before been sold, and the purchase-money not paid: upon which the prisoner, with great heat, and a pertness peculiar to him, stepped up to the deceased, and in molish phrase told him, He expected to be treated like a gentleman. To which the deceased only replied, He should use him and every one as such.

And this, gentlemen, is all the provocation, which, on all the recollection and enquiry that can be made use of, it can be found was ever given by the deceased to the prisoner; since there appear not the least traces of their having long before spoken to each other, or had any intercourse on any occasion at all; and it is almost a certainty, that they never spoke to, or saw one another afterwards, till the morning of the death of the unfortunate deceased: but this, gentlemen, according to the very high conceits which the prisoner had of himself and his own merit, was, it seems, such an indignity, as nothing less than the taking away so important and valuable a life as the deceased's could atone for. And of this he was so full, and so blinded by his purpose, that on the Friday following, the 10th of the same November last, he declared in the street of this very town, That there was a certain gentleman in this island, whom he would either kill, or be killed by, in less than a fortnight: and indeed in less (and very little less) than that time the deceased was killed; and (as I believe you will by and bye be perfectly convinced) by the prisoner at the bar. What could induce the prisoner to make this strange and unnecessary declaration of his intention, is difficult to say; nor is it at all satisfactory to be accounted for, but from that fatality which it has pleased Providence shall hang upon guilt, to convince men, that what he thinks proper shall be revealed, it shall not be in their power, with all their care and precaution, to keep secret. Gentlemen, in pursuance of this declaration, and in the interval between that and the 19th of the same month, when (as it is laid in the indictment) the deceased was killed; the prisoner took an opportunity to exercise himself in firing with pistols at a mark; and, as the event has proved, became but too apt a proficient at it; having fatally improved himself to such a perfection in it, as to enable him to accomplish his design on the deceased; who was found dead of a wound, apparently given from a pistol, between 5 and 6 of the clock on Sunday morning the 19th day of November last; the very night before which,

as you will hear, the prisoner, in a very hasty manner, made his last will at a public tavern in the town of Charles-town in Nevis, where he delivered it into the custody of one who was to have some concern in it. Gentlemen, from these circumstances and this behaviour of the prisoner, previous to the murder, I believe no man, for his own private satisfaction, would look further for the person who committed it, than the prisoner at the bar. But from other more numerous, and much stronger circumstances, which you will likewise hear from the evidence, and which I shall first open to you, I think all shadow of doubt, whether it was the prisoner who committed it, must be entirely taken away. For, gentlemen, the night before the committing the fact, the prisoner, after having thus executed his last will, and delivered it out of his own custody, went from the tavern into the country with one Dr. James Webbe, at whose house he slept, or, at least, made appearance of sleeping; and accordingly, between 9 and 10 o'clock, he bade the doctor and his family a good night, and retired to the chamber allotted him, under pretence of going to bed; but in the morning when the doctor arose at his usual hour, he found to his very great—I beg pardon—I was going to say, to his very great surprize; but that I cannot take upon me to say; but however he did find, that the prisoner was gone from his house; and about 8 or 9 o'clock in the morning he saw him riding up to his house on his (the doctor's) own horse, and with his own negro boy attending him. Where he had been while he had thus withdrawn himself, and what he had been doing, you will presently hear. Gentlemen, about five o'clock, or very little after, that same Sunday morning, as one John M'Kenley, who is an overseer at the plantation of Mr. Spooner near Frigate-Bay, was lying on his bed (for he had risen, it seems, some time before, and had been abroad; but was now lying down again; when) a negro boy whom he very well knew, called Coomy, who belonged to, and usually ran with the deceased when he went on horseback, came hastily into the chamber, and even leaped on the bed, and with great emotion and seeming fright, told M'Kenley, that his master was fighting on the Bay with a gentleman come from Nevis, and that he feared his master was killed; the negro then instantly went out of the room, and mounting his master's horse, on which he had rode thither, galloped back to the Bay again. M'Kenley was going to saddle his horse to follow him; but thinking that would take up too much time, and it not being more than a quarter of a mile, or thereabouts, to the place, he walked away as fast as he could to the place, where, when he came, he found Coomy supporting his master against his knees; but on coming close to him, he found the unhappy gentleman was actually dead, though still warm; having just breathed his last. M'Kenley then asking Coomy, who it was that had killed his master? the negro answered, it was Mr. Barbot, who was come from

Nevis, and was then going back again; and added, If you will go to the sea-side, I believe you will see him; for I am sure he cannot be gone far. M'Kenley then ran to the beach, which was about 50 yards from the spot where the deceased lay; but with a rising bank between; and there saw a canoe with four oars and a paddle, rowing from the shore towards Nevis, with somebody dressed in white sitting in the stern; but by the person's back being towards him, and from the great consternation he was in at the unhappy event, having himself a little while before been a servant to the deceased, he did not distinguish who the person was. However, that, gentlemen, will soon be made appear to you; for about half an hour after, as the canoe was in its way to Nevis, it was met by a schooner coming from Montserrat to this port; the master of which very well knew the prisoner, and saw him sitting in the canoe, dressed in a white coat, and having on a laced hat; he will shew you that there was no other canoe then in sight, than this one, which he pursued with his eye, till he saw it near the bay at Nevis, called Molton's Bay, where the prisoner was seen to land out of it about 7 of the clock in the morning, by persons who knew the canoe, and two of the principal negroes who rowed it. From thence, gentlemen, the prisoner walked up to the house of the plantation called Bridgewater's, which was about half a mile distant from the sea, and there enquiring for Dr. Webbe's negro boy, called Pope, ordered him to saddle the horse; meaning, as you will hear, the doctor's horse, which, as you will find, the boy had brought thither about mid-night, under the pretence of looking for his master, though he knew he was then at home. From hence, gentlemen, the prisoner rode back to Dr. Webbe's, where he had pretended to go to bed the night before, and which is about three miles distant from Bridgewater's; and there dismounting, finished his glorious expedition, and rested from his worthy labours. I must not omit, gentlemen, that a very sensible negro fellow, belonging to the canoe, as soon as they came back to Nevis, seeming greatly dejected and thoughtful, and his master pressing him to know the occasion of it, the fellow answered, He was afraid Mr. Barbot had done some mischief; which is thus far material, that it was said before the news came from St. Christopher's to that island, of the unhappy affair.

Gentlemen, as you may perceive by what I have said, and will still more plainly find from the evidence, the prisoner at the bar, whether to secure a further chance for his escaping the punishment due to his crime, or, it may be, despairing of other means or opportunity to accomplish his purpose against the deceased, took care to draw him to a place of appointment, in order to give the act he committed the favourable construction of a duel. But, in the first place, I believe you are not to be told, that were it really so, or were it ever so fair a transaction, as it is generally termed, of that

sort, that, in the law, by which you upon your oaths are to try the prisoner, is absolutely murder. Should that appear or be believed, how far it might be an argument for mercy or pardon, is the business of another place, and of other persons: but the serious and solemn business of this day, and of you, gentlemen, is upon your oaths to say, whether you believe, upon the whole matter, the prisoner killed the deceased or not. And in the next place, gentlemen, I believe you will be too well convinced by the evidence given, that the notion and form of a duel was only meant as a cover and a sanction to the intended murder; and that the deceased was unquestionably killed before he was provided, or could have a chance of worsting the prisoner or defending himself: For you will find, gentlemen, that by the wound given, which was in the side, and the course it took along his belly, the deceased could be in no offensive posture; and it is plain his pistols neither were, nor had been, loaded. And now, gentlemen, we shall call the witnesses to these several facts which I have mentioned, from whose mouths, and on whose oaths, you will have a confirmation of what it was my duty thus to open to you, in order the better to conduct your attention to the proper and material parts of the evidence.

Mr. Horne. May it please your honours, and you gentlemen of the jury; I humbly beg your honours' indulgence, and, gentlemen of the jury, your favourable attention to my speaking in behalf of the crown, and in support of what Mr. Solicitor-General has opened to you with such strength and perspicuity. And, though I must long lament the fatal deed which brings me before you this day; yet, it is a circumstance of no slight satisfaction to me, when I observe the solemnity of this assembly, this unusual concourse of people from all the islands, speaking the importance of the occasion, and the expectation of the public, that my first appearance before your honours, is, in a cause that requires no extraordinary ability in the advocate, no art to gloss, or sophistry of arguments to disguise it; that I am to speak to a subject that lies level to every understanding; and to a crime whose malignity is confessed by every heart. And as in the course of this trial I shall not abuse you, or dishonour myself, in employing any dishonest artifice; so am I as steadily resolved to suppress no truth (however offensive to any man) that may be necessary to detect guilt, to retrieve honour from the fantastic notions under which it labours, and to engage your justice to the community, as well as to an injured family, in becoming instruments in the hand of heaven to punish the guilty, and to determine agreeably to that denunciation of vengeance from heaven, that, Whoso sheddeth man's blood, by man shall his blood be shed.

Such is the natural odium that every man conceives against the crime with which the prisoner is charged, so much is the common

interest of man affected by murder, that at the name of it we take the alarm, with impatience and sympathy we hear and feel the story, with ardour we pursue the murderer, with eagerness apprehend him, with pleasure deliver him up to justice, with satisfaction hear the sentence, and with approbation all acknowledge that blood for blood is a just restitution. Is there a crime, in the discovery of which the finger of God has been so often held forth? For when man's invention has entrenched the criminal with artifice behind artifice, and covered him in a disguise fitted to cheat the most inquisitive eye, heaven has wonderfully revealed the man of blood.—That providence which is attentive to the fall of a sparrow, can never be regardless of the most excellent of his creation. The first murderer carried about with him a distinguished mark of divine vengeance; and for the innocent blood of a brother, wandered a vagabond through the world.

Crimes so odious in their nature, which the laws have punished with death, are generally contrived with the utmost caution, and perpetrated with the profoundest secrecy; for he who knows that an ignominious death must be the certain consequence of the discovery of his villainy, will, as the prisoner has done, employ all his artifice, and exert his utmost ability, in the concealment of it; while innocence acts always in open day, where the world may be spectators of its actions. But, gentlemen of the jury, I am persuaded that the witnesses will satisfy your consciences, that in spite of all the artful preparations that attended the contrivance, and the studied precaution and secrecy that attended the perpetration of this crime, that no man on earth but the prisoner at the bar could be guilty of it; for notwithstanding his life depended upon the concealment of his crime, and the knowledge of this kept alive all his art and caution when he was retired to himself, and was by himself concerting his scheme; yet in company you will be surprized to find his vanity (such is the fatal, the providential inconsistency of guilt) throwing him off his guard, and drawing from him the discovery of his resentment, and a confession of his intention. You will hear him expressing his malice to the deceased, vowing vengeance against him, and setting but a fortnight's short period, to a life, which, from its amiable and uncommon value, all good men would have wished to have had protracted to the happiest old age.

You will be able, gentlemen, to trace him almost step by step through his whole track, and keep him almost constantly in view, from the first opening to the closing of this abominable deed. As Mr. Solicitor has already opened the fact and the evidence of it, it would be impertinent in me to abuse the patience of the court and jury, by an unnecessary repetition of them in all their circumstances: and had there been nothing else proper to offer to you, gentlemen of the jury, upon this occasion, I should not rise, however

painful for me to be silent on a subject that has so sensibly affected me, and must so long lie heavy at my heart.

The counsel for the king will not, gentlemen, go out of the ordinary road of justice, and have recourse to an unusual evidence, even upon so extraordinary an occasion, when you are inquiring into the murder of so excellent a man. We shall not therefore attempt to produce positive testimony [i. e. the testimony of slaves:] For, though we have such as no law, either of our mother-country, or of these colonies, prohibits; yet good policy in general, the ground of all law, and in particular the policy of these islands, forbids it. Indeed there is no necessity for it, the evidence of concurring circumstances being in the present case, as well as many others, more convincing, than the testimony of any one positive witness. The evidence of the prisoner's guilt must then result from circumstances, but circumstances so strong, so connected, reflecting such light upon each other, as will amount to the most violent presumption, which, gentlemen, their honours will inform you, is in law a full proof.

And here, gentlemen of the jury, as it is impossible in such small communities to avoid hearing the conjectures and opinions that are thrown out in all matters of moment sufficient to engage the public attention; give me leave to take notice of two notions that seem to have been artfully given out, and industriously propagated, on this occasion: "That as the testimony of the slaves, present at this melancholy action, will not be offered, circumstantial evidence can be no proof; and that if the deceased thought proper to meet the prisoner, and was killed in a fair duel, the prisoner ought to be acquitted." Nothing can equal the weakness of these assertions, but the boldness with which they have been maintained. For weak as they are, it seems they have found very zealous supporters. How deep, or how extensive, the impression and influence of them may be, I cannot say: but as the tendency of such notions may be of pernicious consequence, it becomes necessary to prove that they have no foundation, either in law or reason. For it would be to little purpose to aim at establishing a fact upon circumstances, if they were not to be regarded; and to as little purpose would it be (admitting the force of circumstances) to prove the prisoner killed the deceased, if his doing it in what is called a fair duel, was believed to be a justification.

If, gentlemen, it be considered, that a witness may be bribed, and the bribe pervert and falsify his testimony; that a witness may be concerned in interest, and interest warp him into partiality; that a witness may be a partaker in the guilt, and the fear of punishment intimidate him into suppression of the truth; if these, I say, be considered, it will be allowed, that strong circumstantial evidence is more to be depended upon, than the positive testimony of a single witness. For a series of circumstances, which the wit of man could

never forge, following one the other in order both as to time and place, and, as in the present case, coming from different witnesses in different islands, where there was no possibility of concerting a scheme for the prisoner's condemnation; so many, and such strong circumstances pointing him out, from the first projection to the completion of his scheme, force a conviction upon the mind, and demand belief. Facts arising out of circumstances are stubborn things, and will never lie.

Hence it is, that in numberless trials circumstances alone have determined the jury. The case of Harrison and Dr. Clenche,* and many others, might be mentioned: but I shall only observe further, that this kind of proof is thought so strong, that it is ruled particularly in the case of a bastard child, that if it appears there has been an endeavour to conceal its death, there needs no proof that the child was born alive, or that there were any signs of hurt on the body; but it shall be undeniably taken that the child was born alive, and murdered by the mother.† So that circumstances always have determined, and always will determine, the jury in trials, when there is no possibility of producing eye-witnesses of the fact.

This, gentlemen, is no lately invented proof that has but just found a place only in our law-books; for I would (if I may presume to take a liberty with it) refer you to a case of the greatest antiquity, and most sacred authority, that depended absolutely upon circumstance. You will anticipate me, I am sure, and immediately perceive, that I allude to the celebrated judgment of the man transmitted to posterity as the wisest of the creation. No witnesses as assistants to the birth, appeared in that case to evince the reality of the mother; the truth of the fact seemed to depend solely on the assertion of each interested party. Here was an act of justice to be done; the case was nice, the decision hard; even Solomon's wisdom was at a stand, till by a happy thought the alarming proposal for destroying the child, produced a circumstance that removed the difficulty. The tears and anguish of the one revealed the true mother, and prevailed against the vociferation and obstinate persistence of the other.

And indeed, if there was no ground of belief, no evidence on which to determine, but from the direct and positive testimony of an eye-witness; the mind would be left to fluctuate in perpetual doubt, and be irresolute in the most interesting concerns of life. If the proof that arises from circumstance, from reasoning and induction, be excluded out of our notion of evidence, it would prove too much; for how should we be able to judge of the most important points, even of religion itself, either natural or revealed? how should we be able to prove the most momentous of all truths, the existence

* See it in this Collection, vol. 12, p. 834.

† Hawk. b. 2, c. 47, sect. 43.

of the Supreme Being? The several parts of the universe are but so many circumstances of creation, from whence is deduced the proof of a creator. If that absurd and strange opinion already mentioned was to prevail, no crime committed against society would be punished, but such alone as were proved by direct and positive evidence; the consequence of which in a little time would be, that no crime would meet a punishment at all, when the criminal had nothing to do but to sin in secret, and sin safely.

There would be then an end put to the patient attention of courts, and the offices of judge and juror would be entirely useless.

One thing more give me leave to submit to your consideration. If this kind of evidence were excluded from the case of duels particularly, which are always carried on with the utmost secrecy and precaution, murders of that sort could be rarely punished. This consideration too will grow stronger, when you recollect, that if circumstantial evidence is not to be admitted, particularly in duels, what opportunity, what encouragement will you give to this romantic, this cruel practice in a country where the duellist's purpose is to act in secret, will be assisted by the intervention of our slaves, who are incapacitated to be witnesses, and who are always at hand to carry on the dangerous intercourse! An unhappy circumstance attending our situation, (if circumstantial evidence be rejected) that the most atrocious crimes may be committed with their assistance, without the fear of being convicted on their evidence. What an inlet this to confusion, and even to the dissolution of government!

Whatsoever, gentlemen, makes the truth evident, although it be circumstance, is legal evidence; and that which satisfies your conscience, convinces your understanding, and induces you to believe the prisoner guilty, is good evidence in law. It may seem surprising in another place that any pains should be taken to make out what is in itself so clear; but let mistakes be ever so unreasonable, 'tis proper to remove them. Other arguments upon this point might be drawn from the nature of trials and other considerations; but as that may possibly anticipate what may be offered in reply to the defence which may be expected from the prisoner, I shall content myself with having premised thus much by way of preparation for evidence that is entirely circumstantial.

I must appeal to you, gentlemen of the jury, whether you have not heard it asserted with equal confidence, that if the deceased met the prisoner on his challenge, and was fairly killed, the prisoner ought to be acquitted. That this is not the present case, but that the deceased was basely murdered, before he was prepared either to attack the other or to defend himself, you will find, gentlemen, is to be violently presumed from the circumstances of his unloaded pistol, his cloak and gloves being found upon him, and above all the situation of his wound, which the surgeons will prove to you, from its

entrance and its direction, could not be received by a man in the posture of defence.

To the assertors of this second opinion, as irrational and almost as dangerous as the first, it will be in vain to prove the prisoner's guilt, if the imaginary notion of honour is to varnish the crime, and disappoint its punishment. For argument-sake then, grant what is supposed, that the duel was fair, and see how reconcilable this opinion is to reason, or how justifiable by the laws. Alas! how is the name of honour prostituted! Can honour be the savage resolution, the brutal fierceness, of a revengeful spirit? No, gentlemen of the jury, search your own bosoms, and there you'll find, that true honour is manifested in a steady uniform train of actions, attended by justice, and directed by prudence. Is this the conduct of the duellist? Will justice support the duellist (and in the present case, the prisoner, if he be found guilty) in robbing the community of an able and useful member, and in depriving the poor of a benefactor? Will it support him in preparing affliction for the widow's heart? in filling the orphan's eyes with tears, and in bringing sorrow and misfortune on friends, and a numerous train of dependants? Will justice acquit him for enlarging the punishment beyond the offence? Will it permit him, for (perhaps) a rash word that may admit of apology, an unadvised action that may be retrieved, or an injury that may be compensated, to cut off a man before his days be half numbered, and for a temporary fault inflict an endless punishment? On the other hand, will prudence bear him out in risking an infamous death, if he succeeds in the duel? But if he falls, will it plead his pardon at a more awful tribunal, for rushing into the presence of an offended God, with all his imperfections on his head? View the duellist in the light that either religion or the law considers him, and you'll quickly perceive and acknowledge the illegality, the impiety of his spirit. Man, like the centinel fixed to his post, who dares not stir till he is relieved; man, I say, must wait till death, natural death, the grand relief of human nature, shall discharge him; nor can he prodigally throw away a life bestowed for better purposes. The Giver, the Preserver of life must be displeased with him who usurps a power to cast away his own, or take away his fellow-creature's. Man is made in the express image of his Maker. Shall the duellist with impunity, in the person of his fellow-creature, destroy that image, in impious disobedience to that command, which bids us not to kill?

The laws of his country too condemn the duellist. The sages of the law, in their books, will tell him, that persons convicted barely of sending a challenge, have been adjudged to pay* a large fine, and suffer imprisonment without bail, to make a public acknowledgment of their offence, and to be bound to their good behaviour. That where persons coolly

* See Coke, 3 Inst.

and deliberately engage in a duel, which cannot but be attended with the apparent danger of murder, it is not only an open defiance of the laws, but carries with it a direct contempt of the justice of the nation, as putting men under the necessity of righting themselves. That if two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder.† And this the law adjudges to be of malice, and that the party cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity: or that it was only his intent to vindicate his reputation.

Who then after this will be hardy enough to acquit the criminal, whom the laws of God and man condemn? Notwithstanding the law declares that he affronts public justice, who snatches the sword from the magistrate's hand, and carries out his own revenge; yet, who so loud as the duellist, when he has secretly butchered some worthy man, in demanding justice and a fair trial? Try me, says the prisoner, by the laws of my country, and I have nothing to fear. Astonishing presumption! That he should dare to hope for the protection of those very laws, which he has just before disobeyed and dishonoured! That he should insult the wisdom and justice of the laws of his country, and rush contemptuously into the duel that they forbid, and at the same time claim a shelter under the mercy of them, and demand open and positive evidence for a murder which he has contrived and committed in darkness! What! says the man of honour, forbid by laws divine on one hand, and restrained by human laws on the other, must I never draw my sword, never shew my courage? Yes, draw the one, and exert the other, in the cause of your country; employ them to guard your property from a robber, to defend your person from a ruffian, your bed from dishonour, your daughter from violation, and to save your friend from assassins. These are actions worthy of the man of honour.

Duelling seems to be an unnatural graft upon genuine courage, and the growth of a barbarous age. The polite nations of Greece and Rome knew nothing of it; they reserved their bravery for the enemies of their country, and then were prodigal of their blood. These brave people set Honour up as a guardian genius of the public, to humanize their passions, to preserve their truth unblemished, and to teach them to value life only as useful to their country. The modern heroes dress it up like one of the daemons of superstition, besmeared with blood, and delighting in human sacrifice.

A man of honour, in the modern sense, signifies no more than an audacious man who will

fight at all events: A man, perhaps, who has been first indebted to your generosity, by dishonest artifices has abused your patience, and at last attempts your life for calling in your debt: A man, perhaps, who will wound your peace in staining the honour of a wife or daughter, and afterwards, on your remonstrating the wrong, heroically wash away these stains in the father's or husband's blood.

Senseless as this notion of honour is, it unhappily has its advocates among us. But for the prevalence of such a notion, how could the amiable person, whose death has made the solemn business of this day, be lost to his country, his family and friends? Would to God that I was a master of words, and it could be indulged to the tenderness of a friend to pay a tribute to his memory! I might then endeavour to set him full before you in the variety of his excellence: But as this, perhaps, would be venturing too far, I can only lament that such virtue had not a longer date; that this good man was cut off in the strength of his age, ere half his glass was run; when his large heart was projecting and executing schemes to relieve distress, and by the most surprising acts of beneficence, vindicating the bounty of Providence for heaping wealth upon him.

We shall now proceed to call our evidence.

The other gentlemen of counsel for the king, were Mr. Wilson and Mr. Davis.

Mr. Peter Carew sworn.

Sol. Gen. Pray, Mr. Carew, were you at Nevis on the 7th of November last?—Carew. Yes, Sir, I was.

Was Bridgewater's estate sold that day?—Yes, Sir, it was.

Were you present at the sale?—Yes, Sir.

Was the deceased there?—Yes.

Was the prisoner at the bar there?—Yes, he was.

Do you remember any conversation that passed between the prisoner at the bar and the deceased at the sale?—As I went into the room where the estate was put up to sale, I heard the prisoner say to the deceased, He expected to be treated like a gentleman, or, he did not treat him like a gentleman, or words to that effect; which seemed to be in answer to something the deceased had said to him, but I did not hear what.

Do you know whether the prisoner and the deceased had any conversation after that?—I cannot tell whether they had or not.

Were they together at any time after?—I really do not know.

Prisoner. Pray, what was I doing at the time that, you say, I said this to Mr. Mills?—Carew. I cannot tell what you were doing.

Prisoner. Was any body in the room at that time?—Carew. Yes, a great many people.

Thomas Mills, esq. sworn.

Sol. Gen. Pray, Sir, were you at Nevis when Bridgewater's estate was last sold?—Mills. Yes, Sir.

* 3 Vol. Bac. Abridg. 665, 666.

† See Leach's Hawkins's Pleas of the Crown, book 4, c. 31, s. 21.

Were you present at the sale?—Yes, Sir, it was on the 7th of November last.

Were the deceased and the prisoner at the bar there?—Yes, they were both there.

Do you remember any conversation that passed between them at the sale, and what it was?—I remember very well that Mr. Cottle the attorney was drawing the conditions of sale, and after he had finished them, the prisoner objected to them; and the deceased said, Mr. Barbot, the conditions of sale are very fair; why will you cavil about them? Upon which the prisoner said, Sir, I expect to be treated like a gentleman; and the deceased replied, Sir, I shall always treat you and all mankind as such.

Did you observe that the prisoner spoke with warmth?—Yes, he spoke very warmly.

Can you tell whether the deceased had any conversation with the prisoner at the bar, at any time after these words passed?—I cannot tell whether they had or no; for I left them together in the auction room.

Do you know whether the deceased saw the prisoner after the day of the sale?—I cannot positively tell; but I have great reason to believe he did not see the prisoner till the morning he was killed; for after the sale was over, I went with the deceased to Molton's bay; and on the 9th, which was the second day after the sale, we went to St. Christopher's together, and I saw him or heard from him every day after, till the 19th that he was killed.

Do you know whether the deceased gave the prisoner at the bar any provocation?—None, to my knowledge.

Had he never any difference with him at all?—None that I know of.

Had you ever any difference with the prisoner at the bar yourself?—Never any.

The prisoner is an attorney at law; did he ever do any business for you?—Yes, he has done business for me in his profession.

Prisoner. Yes, I have, and have always been very honestly paid for it.

Sol. Gen. Do you know of any letters that passed between the prisoner and the deceased?—Mills. No, I do not know of any; I have heard, since the murder, that some letters did pass between them.

Mr. Frye. Did you hear the prisoner say any thing to the deceased in a cavilling way, at the sale of Bridgewater's estate?—Mills. Yes, he cavilled at the conditions of sale, and the deceased imagined he wanted to delay the sale till sun-set, in order to prevent the estate being sold that day; and from his behaviour I imagined so too.

Prisoner. You say I was cavilling; pray, were not the conditions of the sale, that one-third of the purchase money should be paid down immediately, and the other two-thirds in a month, or else the first third to be forfeited? And do not you remember I said, the Court Act did not direct it should be so, and that it was very hard to impose such conditions, against an act made to regulate sales under executions?—Mills. I do not recollect that.

VOL. XVIII.

Prisoner. Pray, was not the whole of my behaviour warm that day? Did not I say something warmly to Mr. Cottle?—Mills. I do not remember that you did.

Mr. Andrew Armour sworn.

Sol. Gen. Mr. Armour, do you recollect any conversation that passed between you and the prisoner at the bar, some time before you heard the report of the deceased being killed?—

Armour. I remember some time in the beginning of November last, the prisoner told me that Mr. Mills had treated him cruelly, and in such a manner as ought never to be forgiven.

Pray what time in November was it?—I am almost certain it was some time between the 3d and the 7th, but I am sure it was before the 7th; for I went to Montserrat on the 7th, and did not return to this island till after the murder.

Where was you when he said this to you?—I was standing at Mr. Constantine's door.

Prisoner. Pray, Sir, was there any company present at that time?—Armour. No, there had been, but the company was just gone as I came to the door.

Did I express myself warmly?—No, I did not think you did.

Sol. Gen. Did not the prisoner tell you his reason for saying this? Did he not tell you in what manner Mr. Mills had behaved to him, to occasion his saying this of him?—Armour. No, he only said generally, that Mr. Mills had treated him in such a manner as ought never to be forgiven.

Prisoner. Who was in company, do you say?—Armour. Nobody, the company was just gone as I came up.

Had I any other conversation with you about Mr. Mills?—Not that I remember; I do not recollect any other than what I have already related.

Mr. President. Did the prisoner say which Mills it was that ought never to be forgiven?

—Armour. No, Sir, he only said Mr. Mills.

Mr. President. Which Mills did you apprehend it to be?—Armour. I took it to be Mr. Matthew Mills.

Sol. Gen. Gentlemen, pray take notice what Mr. Armour says. Did you, from the tenor of the discourse between you, apprehend it to be Mr. Matthew Mills that the prisoner meant?

—Armour. Yes, Sir, I did.

Mr. Just. Losack. Pray, clear up this point. Mr. Armour, did you then know, or have you known since, that previous to this declaration of the prisoner to you, he had any difference or quarrel with Mr. Thomas Mills, or Mr. William Mills?—Armour. No, I never heard he had any difference with either.

Mr. Just. Losack. Did you know he was on good terms with both those gentlemen?—Armour. I knew nothing to the contrary.

Prisoner. I never had any difference with either of those gentlemen.

Mr. Just. Losack. Pray, what reason had you to imagine it was the deceased that the

prisoner meant?—*Armour*. Because he mentioned Mr. Mills only, without any Christian name by way of distinction; I concluded from thence it was the deceased that he meant.

Patience Dorset sworn.

Sol. Gen. Mrs. Dorset, do you know the prisoner at the bar?—*Dorset*. Yes, Sir.

How long have you known him?—Above a twelvemonth.

Give the Court and the jury an account of what you heard him say at any time before you heard the report of the deceased being killed.—Upon the king's birth-day Mrs. M'Cahée (the tavern-keeper's wife) sent to desire I would come and help her, for they were to provide an entertainment for the lieutenant-general and a great deal of company that day. Accordingly I went, and as I was going into the house, the prisoner was standing under the gallery talking to two men, and as I was passing by, I heard him say, There was a certain gentleman in this island, that within a fortnight he would either kill or be killed by.

What time of the day was this?—Between 11 and 12 in the forenoon.

Did you hear any guns fire that day?—Yes, I heard a great many.

Do you know the persons the prisoner was talking to?—No, I never saw them, to my knowledge, before nor since that time.

Prisoner. Are you sure it was on the king's birth-day you heard me say those words?—*Dorset*. Yes, I am very sure it was.

Mr. Frye. It is very well: we shall bring witnesses to prove the prisoner was at Nevis on the king's birth-day.

Doctor James Webbe sworn.

Mr. Horne. Doctor Webbe, do you know the prisoner at the bar?—*Webbe*. Before I answer any questions, I pray the Court will favour me with a word. I am brought down from Nevis, where I live, as an evidence on this trial, and I desire the protection of this Court from any arrests that may be issued against me. I am a stranger in this island, and it would be impossible for me, if I was arrested, to find security. Another thing too, I am afraid of being assassinated.

Sol. Gen. This is not the country of assassins; they come from elsewhere.

Mr. President. What reason have you to apprehend being assassinated?—*Webbe*. Sir, I have been told there is an intention to assassinate me.

Who has told you so?—I have heard it commonly reported, Sir.

Can you fix the intention on any particular person?—No, Sir, but I am afraid of Mr. Mills's family in general; and I desire Mr. Colhoun will give me security, that I may go in safety from Mr. Mills's family to Nevis.

Mr. Colhoun. May it please your honours, if Dr. Webbe will swear that he is in danger of his life from me, or from any part of Mr. Mills's family, I am very willing to give him the security he asks.

Mr. President. Doctor Webbe, you hear what Mr. Colhoun offers; what say you to it?

—*Webbe*. Sir, I cannot take upon me to swear any more than that I have heard there is an intention to assassinate me.

It is very strange you should not know from whom you heard so?—I did not hear it from any particular person: I have heard it commonly reported.

Well then, unless you can charge some particular person, we can take no notice of it. Surely you would not be mad over the whole island!—Then, Sir, I desire I may have my expences paid me since I have been down here.

Mr. President. No, you cannot; for this is a prosecution at the suit of the crown, and in that case the witnesses always bear their own charges. With respect to your being arrested, the Court will protect you from any arrests during their sitting. Mr. Solicitor, go on with your evidence.

Mr. Horne. Do you know the prisoner at the bar?—*Webbe*. Yes.

How long have you known him?—Between 4 and 5 years.

Did you not usually consult and advise with him in your affairs?—I have employed him as an attorney.

Were you present when Bridgwater's estate was sold last at Nevis?—Yes, I was.

Did not that estate belong to you, and was it not sold for a debt of yours?—Yes, it was my estate, and was sold for a debt of mine.

When was it sold?—On the 7th of November last.

Were the prisoner at the bar and the deceased present at the sale?—Yes, they were.

Did not the provost-marshal make conditions of sale?—Yes, I believe there were terms of sale.

Were those conditions read, before the estate was put up to sale?—I believe they were, but I am not certain.

What were the conditions, pray?—I do not remember what they were.

Did the prisoner make any objections to them?—I heard him say, We will be bound by these conditions, as far as the law can bind us, and no farther; and that the marshal had no right to make any terms of sale.

Did you hear him make no other objection? Were there no other words past?—No, only the deceased said, We will have no school-boy's play.

What answer did the prisoner make to that?—I do not know, I did not hear any answer.

Why, were you not present all the time?—No, I was backward and forward.

How near were you to the prisoner, when he said what you have related?—About the distance of the room off.

And did you hear nothing else that passed on the occasion?—No, Sir.

How came you so unconcerned, as not to attend to what was going forward?—I was so confused I could not mind any thing.

What was the cause of your confusion?—The estate being sold.

Did the prisoner at your request purchase that estate?—Yes, he did purchase it at my request.

One would imagine, that, as you were so nearly concerned in the purchase of the estate, you would have been more attentive to all that passed.—I was walking backward and forward, and getting Mr. Jacob Saunders to sign the bills for the purchase-money.

You say you were much confused; pray, did your confusion proceed from concern or resentment?—From concern at having my estate sold.

How long did the deceased stay at Nevis after the sale?—I do not know, I never saw him after.

Did the prisoner see him after the sale?—I do not know that he did.

Did the prisoner go home with you after the sale?—No.

When was the first time that you saw him after the sale?—I saw him the next day.

Do you not live in great intimacy with the prisoner?—Yes, I am intimate with him.

Has he not confided in you often?—Yes, he has.

The next day after the sale that you saw the prisoner, did he not tell you the conversation that had passed between the deceased and him at the sale?—No.

Had you no conversation at all about the sale?—No, we only talked about the bills.

Did you see the prisoner the day after that, on the 9th?—Yes.

What conversation had you with him then?—I do not remember the conversation.

Juryman. Had you no conversation about the estate that day?

Webb. I do not remember we had.

Juryman. It is very strange, that you, who were the purchaser of the estate, should not say something of it to the prisoner, who purchased it for you; or that you should not remember what he said to you about it!

Webb. We had frequent conversations about the estate, but I do not remember the particulars of them.

Mr. Horne. Did you make no inquiry about the event of the sale?—Webb. No.

Did you never hear any complaint from the prisoner of his having been ill-treated at the sale?—Not that I remember.

Try to recollect: I am sure, Sir, your memory will serve you on this occasion, if you please. Did you never hear the prisoner mention any thing of satisfaction, or ill-treatment?—Never.

Did you never hear him express any dissatisfaction at the conditions of sale?—I heard him say they were contrary to law.

Did he not complain of the hardship of them?—I do not remember that he did.

Did you yourself complain of the conditions?—I said I thought them hard too, and I advised him not to sign them.

Mr. President. You said in the beginning of your evidence, that you knew not what the conditions of sale were, and now you say you advised the prisoner not to sign them, because you thought them hard; surely you must have known what the conditions were, or you could not have given him such advice. This is strangely inconnected indeed!

Webb. I advised him not to sign any conditions at all.

Mr. Horne. Do you know whether the prisoner went to St. Christopher's after the sale of the estate?

Webb. I do not know that he did.

Pray, are not you a guardian to Mrs. Dasset's daughter?—Yes.

Did not Mrs. Dasset apply to you, and tell you she thought it improper for the prisoner to stay at her house, and did not she desire you to speak to the prisoner not to continue there?—Yes, she did apply to me, and I did desire the prisoner to leave her house, and to come to mine.

And did he go to your house?—Yes.

When did he go there?—He came to my house on the 16th of November at night.

How long did he stay there?—He stayed there all the next day.

Did he never say any thing to you on the subject of the dispute that had happened at the sale of Bridgwater's estate?—No, he never did.

Do not you know, or did not you hear the prisoner say, he had hired a caboe from John Cribbe to carry him down to St. Christopher's?—No, I never heard him say so, nor do I know that he did.

Where was the prisoner on the 18th of November?—On the 18th he went to Mr. Jacob Saunders's, where we dined.

Did not you and the prisoner execute a bond of indemnity to Mr. Jacob Saunders that day?

—Yes, we executed a bond to indemnify him for endorsing the bills for the purchase-money of the estate.

Do you know whether the prisoner sent any letters to St. Christopher's on the 18th?—He told me he had wrote to Dr. William Mills, about Mr. Symmonds's affair.

Did the prisoner receive any letters from St. Christopher's that day?—While we were at Mr. Saunders's, the prisoner's negro boy brought him a packet from St. Christopher's, and the prisoner shewed me a letter he had received from Dr. William Mills.

Did he shew you no other letter?—No.

Nor tell you he had received any letter from the deceased?—No.

Did nothing more pass while you were at Saunders's than what you have already related?—Nothing more that I remember.

Were you not at O'Donnell's tavern with the prisoner, the night before the murder?—Yes, we were that evening at O'Donnell's.

Did not you know the prisoner intended to execute some paper, or writing, that evening?—No, I did not.

Did not you see the prisoner that evening writing a paper at O'Donnell's?—Yes, I saw him writing at a side-table.

What was it he was then writing?—I do not know.

Do not you know he was then making his will?—No, I do not know whether it was a will, or what it was.

Did not the prisoner desire you to procure three witnesses to attest that paper? and did not you desire one Springett not to be out of the way that evening?—Yes, I believe he did desire me, and I did speak to Springett not to be out of the way.

Did not you look over the prisoner while he was writing?—No.

Nor did not you read what he was writing?—No.

Nor after he had finished it?—No.

You read no part of it at all?—No.

Were you in the room all the time the prisoner was writing?—No, I was in and out.

Did not the prisoner call you frequently while he was writing?—Yes.

What did he say to you at those times?—I remember nothing, but his asking me if I had got the witnesses ready.

Did not he whisper to you?—No.

Did he say nothing else to you?—No, he only asked me if the witnesses were come.

Do you know the contents of the paper the prisoner was writing?—No.

Did not he show it you while he was writing it?—No.

Who were the witnesses to it?—Mr. O'Donnell, Mr. Potts, and Mr. Springett.

Did the prisoner execute it in their presence?—Yes.

Did not you know, or had not you great reason to believe, it was his will?—I do not know it was his will. It might have been his will, or a power of attorney; for I heard him say, he would either make a will, or give a power of attorney to secure Mr. Jacob Saunders for indorsing his bills.

How could a will or a power of attorney secure Mr. Saunders? Besides, what necessity was there for either, when the prisoner had that very day joined you in a bond of indemnity to Mr. Saunders?—I do not know, but he said he would do so.

Did not the prisoner tell you he had made you a legatee in his will?—No, he did not.

What did the prisoner do with that paper, when he had executed it?—He gave it to me.

Did you look into it at the time he gave it to you?—No.

Was it sealed up or open when he gave it to you?—It was folded up, but not sealed.

When the prisoner delivered it to you, did he pronounce any words?—None that I heard.

In whose custody is that paper now?—In mine, it is at Nevis.

Was it indorsed?—No.

Was it ever recorded?—No.

What did you really take it to be?—I

thought it was a power of attorney to secure Jacob Saunders.

Did you never read it, nor look into it all?—No, I never did.

Mr. J. Losack. It is very strange you should not have the least curiosity to look into a paper, that, by your own confession, was so relative to your own concerns! but upon the oath you have taken, did the prisoner say any thing to you, and what, at the time he delivered into your hands the paper we are now upon, at the tavern?—Webbe. No, he said nothing at all to me.

Mr. J. Losack. Did he not tell you it was his will?—Webbe. No.

Mr. J. Losack. Upon your oath, Dr. Webbe, did he not inform you it was his will, and that you were a legatee in it?—Webbe. No, he did not.

Mr. J. Losack. Is Dr. Webbe's Examination, which was taken at Nevis, in court?

Cl. of Arr. Yes, Sir.

Mr. J. Losack. Please to hand it up here.

Mr. Horne. I pray that judge Herbert may be called, and the examination read; for this gentleman has now contradicted what he positively swore to before judge Herbert.

Joseph Herbert esq., sworn.

Mr. Horne. Judge Herbert, is not that the hand-writing of Dr. Webbe subscribed to that examination? and was not that examination sworn to and subscribed by Dr. Webbe before you?

Mr. Herbert. Yes, this examination was subscribed by Dr. Webbe, and sworn to before me, and that is my hand to the jurat.

Mr. Horne. Was not the examination read by Dr. Webbe, or read to him, before he swore to it?

Mr. Herbert. Yes, the examination was by my desire written by Mr. Cottle the attorney, and taken from Dr. Webbe's own lips, and afterwards read by Mr. Cottle to Dr. Webbe before he swore to it, or before the doctor had signed it, and he read it himself also.

Mr. President. Mr. Smith, read Dr. Webbe's examination.

Cl. of Arr. "Nevis, Before the honourable Joseph Herbert, esq. chief-justice of his majesty's Court of King's-bench and Common Pleas, in the island of Nevis, and Samuel Clarke and Sommers Payne, esqrs. justices of the same bench.

"The EXAMINATION of James Webbe, of the said island, surgeon, who being sworn on the holy Evangelists of Almighty God, deposeth and saith,

"That on Thursday the 16th day of this instant, deponent going to his house, found John Barbot there.

"That it was some time in the evening after candle-light, when he so returned home; but deponent knoweth not the time precisely, or any particular hour near it.

"That said John Barbot continued at this de-

ponent's with deponent till the Saturday following, when they dined at Mr. Jacob Saunders's, and stayed there till about five in the evening, when Barbot and deponent both went away from thence to Mr. Edward Parris's, where they made a stay of about half an hour, and thence came to Charles-town to Mr. O'Donnell's tavern, where they stayed about an hour, and then went directly home to deponent's house, where they arrived about nine o'clock, as deponent believes.

"That the said Barbot, soon after his coming to deponent's house, declared he was sleepy, and wished deponent a good night, and went to bed, as deponent believes; that deponent being troubled with a lax, got up in the night to go to the necessary-house, and on passing through the hall for that purpose, said Barbot called to deponent, and asked him, what was the matter? To which deponent replied, nothing had happened, or was the matter: said Barbot then asked what it was o'clock? Deponent told him, he believed it was about one: no other conversation then passed. Deponent did not see or hear said Barbot till the next morning, Sunday the 19th instant, when said Barbot came to deponent's house on horseback, upon one of deponent's own horses, between eight and nine o'clock, attended by a boy slave called Nero.

"Barbot continued with deponent till they both set out for Gingerland parish, in order to dine abroad; and deponent parted with said Barbot at Mr. Pemberton's negro-houses, when said Barbot took leave of deponent, who told him he was going to dine at deponent's uncle George Webbe's. That deponent then went and dined at Mr. Maynard's; from thence he went with Mr. Maynard to capt. Symmonds's; but whilst he was at Mr. Maynard's, a negro man came to enquire for deponent, and asked deponent, who was then by himself in a back room upon a bed, if he knew where Mr. Barbot was? Deponent told him, he was at Stony-hill; the negro then went out, and soon afterwards returned, and told deponent, that there were people come from St. Christopher's after Mr. Barbot for killing Mr. Mills, or the gentleman upon Toby Wall's estate; but deponent does not particularly remember which. The boy told no other white person in the family. About half an hour after deponent's hearing this account from the boy, deponent and Mr. Maynard set out for capt. Symmonds's as aforesaid, where he received a note from said Barbot, desiring him, upon the receipt thereof, to come to the said Barbot directly at Mr. John Herbert's; upon which deponent went to him immediately, and found him drinking tea. Barbot soon afterwards told deponent he wanted to speak with him, and they both went out together into the necessary-house. Barbot there asked deponent if he had heard any thing of the killing Mr. Mills; the deponent told him, Yes, he had heard it at capt. Symmonds's, who read a letter which had been received from St. Kitt's about it, and that he (capt. Symmonds)

was gone after him (Barbot) to take him. Barbot replied, he did not care, he should not go out of the way, for he knew nothing of the matter. This was the purport of all the conversation which passed between deponent and Barbot in the necessary-house, till the constables appeared to take him. The deponent never heard, saw, knew, or was informed of any letters or messages that passed between the said Barbot and the deceased Mr. Mills. That deponent and said Barbot were one day at the widow of James Dagent's house upon Saddle-hill, when she was from home; when deponent took up a case of pistols that were lying in the house, and said he would try whether he could shoot with them, and asked the said Barbot if he would go; and they accordingly went out and fired several shot together at the head of a barrel. That deponent believes, it was about the time Mrs. Hickman was sick, and that deponent believes Mrs. Dagent was then gone to visit her.

"That on the Saturday evening when the said Barbot came to Mr. O'Donnell's tavern as aforesaid, he made his will: that the said O'Donnell and Charles Potts, and John Springett, both in the deponent's service, were witnesses to the same; the will was delivered to the deponent that same night: that said Barbot informed deponent he was a legatee. That the road deponent and Barbot went that said Saturday night to deponent's house, was through Willet's estate. That said Barbot was writing at Mr. O'Donnell's house that same Saturday night, and deponent believes it was his will. That deponent was present when the said Barbot's will was executed, and does not recollect any conversation that passed between the said O'Donnell and Barbot on that occasion; nor, that, upon the said O'Donnell's saying to said Barbot, that this (meaning the executing the said will) looked like a military settlement of a man's affairs, he this deponent said hush to the said O'Donnell, or made use of any other means to desire the said O'Donnell to keep silence. JAMES WEBBE."

"Sworn this 22d day of November,
1752, before

Joseph Herbert, Samuel Clarke,
Sommers Payne."

Webbe. I do not remember, when I read the examination, that any thing was in it about making me a legatee. I read it in a hurry.

Mr. Horne. Did the prisoner give you any reason for making his will so suddenly?—

Webbe. I do not remember it was his will; he had talked of going to England, and said he would make his will.

Mr. J. Losack. Dr. Webbe, pray raise your voice, the Court does not hear you; and considering how much your evidence seems calculated for the advantage of the prisoner, it is pity he should lose any part of the benefit of it. Did you ever receive any letters from the deceased?—*Webbe.* Yes, I have received a note or two from him.

Then you know his hand?—Yes, I believe I should, if I was to see it.

Did you never see his hand-writing in any letters to the prisoner?—No.

Nor on the superscription of any letter to the prisoner?—No, I never did.

At what o'clock did you leave O'Donnell's tavern the evening the prisoner executed the paper he delivered to you?—Between seven and eight in the evening.

Where did you go to?—We went home.

Did the prisoner go home with you?—Yes.

Had you no conversation with the prisoner relative to the deceased, in your way home, or after you got home?—I do not remember any.

Had you positively no conversation relative to the deceased?—I do not remember we had.

Pray, Dr. Webb, do you remember on what day you came last from Nevis?—From Nevis, Sir?

Yes, from Nevis.—I came from Nevis the day before yesterday.

It is very well, Sir; I only wanted to know whether you had remembrances of any thing.

Mr. Horne. Did the prisoner never tell you of any letter he had received from the deceased?—Webb. No.

Nor any verbal message?—No.

Did he mention to you any intention he had of going out that night you came from O'Donnell's?—No.

Pray, what was the conversation you had together, after you got home?—I do not recollect what it was, but we had very little conversation together, for we were reading.

How long were you reading?—I cannot tell exactly, I believe it was about an hour.

What book were you reading?—James's Dictionary.

At what time did the prisoner go to bed?—At about nine o'clock.

Did you see him that night after he went to bed?—No, I did not see him till the next morning; but I was up at about one o'clock in the morning, and heard him.

How came you up at that hour?—I had a lax, and was going to the necessary-house, and as I was passing through the hall, the prisoner called to me, and asked me what o'clock it was? and I told him it was about one.

You say you saw the prisoner the next morning: was he on foot, or on horseback, when you saw him?—He was on horseback, riding up to the house.

Whose horse was he on?—On my horse.

Had he any negro with him?—Yes, he had my boy.

What is the boy's name?—Pope.

Pray, at what time do you generally rise in the morning?—Between seven and eight generally.

At what time does the prisoner usually rise?—He commonly rises later than that.

Mr. J. Losack. Did you miss any of your horses that morning, before the prisoner came to your house?—Webb. No, Sir.

How many horses do you keep?—I keep four, Sir.

When you get up in a morning, do you not usually go to your stable to see to your horses?—No, I very seldom do.

Did not you visit your stable that morning, on the 19th of November?—No, Sir.

Mr. President. Pray, when the prisoner came to your house that morning, had he any pistols?—Webb. No, he had none.

Was his coat wet?—I cannot tell.

Were any of his clothes wet?—I do not know, I did not take notice that they were.

Mr. J. Losack. Had you any conversation with the prisoner when he came into your house?—Webb. Yes.

What was it?—He asked me, whether I had breakfasted? I said, I believed not.

Why, could not you tell whether you had breakfasted or not?—I meant, that I believed breakfast was not over; for I seldom do breakfast myself.

Did you not ask the prisoner where he had been?—No.

Mr. Horne. Did you not ask him why he took your horse and boy without your leave?—Webb. No, for he was always welcome to my horse and boy too; he had my leave to take them, whenever he wanted them; and he had frequently taken them without first acquainting me of it.

Where did you imagine the prisoner had been?—I had no suspicion of where he had been; I thought he had been venching.

Did the prisoner say nothing to you about one Peter Rowland, a Christian slave?—No.

Did he never tell you he had bespoke a canoe of that Peter Rowland?—No.

Did he say nothing to you about a canoe?—Nothing at all.

Did he not tell you he was to give a dollar to each of the oars-men?—No, he did not.

How does the prisoner carry his things generally when he travels?—His boy generally carries them.

What is his boy name?—Nero.

Do you know whether the prisoner has a trunk?—Yes, he has.

What colour is it of?—It is a red trunk.

Where did you see the trunk last?—The last time I saw it was at Mrs. Dacent's.

Does he generally carry his things in that trunk when he travels?—He generally carries them in a red trunk, I cannot tell whether it is the same I saw at Mrs. Dacent's.

Mr. President. When the prisoner came to your house from Mrs. Dacent's on the 16th of November, had he a trunk with him?—Webb. Yes, I believe he had.

Was the prisoner's boy Nero at your house on the 18th of November at night?—No, I did not see him there.

Did you see him on the 19th in the morning?—Yes.

Had he the trunk with him then?—Yes, I saw him with the trunk coming up to the house.

Was it before the prisoner came to your house?—It was about the same time.

Mr. *Horne*. Did you not see the trunk opened; or did you not see the prisoner, or his boy, take any pistols out of it?—*Webbe*. No, I did not see it opened, nor I did not see the prisoner, or his boy, take any pistols out of it.

What clothes had the prisoner on, when he came to your house that morning, on the 19th of November?—He had on a whitish coat and a silver-faced hat.

What waistcoat had he on?—A dark coloured waistcoat, I think.

Did the prisoner shift his clothes as soon as he came in?—Yes.

Where did he shift them?—In one of the rooms of the house, I cannot tell which.

Did you ever see the prisoner fire at a mark with a pistol?—Yes.

Where was it?—At Mrs. *Dasent's*, at Saddle-hill.

On what occasion?—He fired at my request.

What was your reason for desiring him to fire the pistols?—No particular reason, we were talking about Mr. *Dasent's* fighting *Peterson* with those pistols.

What kind of pistols were they the prisoner fired out of?—They were silver-mounted, and had brass barrels.

How often did he fire out of them?—But that once.

I mean, how many times did the prisoner fire out of the pistols that day?—A good many times.

What mark did he fire at?—At a barrel-head.

On what day was it?—The Sunday before the deceased was killed.

Who did the pistols belong to?—They were a pair of James *Dasent's*.

Are these the pistols? (a pair of pistols shewn him.)—I believe they are.

When you were exercising the pistols, had you any conversation with the prisoner about the deceased?—No.

What became of the pistols, when you had done exercising them?—I ordered one of Mrs. *Dasent's* boys to clean them.

Where were the pistols generally kept at Mrs. *Dasent's*?—There was no fixed place for them: sometimes they were kept in the shop, and sometimes in the judge's room on a beam.

When did you hear that Mrs. *Dasent* missed the pistols?—On Monday, the day after I heard the report of the deceased being killed, Mrs. *Dasent* sent to me to desire I would go to her: I went to her accordingly, and she told me she missed a pair of pistols, and had been looking for them, but could not find them. She seemed frightened, and asked me, if I knew where they were? I said, I did not, but I would help her to look for them; and I went into the shop, and searched there, but could not find them; from thence I went with her into the judge's room, and I said, Let us look under the bed; and I sat upon the bed, and took up the base, and found the pistols under the bed.

Why, did you know where they were, that you so readily found them?—No, I did not know where they were.

Were they not in holster caps?—Yes, lying on a box upon the floor: the caps were mouldy.

Do you, or do you not know that the pistols were placed there by the prisoner or his boy?—I did not know they were in that place, nor do I know who put them there.

Did the pistols appear to have been lately made use of?—I cannot tell, I did not examine them.

Were they the same pistols the prisoner fired at the mark with?—I believe they were.

Did the prisoner ever make use of them, after he fired at the mark with them?—Not to my knowledge.

Did he ever borrow any pistols of you?—No, he never did.

Had he any pistols of his own?—He had none that I know of.

Did he not usually ride with pistols?—No.

Do you not know, or have you not great reason to believe, the prisoner had those pistols with him the morning the murder was committed?—I do not know whether he had them or not.

Did not the prisoner's boy carry the pistols to Mrs. *Dasent's*, the morning the murder was committed?—I do not know that he did.

Did not you and the prisoner usually lie in the room where the pistols were found?—We have lain there sometimes.

Did you observe the furniture of the room the day you found the pistols?—No, I did not take notice of it.

Was there a red trunk in it?—Yes, there was a red trunk.

Did it belong to the prisoner?—Yes, I believe it did.

Was it the same that Nero brought to your house the morning before?—Yes, I believe it was.

Did not the prisoner ask you, the night before you heard the deceased was killed, to lend him your horse, or your boy *Pope*?—No.

Nor had you any suspicion of his going out that night?—None at all; nor did I know where he had been till the next morning, that *Pope* told me he had been at *Molton's Bay*.

Did not you miss *Pope* that night?—No, I did not miss him, till I saw him in the morning coming up with the prisoner.

Where did you dine on Sunday the 19th of November? and where did the prisoner dine that day?—The prisoner dined at my uncle *Webbe's* at *Stony-hill*, and I dined at Mr. *Maynard's*.

Did the prisoner stay at your house all that morning, from the time you saw him alight, till he went to your uncle's to dinner?—Yes, he did; and I rode with him to the turning off at Mr. *Ottley's*, where we parted; I went to Mr. *Maynard's*, and he went to my uncle's.

Had you no conversation with the prisoner about the deceased then? Did he not tell you of his having killed the deceased, or having

fought a duel with him that morning?—No, he did not say a word about the matter.

Did not you hear of the murder while you were at Mr. Maynard's?—Yes.

By what means did you hear it?—A negro came to me and told me, that Mr. Barbot had killed Mr. Mills.

Whose negro told you this, and who sent him to tell you? Did not you inquire?—I do not know whose negro it was: I did not inquire, and do not know who sent him.

This is extremely odd, that a negro should come and tell you this news, and you not inquire whom he belonged to, or who sent him! When you heard this, did you tell the news to Mr. Maynard's family?—I do not know whether I did or not, but I believe I did tell it.

Strange, indeed! that upon hearing such news as must have surprized and concerned every other man, you should be so very indifferent about it, as not to recollect positively your telling it to the family!—I believe I told them the news.

How long did you stay at Mr. Maynard's after hearing the news?—Not very long.

Where did you go from thence?—I went to Mr. John Symmonds's.

Whom did you find there?—Mr. Edward Bridgwater.

Did you tell them the news of the murder, when you went there?—No, I did not.

Did you not receive a letter from the prisoner, while you were at Mr. Symmonds's?—Yes, I received a note from him.

What was the purport of it?—It was, as well as I remember, "Dear doctor, I want much to see you; on receipt of this, come immediately to me."

Did not Mr. Symmonds, while you were at his house, receive a letter, giving him an account of the murder?—Yes, he did.

Did he not, upon receiving the news, ask you, if the prisoner did not sleep at your house the night before?—Yes, he did; and I told him that the prisoner had slept at my house the night before.

Did he not ask you, if you had seen the prisoner that morning?—Yes, I believe he did.

What answer did you make him?—I do not recollect the answer.

Did you, or did you not tell him, you had not seen the prisoner that day?—I do not recollect what I told him.

Did not Mr. Symmonds, on hearing the news of the murder, say, he would go and assist the posse in taking the prisoner? and did he not immediately order his horse, and set out for that purpose?—Yes, he did say he would go and assist, and did order his horse, and I believe did go.

Did you make any offer to assist in taking the prisoner, or did you tell Mr. Symmonds where the prisoner was?—No, I did not.

Why did you not offer to give your assistance? Was it not the duty of every honest man to assist in taking up a murderer? What

was your reason for behaving with that indifference, on a matter of such consequence?—It was none of my business. I did not like such troublesome jobs.

It is very strange you should act thus, when a gentleman of Mr. Mills's universal good character had lost his life, nay, when it was reported he had been murdered! Surely you must have had some very particular private reasons for such a behaviour!—I did not care to meddle in such matters; I thought it was nothing to me.

How long did you stay at Mr. Symmonds's, after you received the letter you mention from the prisoner?—I did not stay long; I went immediately to John Herbert's, where I found the prisoner.

Who was with the prisoner?—Nobody but the family, they were drinking tea.

Where was the prisoner taken?—At Mr. John Herbert's.

Were you present when he was taken?—Yes, I was.

How long had you been with the prisoner before he was taken?—Not long.

How long?—I cannot positively say.

Pray, Sir, recollect how long.—When I came in, they were drinking tea; and the prisoner took a turn or two about the house, and then desired to speak with me, and we went into the necessary-house, where he was taken by the officers of justice.

This, Sir, does not answer the question. Pray, Sir, tell the Court and Jury how long (as near as you can recollect) you were with the prisoner at Mr. John Herbert's, before he was taken.—We were in the necessary-house, I believe, about five minutes before he was taken.

Pray, what did the prisoner say to you when he took you aside there?—I do not recollect what he said to me.

What! not recollect what he said to you, when you had been sent for by the prisoner upon a matter of such consequence! You say, you had heard the news of the prisoner's killing the deceased; the prisoner wrote to desire you to come immediately to him: You went, you say, directly to him, and were in private with him, the prisoner, your very particular friend; and, notwithstanding all this, you cannot recollect what passed between you! This is very strange! But pray, Sir, recollect yourself, and tell the conversation.—I cannot recollect positively what passed, for I did not take much notice of it. I believe he said something of the report of his having killed Mr. Mills. He asked me, if I had heard the report of his having murdered Mr. Mills? I told him, Yes, I had heard it; and he said, he should not fly for it, for he knew nothing of it.

Did he, or did he not tell you, he had killed Mr. Mills that morning?—No, he did not.

Did no other conversation pass between you and the prisoner at that time?—No other, that I remember.

Did you not ask him whether he had been off Nevis?—No, I did not.

Did not the prisoner, after he was taken into custody, take you aside in Mr. Herbert's hall, and speak in private with you?—Yes, he did.

What did he say to you at that time?—He desired me to speak to my uncle, George Webbe, to let him have ten pistoles.

Did nothing more pass?—Nothing more.

Mr. J. Losack. Was that all he whispered to you?—Webbe. Yes, Sir, all.

Mr. J. Losack. Was it necessary to convey such a request in a whisper?

Mr. Horne. How long were you aside with the prisoner at that time?—Webbe. About two or three minutes.

Did he give you any papers at that time?—No, he did not.

Did you see the prisoner while he was in gaol at Nevis?—Yes, I saw him once.

What conversation had you with him then?—I desired him to make over Bridgwater's estate to me.

What else?—I do not remember any thing else.

Had you no other conversation at all?—I do not recollect any thing but that.

Do you know whether the prisoner burnt any papers while he was in gaol?—I heard Mr. Burnet the marshal say he did.

Do not you know it of your own knowledge?—No, I only heard Mr. Burnet say so.

Did not you hear from the prisoner what those papers were that he burnt?—No.

Did the prisoner ever give you any paper relative to this murder?—No, he never did.

Where was your Pope on the Saturday night preceding the murder?—At home.

Did you send him out on any errand that night?—No.

Did you send any of your horses out?—No.

You did not positively send either your boy Pope or your horse out at all that night?—No, I did not positively.

Were you sent for that night by any of your patients?—No.

Sol. Gen. Gentlemen of the jury, I beg, for a particular reason, that you would attend to this part of Dr. Webbe's evidence. He says, that the night preceding the murder, he neither sent out his boy Pope, nor any of his horses; and further, that he himself was not sent for by any of his patients.

Mr. Horne. Did you give the prisoner any dram or cordial that night?—Webbe. No.

Did you make any composition for him?—No.

When you got up that night, did you observe what kind of night it was?—Yes, it was a very boisterous night.

Would you have gone out in such a night for pleasure?—No, I should not.

Do you know whether Pope was at Bridgwater's estate that night?—I cannot tell whether he was or no.

Do you think, that from the time you spoke to the prisoner that night, to the time you saw him riding up to your house the next morning,

VOL. XVIII.

he could have been at St. Christopher's and back again?—Yes, I believe he might.

Were you present at Mrs. Dasent's, when the prisoner's trunk was opened?—Yes.

What was in it?—There was a coat and waistcoat, and some linen.

Was not there a night gown?—Not that I saw.

Were the coat and waistcoat wet?—Yes, they were moist.

What part of them was moist?—I cannot tell what particular part, but they were moist.

Are these the same coat and waistcoat that were found in the trunk, and is this the trunk [The prisoner's trunk and clothes shewn him] in which they were found?—I believe they are the same, and I believe that is the trunk.

Are these the same coat and waistcoat the prisoner had on, when he came to your house on Sunday morning, the 19th of November last?—I cannot tell whether they are or not.

Is this the prisoner's trunk?—I do not know.

Did you know that the coat and waistcoat were in the trunk at your house?—No, I knew nothing of the matter.

Mr. Horne. May it please your honours, we have done with this witness.

Mr. President. Mr. Barbot, the king's counsel have done with this witness, would you ask him any questions?—Prisoner. No, Sir.

Sol. Gen. Then call Hugh O'Donnell. (Who appeared, and was sworn.)—Mr. O'Donnell, Do you keep a tavern at Nevis?—O'Donnell. Yes, Sir.

Do you remember to have heard the report of the deceased being killed?—Yes, I heard it on Sunday the 19th of November last.

Do you remember to have seen the prisoner the night before you heard the report?—The night before I heard the report, between 7 and 8 o'clock, Dr. Webbe, and Mr. Barbot the prisoner at the bar, rode up to my house. I called to the prisoner, and gave him a letter that had been left at my house for him. As soon as I gave him the letter, he attempted to read it by the light of the moon; but finding, I suppose, that he could not, he alit off his horse, and came into the house; Dr. Webbe followed him in, and the prisoner, as soon as he came in, asked for pen, ink, and paper, which were brought him, and he sat down to write, and continued writing for a considerable time.

Was Dr. Webbe in the room with the prisoner while he was writing?—Yes, the prisoner called to him several times, and he went to him.

Did the prisoner speak to him while he was writing?—Yes; but I did not hear what he said, for they spoke in a kind of whisper.

When the prisoner called Dr. Webbe to him, did Dr. Webbe look over him?—Yes, he did look over him.

What did the prisoner do with the paper he was writing, when he had finished it?—As soon as it was finished he sealed it, and the prisoner and Dr. Webbe went into another

4 M

room; and after some little time, Dr. Webbe came out, and desired Dr. Potts, Mr. Springett, and myself, to go in and witness a paper: We went into the room, where the prisoner was, and we did see him write his name to the seal.

Did you see him acknowledge it?—Yes, he put his thumb on the seal, and spoke some words, but they were hurried over so inarticulately, that I did not understand them.

Tell in what manner he did it?—When he took his thumb off the seal, he said, ‘seal and deliver this,’ and then mumbled over some words (as I said before) so very inarticulately, that I did not understand them.

Mr. Just. *Greatheed*. Was there any thing written just over the place where you signed?—*O’Donnell*. I believe there was, but he covered that with his hand.

Sol. Gen. Pray, what did you take that paper to be?—I took it to be a will.

Why did you think it was a will?—Because there were three witnesses to it.

Who witnessed the paper besides yourself?—*Dr. Potts* and *Mr. Springett* were the other witnesses.

What did the prisoner do with the paper, after it was signed and witnessed?—He folded it up, and gave it to *Dr. Webbe*.

Did you hear him say any thing, when he delivered it to *Dr. Webbe*?—He did say something, but I could not hear distinctly what it was, for he spoke in a low voice.

Did you hear him pronounce the words, ‘publish’ or ‘declare’?—I did not hear any one word distinctly that he said.

Had you reason to think, from his manner of pronouncing the words, that he intended to conceal them?—No, I did not apprehend that he did.

In what manner did he speak the words?—He seemed to speak them indifferently.

Was the paper sealed, or only folded up, when he delivered it to *Dr. Webbe*?—It was folded up, but not sealed.

Is it usual to make wills, or draw instruments of writing, at your tavern?—No, Sir, I do not remember any such thing being done at my house before.

Mr. *President*. Would you ask this witness any questions, Mr. *Barbot*?—*Prisoner*. No, Sir.

Sol. Gen. Then call *Charles Potts*. (Who was sworn.) Do you remember on what day it was you heard that the deceased was murdered?—*Potts*. Yes, I remember it was on Sunday the 19th of November last.

Were you at Mr. *O’Donnell’s* tavern the night before you heard the deceased was killed?—Yes, I was.

Do you remember what passed with regard to your witnessing any paper for the prisoner?—I was sitting in the tavern in the evening, and somebody called me, and told me I was wanted in the inner room.

Who called you?—I cannot tell who it was, but somebody called me, and told me, I was wanted in the inner room; and I went in, and the prisoner desired me to sign, as a witness,

to an instrument of writing; and accordingly the prisoner signed his name to it: Mr. *O’Donnell* signed first as a witness to it, I signed next, and Mr. *Springett* last.

Did not the prisoner acknowledge that instrument of writing, when he had signed his name to it?—Yes, he put his thumb on the seal, and took it off again.

What did he say when he acknowledged it?—I do not recollect what he said.

What did you apprehend that instrument of writing to be?—I thought it was some deed to secure *Jacob Saunders*.

Why did you think so?—Because I met the prisoner and *Dr. Webbe* coming from Mr. *Saunders’s* that day.

Is that all the reason?—That is all, Sir.

Did you read the paper before you signed it?—No, I did not read it.

Nor any part of it?—No, Sir.

Then how are you sure it was not a note of hand that you signed?—I am sure it was not a note of hand, for it was too long.

What was too long, the attestation? Did you not sign just under the attestation?—I did not observe the attestation: I had no suspicion of its being a note of hand: I thought it was a deed to secure Mr. *Saunders’s* debt.

Did not the prisoner cover the attestation with his hand?—He did not when I signed.

Did you not hear the prisoner say, he published that paper as his will?—No, I did not.

Did you come to the tavern by accident, or did any one desire you to be there at that time?—I came there by accident; I had been round the island, and called at Mr. *O’Donnell’s* to refresh myself with a mug of beer.

Where did you go after you signed as a witness to the paper?—I went with Mr. *James Brodbelt* to his plantation, and from thence I went to *Dr. Webbe’s*: It was about ten o’clock when I got there, and I went to bed in about an hour after.

Did you see the prisoner that night at *Dr. Webbe’s*?—No, I did not see him from the time I left Mr. *O’Donnell’s*, till about nine o’clock next morning, I saw him come into the yard on horse-back, upon *Dr. Webbe’s* horse, *Kent*.

Did you ever hear of any resentment the prisoner had against the deceased?—None in the world; on the contrary, I have always heard him express great respect for the deceased.

Prisoner. Mr. *Potts*, you saw me some days before this accident happened, did you ever hear me express any resentment against Mr. *Mills*?—*Potts*. Never; I never did indeed.

Have you not often heard me speak of him in the most respectful terms, and such as shewed I had a great esteem for him?—I have indeed very often; and I never heard you say any thing of him that looked like malice or resentment.

Thomas Hobson sworn.

Sol. Gen. Do you remember hearing the report of the deceased being killed?—*Hobson*. Yes, Sir.

Do you remember when it was that you heard it?—It was on Sunday the 19th of November last.

Where do you live?—I live on Bridgwater's estate at Nevis.

Pray inform the court and the jury of what you know concerning a horse and boy coming to your house, the night before you heard the deceased was killed.—On Saturday night, the night before I heard the deceased was killed, Dr. Webbe's boy Pope came to the house where I live with Dr. Webbe's horse, and knocked at the door, and called me: It was about midnight. I got up and opened the door, and saw it was Pope. He was wet. I asked him, where he had been; he told me, he had been round the island looking for his master.

Was the horse wet?—Yes, the horse was wet.

Did the horse and boy stay at your house all night?—Yes, Sir, he put the horse in the stable, and stayed there all night; and about eight o'clock next morning, I saw a little man, in a whitish coat, and a silver-laced hat, coming up: As soon as he came up to the steps, he asked for Pope. Pope went to him, and he bade him saddle the horse.

Did not he ask first, if there was a horse there?—No, the minute he came to the steps, he called for Pope, and bade him saddle the horse.

Did he seem to expect a horse there?—Yes, I believe he did, for he bade Pope saddle the horse, without asking whether there was any horse there.

Pray, look at the prisoner. Was the person you saw that morning, that bade Pope saddle the horse, like the prisoner?—Yes, it was that very man.

You are sure it was the prisoner?—Yes, I am sure it was him.

After he ordered Pope to saddle the horse, what did he do then?—As soon as the horse was saddled, he asked Pope which road he should take; and Pope shewed him the highest way to Pinney's, where Dr. Webbe lives, and he got on horseback, and rode away.

Did the prisoner come up from the Bay the morning you saw him?—I believe he did; he came from that way.

Did you take notice whether his clothes were wet?—I observed his shoes were wet. I cannot tell if the rest of his clothes were wet or not.

How high up was he wet?—Only his shoes, that I saw.

Had he any boy with him with a trunk?—No, I saw no boy with him, nor no trunk.

Sol. Gen. We have done with this witness.

Mr. President. Would you ask this witness any questions, *Mr. Barbot*?

Prisoner. No, Sir.

Sarah Hobson sworn.

Sol. Gen. Where do you live?—*S. Hobson.* I live on Bridgwater's estate at Nevis.

Do you remember hearing the report of the deceased being killed?—Yes.

And when it was?—Yes, it was on Sunday the 19th of November last?

Well, give the Court and the Jury an account of what you know of a horse and boy coming to your house, the night before you heard of the report of the murder.—The night before I heard the report of the murder, I heard a knocking at the door about midnight, and I called to my brother, and asked him what it was. He told me, he believed it was the negroes cutting wood in the garden; but I knew it could not be that, for the garden was too far off to have heard, if it had been so. My brother immediately got up and opened the door, and found it was Dr. Webbe's Pope with his horse. My brother asked him, where he had been? He said, he had been round the island looking for his master. I did not see Pope, but I heard this as I was in the chamber; and about eight o'clock the next morning, as I was standing at the door, I saw a little gentleman coming up to the house. As soon as I saw him, I went into the chamber, and looked through the window at him; and as soon as he came up to the steps, he called for Pope. Pope went to him, and he ordered him to saddle the horse.

Sol. Gen. Gentlemen of the jury, you observe both these evidences say the boy Pope declared, when he came to Bridgwater's, that he was looking for his master; and yet, as I desired you to take notice in the course of Dr. Webbe's evidence, the doctor himself declared, he neither sent out this boy, nor any of his horses, that night. What! did he bid Pope saddle the horse, before he knew whether there was a horse there or no?—*S. Hobson.* Yes, the moment he came to the steps, he called for Pope and bade him saddle the horse.

Did he speak as if he expected to find a horse there?—I believe he did, by bidding Pope saddle the horse the minute he came to the steps.

Pray how was he dressed?—He had on a whitish coat, a silver-laced hat, and a pig-tail wig.

Look at the prisoner. Pray, was the person, you saw that morning, like him?—Yes, that is the very man.

You are sure it was the prisoner?—Yes, I am sure it was him.

What did he do, after he had ordered Pope to saddle the horse?—As soon as the horse was saddled, he asked Pope which road he should take, and Pope shewed him the highest way to Pinney's, where Dr. Webbe lives, and he got on horseback, and rode away.

Do you know where the prisoner came from, when he came up to your house?—I believe he came from the Bay, for he came from that way.

Were his clothes wet?—I did not take notice that his clothes were wet, but his shoes were.

How high up was he wet?—I only observed that his shoes were wet.

Had he any boy with him with a trunk?—No, he had nobody at all with him, that I saw, nor no trunk.

Sol. Gen. We have done with this evidence.

John M'Kenley sworn.

Sol. Gen. Mr. M'Kenley, where do you live?—*M'Kenley.* I live upon Mr. Spooner's estate at Frigate-Bay.

Pray inform the Court and the Jury of what you know concerning the death of the deceased.—On Sunday morning the 19th of November last, I got up at about four o'clock, and went out to give some orders in the plantation, and returned in about a quarter of an hour. As soon as I came in, I lay down upon my bed; and presently after a negro-boy rushed into my chamber, and threw himself upon the bed where I was lying, and cried out, "O Lord, master, make haste and come down, for my master is fighting with sword and pistols, with a gentleman that is come from Nevis." I immediately got up, and asked him, who was his master? He answered me, Mr. Matthew Mills. I then looked hard at the boy, and knew him to be Coomy, that always ran with the deceased. The boy immediately got upon his master's horse, (for he had rode up) and galloped down as fast as he could, and I followed him on foot, for I thought I should get down to the Bay sooner, than if I staid to have my horse saddled. When I came down to the place just by the starting-post, I found Coomy supporting the deceased between his legs, and the deceased's head leaning on Coomy's breast. I ran immediately up to him, and asked him who had bled him so, but he made me no answer: I took hold of his hand at the same time, and he had no pulse. I found then that he was stone-dead, but still warm, and was but just expired. I then asked Coomy, who it was that had killed his master; he told me it was Mr. Barbot, and that if I would go down to the Bay, I might see him, for that he was just gone off in a canoe.

Prisoner. Gentlemen of the jury, you will please to observe, that what Mr. M'Kenley tells you of Coomy's declaration, is no evidence at all. Coomy himself cannot be an evidence at any rate, much less can what he only told another be evidence.

Mr. Frye. Gentlemen, this is but hearsay evidence, which I appeal to the bench is no evidence in any case, much less where a man's life is concerned.

M'Kenley. I immediately ran down to the sea-side, and saw a canoe with four oars and a paddle, making very fast from the shore.

Sol. Gen. At what distance was the canoe from the shore, when you first saw it?—

M'Kenley. It was about fifty yards off.

Could you distinguish the persons in the canoe?—No, I could not distinguish who they were. I saw somebody in white sitting in the stern of the canoe, but I could not tell who it was. I was in so much confusion, that I did not take as much notice as I might have done.

What clothes had the deceased on?—He had on his great coat and his gloves.

What kind of gloves?—I really cannot tell what kind of gloves; they were of a brownish colour.

Were they buff gloves?—No, I think they were not buff; but I cannot positively say what kind of gloves they were.

What situation were the deceased's pistols in?—His pistols were in the holsters on his horse.

Did you examine his pistols?—No, I did not.

Was his sword drawn?—No, his sword was lying on the ground at some distance from him in the scabbard, and the belt wrapt round the hilt.

Mr. J. Losack. What time do you think it would take to go in a canoe from Frigate-Bay to the Salt Ponds?—*M'Kenley.* I cannot tell; but the canoe was rowing very hard from the shore.

Sol. Gen. How long do you think it would take? You may guess pretty near the time.—*M'Kenley.* I believe it might take about half an hour.

Prisoner. Was the person you saw in white, sitting in the stern of the canoe, a white man or a negro?—*M'Kenley.* I cannot tell whether it was a white man or a negro.

Sol. Gen. Call William Johnson. (Who appeared.)

Prisoner. May it please your honour, I humbly beg leave to oppose Johnson's being sworn.

Mr. President. Let us hear your objections to him.

Prisoner. He is an infamous person.

Mr. Frye. He is so, for I saw him publicly whipt at Montserrat for petty larceny.

Sol. Gen. May it please your honour, if the prisoner would invalidate the evidence of Johnson, on the score of what Mr. Frye alleges, it is necessary that he produce the record of his conviction. Let him produce the record.

Mr. Frye. I knew nothing of this man's being produced as a witness till the day before yesterday; otherwise I could have had the record, or an attested copy of it now. But I humbly apprehend I may be admitted to produce witnesses to prove that he was publicly whipt for petty larceny, for stealing a pair of silver shoe-buckles. He is rendered an infamous man, and ought not to be admitted as a witness.

Sol. Gen. I am surprized to hear a gentleman of Mr. Frye's standing and experience in the law, offer a thing of this kind, when he must know, that nothing but the record of this man's conviction, or an attested copy of it, can disable him to be a witness. It is absolutely illegal, Sir, to offer to prove the fact Mr. Frye speaks of by witnesses, who, he says, saw Johnson punished; or by any other method, than that which I have mentioned.

Mr. Frye. Surely we shall be allowed to examine witnesses to the character of this man.

Sol. Gen. Yes, to his general character you may be allowed to give evidence, but not to any particular part of it; and that only to discredit his evidence, after he has given it: but no evidence of that sort can disable him from being a witness at all.

Mr. Frye. I did see him publicly whipt, and I know him to be an infamous person, and would not regard his oath of a farthing.

Mr. Horne. May it please your honours, I humbly beg that Mr. Frye be not allowed to speak in this manner of the witness. If he had intended to object to this man, he ought to have done it legally; he knew the method the law had prescribed, and ought to have pursued it; and I hope your honours will not allow him to discredit the witness, by throwing out things he cannot legally support. It is done with a design to influence the jury. If Mr. Frye can produce any evidence to his general character, he has been told he may do so; but that in its proper place, and not to prevent his giving his evidence, or before he has given it.

Mr. Frye. I will produce witnesses to his character; but it is strange I sha'n't be allowed to prove that fact by *viva voce* witnesses!

Mr. Horne. You are not to be allowed that, Mr. Frye; you know it is illegal; and I am surprized a gentleman of your knowledge in the law, should insist on a thing of this kind.

Mr. Frye. Go on then, Sir, I will by-and-bye produce witnesses to this man's character.

Mr. President. Swear Johnson. (Which was done.)

Sol. Gen. Did you come to this island at any time in or about the month of November last?—Johnson. Yes, on Sunday the 19th of November.

Sol. Gen. Pray inform the Court and the Jury, whether you saw the prisoner at the bar on Sunday the 19th of November last, and where it was you saw him?—Johnson. I left Montserrat on Saturday the 18th of November last, and came to an anchor at the Salt-Ponds at about two o'clock the next morning, and at about four I put out of the Salt-Ponds; and in about two hours after, a canoe with four oars and a sail passed by me. The prisoner was in the canoe, he had on a white coat and a laced hat, and a dark-coloured waistcoat.

Do you know the prisoner?—Yes, I have seen him several times at Nevis, and once at Montserrat.

Could you see, from the place where you were when you met the canoe, all the way between Frigate-Bay and Nevis?—Yes.

And was there any other canoe in the channel?—No, there was none but that which the prisoner was in.

At what distance was the canoe from you, when it passed by?—It was about 40 or 50 yards off.

Where did you think it came from?—It seemed coming from Frigate-Bay, and was standing for Nevis.

Are you sure the prisoner at the bar was the person you saw in the canoe?—Yes, I am sure he was the person.

Mr. Frye. It is very odd you should now be so positive it was the prisoner, when you could not positively swear to him the very day of the murder, when you were examined before the coroner's inquest. We shall produce a witness by-and-bye to prove that you were not then so positive.

Sol. Gen. Since this has been thrown out, I beg leave to ask the witness another question. Pray, did you see the prisoner at any time between your examination before the coroner, and this day?—Johnson. Yes, I saw him in gaol; and when I saw him there, I was satisfied he was the man that I had seen in the canoe the morning I was coming from the Salt-Ponds.

Sol. Gen. However, to make this matter still plainer, we shall call a gentleman of character, who will inform the Court and Jury, that this witness declared his seeing the prisoner at the time and place he has now sworn he did, before he had received any intimation, or had it at all suggested to him, that the prisoner was then there. Call Thomas Wilson, esq.

Thomas Wilson, esq. sworn.

Sol. Gen. Mr. Wilson, will you please to give the Court and the Jury an account of your seeing Johnson on the 19th of November last, and what passed between you?—Wilson. On Sunday the 19th of November last, in the morning, on hearing that the deceased was killed, I went down to Mr. Colhoun's, to enquire further of the matter. I staid there about half an hour, and at my return home I found this witness, Johnson, waiting for me with a letter, which he had just brought from Mr. Misset of Montserrat. He told me, that Mr. Misset had hired him on purpose to bring me that letter, and that if I did not dispatch him by twelve o'clock, Mr. Misset was to pay him so much an hour after that time. I then said to him, There has been murder committed here. He asked me, What murder? I told him, that a gentleman of this island, one Mr. Mills, was killed, and it was supposed by Mr. Barbot. Barbot! said he, why I met him going in a canoe to Nevis this morning. Do you know him then? said I. Yes, said he, I have known him above eighteen months. I thought this so material a circumstance, that I immediately acquainted Mr. Colhoun of it.

Sol. Gen. The Court and Jury will take especial notice of Mr. Wilson's evidence, because it will stand for an answer to the objection that will be made to Johnson's evidence, from what they insinuate of the badness of his character; which in this case must be wholly out of the question, seeing the first information he gave was before there is the least probability he could have had it suggested to him.

Jasper Thomas sworn.

Sol. Gen. Pray inform the Court and the

Jury, whether you saw the prisoner on the 19th of November last, and where you saw him.—*Thomas*. On Sunday morning, the 19th of November last, I saw a canoe land under the manichional trees, just under Lowland-Church: it was Mr. Cribbe's canoe: Mr. Hulburt's Peter and Mr. Deverade's Joe were in it, and the prisoner jumped out of the canoe the instant it struck the shore. He had on a silver-laced hat, and a whitish coat.

What time in the morning was it that he landed?—It was between six and seven in the morning.

Did any body come out of the canoe with the prisoner?—There was a little yellow negro boy, with a little red trunk on his head, that jumped out of the canoe at the same time that the prisoner did, and went towards the town.

Did you see the canoe at any distance before it landed?—I saw it above fifteen hundred yards off before it landed. It was under sail, and they did not strike sail till the canoe struck the ground.

Where did you think the canoe came from?—It seemed to me to be coming from the Salt-Ponds.

Are you sure it was the prisoner at the bar you saw land out of the canoe?—Yes, I am sure it was him, for I know him very well.

Do you know where he went to when he landed?—No, I cannot tell where he went to.

John Thomas sworn.

Sol. Gen. Do you remember when it was you heard the deceased was killed?—*Thomas*. Yes, it was on Sunday the 19th of November last that I heard it.

Did you see the prisoner at the bar that day?—Yes.

Then give the Court and the Jury an account where, and at what time, you saw him.—It was on Sunday morning, the 19th of November last, the day that I heard the deceased was killed. I was with my father Jasper Thomas, and I saw a canoe at a distance under sail, that seemed to be coming from St. Kitt's; and I said to my father, I believed there were some St. Kitt's people coming up; and soon after the canoe came ashore, and Mr. Hulburt's Peter and Mr. Deverade's Joe were in it; and I saw a little man, very like the prisoner, jump out of the canoe, and run up the bank. He had on a silver-laced hat and a long-tail wig, a whitish coat, and a brownish waistcoat.

Was it the prisoner at the bar that you saw?—I do believe it was him, for the person I saw was very like him.

Did any body land out of the canoe besides the prisoner?—There was a little yellowish negro boy, with a small red trunk on his head, that jumped out of the canoe at the same time the prisoner did, and went towards town.

What time in the morning was it that the prisoner landed out of the canoe?—It was between six and seven in the morning.

Did you observe which way he went after

he landed?—No, I did not take notice which way he went.

William White sworn.

Sol. Gen. Do you know the prisoner at the bar?—*White*. Yes, I know him very well.

Do you live at Nevis?—No, but I have been working there for above a twelvemonth.

When was it you first heard the report of the deceased being killed?—I heard it on Sunday the 19th of November last.

Did you see the prisoner that day?—Yes, I was at work at Mr. Woodley's estate at Nevis that very morning, and I looked towards the common road, and saw a little man that I took for the prisoner. He was walking up the road that leads to Bridgewater's estate.

Pray, does that road lead to any other estate or house besides Bridgewater's?—Yes, it leads to Mr. Huggins's.

Did you see where the prisoner came from?—No, but I believe he came from the Bay.

How was he dressed?—He had on a laced hat, and a brown coat.

A brown coat? You must be mistaken surely?—No, I am not; it was a brown coat.

Do you see any coat here in court that is like it? Look about, and see if you can't find some coat that resembles it in colour?—It was like this coat, I think (showing a brown coat).

Sol. G. He may be mistaken in the colour of the coat. If he swears to the identity of the person, it is sufficient. Once more let me ask you on your oath, are you sure it was the prisoner at the bar that you saw?—Yes, I am sure it was him.

Mr. Edward Bridgewater sworn.

Sol. Gen. Mr. Bridgewater, pray inform the Court and the Jury, whether you saw the prisoner on the 19th of November last, and where you saw him.—*Bridgewater*. On the 19th of November last, between nine and ten in the morning, I saw the prisoner riding over Gruff's Gutt, the nearest way to Dr. Webbe's. He met Jacob Saunders, and they stopt and spoke together, and that gave me an opportunity of coming pretty near him, and I took notice that the prisoner was on a horse of Dr. Webbe's; it was a sorrel horse, with a white face. In the afternoon of the same day I went to Mr. John Symmonds's; while I was there, Dr. Webbe came in, and presently after Mr. Symmonds received a letter, that gave an account of the prisoner's having killed the deceased. As soon as Mr. Symmonds mentioned it, Dr. Webbe said, that the prisoner had lain at his house the night before.

Did you perceive any alteration in Dr. Webbe, on Mr. Symmonds's mentioning what had happened?—Yes, he changed countenance, and seemed, I thought, a good deal confused; and Mr. Symmonds asked him, if he had seen the prisoner that morning? Dr. Webbe answered, That he had not seen the prisoner since he went to bed the night before at his house; at which I expressed a good

deal of surprize, and said, that I had seen him that morning riding towards Dr. Webbe's house on a horse which I was sure belonged to Dr. Webbe.

Did Dr. Webbe make you any answer to this?—I do not remember that he did; but in about five or six minutes after he went away, and said he was going up towards the mountain.

John Cribbe sworn.

Sol. Gen. Pray inform the Court and the Jury, whether the prisoner hired a canoe of you, and when it was.—*Cribbe.* It was the Friday before I heard the deceased was killed. The prisoner hired my canoe to carry some letters to St. Kitt's, and the canoe returned the next day in the afternoon.

Did the prisoner hire the canoe again of you the day she returned?—No, the day she returned, the negroes that belong to her took her to go a fishing, as I understood; and I did not see them again till about eight o'clock on Sunday morning, which was the day I heard the deceased was killed. I went to Peter, and asked him, What luck? for I imagined they had been fishing: He answered me, Poor luck! and looked very thoughtful and melancholy, and said, he was troubled. I asked him, what was the matter? He told me, he had been at St. Kitt's with Mr. Barbot, who, he was afraid, had done a great deal of mischief, for he believed he had killed Mr. Mills.

Prisoner. Gentlemen of the jury, pray don't be influenced by this part of the evidence. This is the same with what M^r Kenley swore of Coomy's declaration; but neither one or other of them, as being only hearsay evidence, and that of slaves too, ought to affect me.

Mr. Frye. Nay, indeed, the evidence ought not to have been given: Surely, no hearsay can be evidence. Nothing is more indisputable than that.

Sol. Gen. In this case it is very material evidence; but of that by and bye: We won't interrupt the course of evidence; but observe upon it in a more proper place. At what o'clock in the morning was it that you had this discourse with Peter?—*Cribbe.* It was about ten o'clock.

Had you then heard it reported that the deceased was killed?—No, I had not heard it, 'till Peter told me of it.

He was the first person you heard it from?—Yes, he was the first that told me of it.

Sol. Gen. We will bring a witness to prove Peter could not have heard the report of the murder at the time this witness says he told him of it; for we shall shew that the person who carried the first news of the murder to Nevis did not arrive there, 'till at least an hour after Cribbe had the conversation he has related with Peter.

Thomas Quin sworn.

Sol. Gen. Mr. Quin, at what o'clock did you arrive at Nevis, the day you were sent up in pursuit of the prisoner at the bar?—*Quin.* It was about eleven o'clock, Sir.

When you arrived at Nevis, did you report publicly that the deceased was killed?—No, I did not say a word of it to any body but the gentleman I carried the letters to from Mr. Colbourn.

Was it known at Nevis, before you arrived there, that the deceased was killed?—No, I am sure it was not, or I should have heard of it. I am sure I was the first that carried the news of it, for I did not stop or stay any where but went off the minute Mr. Colbourn gave me the letters, and made the best of my way up.

Mrs. Frances Dasent sworn.

Sol. Gen. Madam, will you please to give the Court and the Jury an account of what you know concerning the prisoner's taking away a case of pistols from your house?—

Dasent. Upon hearing that the Magazine was broke open upon Sunday night, the 19th of November last, I ordered all the arms in the house to be searched for, to see that there were none missing; and upon missing a pair of pistols, I ordered the boy to look on the beam for them, where I had directed him to put them. He looked, and could find but one pair: I then grew very uneasy, and sent to desire Dr. Webbe to come over to me. He did so the next morning, and I told him I was very uneasy; that I missed a pair of pistols, and asked him, if he knew where they were? He told me, that he knew nothing of them. I begged of him then to help me to search for them. Accordingly he went into the shop with me, and searched there, but could not find them. From thence we went into the chamber, and the doctor looked under the bed and found the pistols.

Mr. Horne. What was it that induced you to look for the pistols?—*Dasent.* Hearing the Magazine was broke open, and the accident that had happened to Mr. Mills together, made me think of looking for them. I was very uneasy about it, for I had heard that the prisoner and Dr. Webbe took down the pistols in my absence, while I was at my mother's, to fire out of.

Did you see a red trunk belonging to the prisoner, in the room where the pistols were found?—Yes, there was a small red trunk that belonged to the prisoner.

Did you ever desire the prisoner to leave your house?—Yes; the Thursday before this accident happened, I desired him to come to my house no more, for some prudential reasons I had,

Did this put an end to his visits?—Yes, he came to my house no more; but he sent to borrow a horse of me the day before the murder, which I refused to lend him; nor I knew nothing of his trunk being at my house 'till the Monday after the accident, that Judge Herbert came to my house, and demanded the trunk, and it was opened before him.

Were you present when the trunk was opened?—Yes, Sir.

What was in it, pray?—I saw nothing in it.

but a brown waistcoat, and a pair of black breeches.

Did they belong to the prisoner?—Yes, I believe they did.

Is this the prisoner's trunk, and are these the clothes [the prisoner's trunk and clothes shewn her] you saw taken out of that trunk?—Yes, I believe they are.

Joseph Herbert, esq. sworn.

Herbert. On hearing the deceased was killed by the prisoner with a pair of James Dasant's pistols, I went, the day after the murder, to Mrs. Dasant's, to inquire for them. When I came there, I saw a small red trunk, which being opened, I found a pair of black breeches and a brown waistcoat in it, which were wet. I touched the waistcoat with my tongue, and found it salt, from which I concluded it must have been wet with salt-water. These pistols [pistols shewn him.] which Mrs. Dasant had missed, were shewn to me at the same time; and I was informed by some of the negroes, that they believed the prisoner's boy had brought the pistols to Mrs. Dasant's privately in his clothes.

Sol. Gen. Is this the trunk, and are these the clothes, you saw at Mrs. Dasant's [the trunk and clothes shewn him] the day after the murder?—*Herbert.* Yes, they are.

Dr. Hamilton and Mr. Edwards sworn.

Mr. Horne. Dr. Hamilton, you were sent for, I think, to inspect the body of the deceased?—*Dr. Hamilton.* Yes, Sir, I was sent for on Sunday the 19th of last November by the coroner, to view the body of the deceased. When I came to Mr. Colhoun's, where the body lay, I found that the deceased had received a wound on the right side, which must have been given him by a ball out of some fire-arm.

Whereabout on the right side?—I cannot describe it better than thus; by drawing a straight line directly from the pap four inches downwards, and then carrying it four inches towards the back. In that place was the wound.

Sir, will you please to put your finger on the place, as near, as you can guess, where the wound was received?—It was just here [placing his finger on his own side].

Now, go on, Sir, if you please.—I then, with the assistance of my son, Mr. Edwards, opened the body, and found that the ball had entered between the two last false ribs, and splintered one of them, and had penetrated the body obliquely from the right to the left side, and had wounded the fore part of the liver on the left side. I found too, that in passing it had wounded a large blood-vessel.

Do you think the deceased could have received that wound if he had been standing in a posture of defence?—No, I think he could not; for the situation of the wound was such, that had he been in a posture of defence, he could not have received it in that place: And from

the course the ball took (which was towards the fore part of the left side of the body) it is evident, I think, that the deceased could not have been in a posture of defence.

Do you think that that wound was the cause of his death?—Yes, I am certain it was.

Did you find the ball?—No, I searched for it, but could not find it. I believe it had fallen into the abdomen, which was so full of blood, that there was no possibility of finding the ball, unless we had taken out all the bowels; and it was so late, that the jury, satisfied on my report that the wound must have been given by a ball discharged from some fire-arm, and that it was the cause of the deceased's death, did not think it necessary to look any farther for the ball.

Mr. Horne. Mr. Edwards, you assisted Dr. Hamilton in opening the body of the deceased; can you give the Court any further information of the nature of the wound than what the doctor has already related?—*Edwards.* No, Sir, I can say no more than what Dr. Hamilton has already related.

Mr. Walter Pringle and Mr. Samuel Baker sworn.

Sol. Gen. Mr. Pringle, Pray give the Court and the Jury an account of the situation you found the deceased's pistols in the morning he was killed.

Pringle. On Sunday morning, the 19th of November last, I heard the deceased was killed at Frigate-Bay, and that his body was brought to Mr. Colhoun's, where I went to see it. As soon as I came into the room, I asked for the deceased's pistols, and somebody (I really do not recollect who it was) brought them to me. They were a small pair of screw-barrel pistols, with a brown wooden flat handle [the pistols shewn him.] These are the pistols. I unscrewed one of them, and found a ball sticking in the barrel. I looked into the chamber, and could find no powder in it. I smelt it, and it did not appear to me by the smell that it had been lately fired out of. Then I examined the screws and the cock very carefully, and could not perceive that any part of them were the least tinged with powder. I then unscrewed the other pistol, and examined it in the same manner I had done the first; but I found no ball in it, nor any the least sign of powder either in it or about it, except about two grains, which I imagine had been bruised by the hammer; but I think, if the pistols had been fired out of lately, there would have been a stain of burnt powder left about the cock, which always remains after any fire-arm is discharged; and there was no such stain on either of these pistols. After I had done with the pistols, I examined the deceased's clothes, and found upon the right flap of his coat a stain of dry powder, and the same upon the inside of his great coat, on the right side.

Baker. I was at Mr. Colhoun's on Sunday the 19th of November last, the morning that the deceased was killed, and upon enquiring for

the deceased's pistols, they were brought to me. These are the pistols: they were half-cocked. I unscrewed one of them, and examined it very carefully, and there was neither powder nor ball in it, nor any where about it, except about two grains of powder, which seemed to have been bruised by the hammer. I unscrewed the other, and examined it in the same manner, and found a ball sticking in the barrel, but no powder at all either in the chamber, or any where else about it, and there was not the least stain of burnt powder either about the cock, or any where else; for I put my little finger into the barrel, and there came off upon my finger a yellowish rusty dirt; whereas if the pistols had been fired out of, there would have remained in the barrel a black moisture, which would have come off on my finger: from all which circumstances I am convinced the pistols had not been fired out of. After I had done with the pistols, I examined the deceased's clothes; and the right flap of his coat, and the inside of his great coat, were stained with dry powder, as Mr. Pringle has related.

Mr. Horne. I desire Judge Herbert may be called again.

Judge Herbert was called, and appeared.

Mr. Horne. Will you please, Sir, to give the Court and the Jury an account of what you found in the pockets of the deceased?—Herbert. The morning that the body of the deceased was brought to Mr. Colbourn's, I was there; and a little while after the body was laid down, I searched the deceased's pockets, and found in his breeches pockets three bullets.

Sol. Gen. May it please your honours, we shall call no more witnesses, unless the prisoner makes it necessary by his defence; but shall rest the Charge here.

Mr. President. Mr. Barbot, now is the time to make your Defence. The king's counsel will call no more witnesses till they hear what you have to say.

Prisoner. May it please your honours, and you gentlemen of the jury; now that the counsel for the crown have gone through their evidence, such as it is, and finished their Charge, I am to beg your serious attention, while I speak to you in my Defence.

To you, gentlemen of the jury, I shall chiefly address myself. You, gentlemen, are my principal judges on this unhappy occasion; judges, which the wisdom of our ancestors has provided for every British subject, who is, or shall be, accused; lest the torrent of power should at any time prevail over justice, and malice and ill-will should injure and oppress the innocent. It is now, gentlemen, I have reason to think myself fortunate. I am by birth an Englishman, and thereby, notwithstanding the implacable resentment of my powerful prosecutors, I cannot be denied the privilege of having twelve honest men to acquit me of the crime laid to my charge: for acquit me you must, if you, as I am sure you

will, govern yourselves according to the evidence; since, notwithstanding the colourings which the gentlemen for the crown have given to what they have produced as such, there cannot, even upon the footing on which it now stands, be more reason to adjudge me guilty, than any of you, gentlemen, who are now to pass upon me on my life or death.

Gentlemen, could I lay open my heart to you, and make the sentiments of my soul visible to your eyes, you would there see the most lively sorrow for the decease of the worthy gentleman, for whose death I stand here accused. I truly revere his memory. He was, I doubt not, all that the gentlemen concerned against me have said of him. But while I lament his untimely end, I cannot accuse myself for his death. Would the depriving me of life, on rumour and surmise, make atonement for the loss the world has sustained in him? Surely no! And therefore, as this prosecution has been begun and carried on against me, not only with all imaginable heat, but every art has been used to deprive me of existence, I must, I will stand up in support of it, and, by preserving my life, thereby pave the way for vindicating my injured character, and depriving my prosecutors of the satisfaction of triumphing over my misfortunes.

Gentlemen, was I not afraid I should take up too much of your time, I could give a detail of impositions and hardships that would shock you; the chief end of which was to deprive me of the opportunities and means of making a fair and just defence. My friends, gentlemen, have been spirited from me; they have been threatened, if they should dare to come near me; spies have been placed round the gaol, to see if I was continually in irons or no; and if at any time I was taken out to dress, Mr. Thompson the marshal has been harassed and reprimanded for giving me too much indulgence. I have been kept in total ignorance of all which I ought to have known; and till this day, I was not made acquainted with the persons who were to be produced as evidence against me, much less with the purport of what they were to swear, lest I might have provided the means of invalidating any of their testimony. I have been deprived of the privilege of writing privately to such persons as I had business with; even Mr. Cooke my solicitor never approached me without a witness (intended at least) to our conversations; and the whole island has been made acquainted with the contents of a private letter I received from my father, on which some very ingenious comments have been made, with an intent, I suppose, to raise a popular odium against me, and to make you think, gentlemen, the life of a villain, such as I have been represented to be, was not worth your care, and that you might, upon the slightest surmise, condemn me to death, if not for the crime wherewith I am accused, yet for the general disrepute I might acquire by the success of these artful endeavours to vilify my reputation.

No wonder then, gentlemen, if that appears thus clouded. But I have such confidence, gentlemen of the jury, in your honour and integrity, that I am assured you will not be influenced by any of these artifices. Your breasts, I doubt not, are divested of all prejudice. I therefore promise myself you will attend calmly and deliberately to me, while I make some observations on the evidence you have heard delivered to you, and answer the arguments which have been advanced against me.

One of these witnesses, Johnson, gentlemen, has taken upon himself, you have heard, to swear most positively he saw me on Sunday the 19th of November last in a canoe, rowing towards Nevis, with some other particulars. Yet is it not strange that this man, on the very day on which he thus pretends to have seen me, when the fact must have been supposed to be most recent in his memory, before the coroner's inquest, on being to this purpose particularly interrogated by Mr. Julius, declared he could not positively swear it was me he saw, but only believed so? His reason he gave for knowing me at the same time shewing his malice against me, on account of my being the instrument of putting him twice in gaol, which, however, I have no recollection of. It is most plain, if he saw any canoe at all, he judged me to be in such canoe, from the reports he had heard on shore; and mad with the desire of revenge, he hastened to the coroner's inquest, with intent to do me all the prejudice in his power. Yet there his conscience pricked him, and, when made to recollect himself, could say no more than that he believed he saw me. After this, and from the character you have heard of him, can any credit be given to what he has sworn? I am well assured, gentlemen, you will give it none.

As to the evidence of Patience Dorset, she swears, gentlemen, positively, that the words which she is pleased to have heard me say, were spoken by me on the 10th of November in the morning, being the king's birth-day, at Mr. McCabée's tavern. Now, gentlemen, I shall prove to you beyond contradiction, I was all that day, and for four preceding days, and for ten days after, at Nevis. And particularly on the 10th of November, I was for the whole day in a part of Nevis the farthest removed from this island, at least seven miles from the town, and did not in the least dream of coming down here, having business of importance to transact there, which required my presence. And when I have done this, I hope, I shall have effectually destroyed this mighty fabric, which the Counsel for the Crown have taken such infinite pains to raise up. All the rest of the evidence have not the least, the most distant relation to the crime wherewith I am charged, consisting only of my motions from place to place, and of some trifling transactions, none of which shew any thing like my harbouring designs to the prejudice of any one, much less of Mr. Mills; against whom

there is not the least appearance I could entertain any anger.

I desire Mrs. Lowman may be called.

Mrs. Frances Lowman sworn.

Prisoner. Please to inform the Court, Madam, whether I was or was not at Nevis on the 10th of November last?—*Lowman.* Mr. Barbot came to my father's, Mr. George Webbe's senior, on the 8th of November last; he dined and lodged there; and lodged there the next night also. On the 10th he breakfasted there; and after breakfast, he and Mr. William Daniel walked out together, and returned in about two hours; and I left him at my father's, at about one o'clock, just going to sit down to dinner. Dinner was upon table, and I went away to my brother George Webbe's, where I dined in company with Mr. William Herbert.

Sol. Gen. You say the prisoner and Mr. Daniel took a walk after breakfast on the 10th of November; pray, where did they go to?—*Lowman.* I believe they went to Mr. Otley's.

Sol. Gen. They were absent for about two hours, you say; at what time in the morning did they go out?—*Lowman.* They went out at about 9 o'clock, and returned in about two hours.

Sol. Gen. Pray, Madam, when were you first applied to, to endeavour to recollect where the prisoner was on the 10th of November?—*Lowman.* I was first applied to the day before yesterday, and I am positive he was at my father's on the 10th of November.

Prisoner. I pray Mrs. Otley may be sworn.

Mrs. Lucretia Otley sworn.

Prisoner. Do not you recollect, Madam, that I came to your house with Mr. William Daniel, on the king's birth-day in the morning?

—*Otley.* I do remember that Mr. Daniel and you came to my house one morning after the sale of Bridgewater's estate, but I cannot positively say what day it was, though I remember it was in the same week that Bridgewater's estate was sold.

Sol. Gen. Was the prisoner at your house any more than one morning?—*Otley.* No, he never was there more than once, to my knowledge.

Prisoner. I pray Mr. Otley may be also sworn.

Mr. Thomas Otley sworn.

Prisoner. Will you please, Sir, to inform the Court on what day it was I came to your house with Mr. William Daniel?—*Otley.* I remember that the prisoner did come to my house one morning with Mr. Daniel, but I neither remember on what day of the week or month it was.

Prisoner. I desire that Mr. Josiah Webbe, the son of Mr. George Webbe, senior, may be sworn.

Mr. Josiah Webbe sworn.

Prisoner. Pray, Sir, be kind enough to in-

form the Court, whether I was not at your father's on the 10th of November last.—*Webbe*. I am not certain, but I think Mr. Barbot dined at my father's on the 10th of last November. I remember that he and Mr. Daniel dined at my father's on Wednesday the 8th of November, and lay there at night, and they stayed all next day, and spent most part of the day in playing at backgammon, and lay there again that night; and I cannot be positive, but, to the best of my remembrance, Mr. Barbot dined at my father's on the 10th. I stayed at home that day to keep Mr. Barbot company, and I am almost sure it was the 10th.

Sol. Gen. When were you first desired to recollect this?—*Webbe*. The day before yesterday.

Prisoner. I desire Mrs. Lowman may be called again.

Mrs. Lowman called up again.

Prisoner. Pray, Madam, are you not very positive I was at your father's on the 10th of November?—*Lowman*. Yes, Sir, I am positive that I left you at my father's on the 10th of November, and I dined that day at my brother George Webbe's, in company with Mr. William Herbert.

Mrs. Otley. I now recollect very well that it was on Thursday the 9th of November, that Mr. Barbot came to my house with Mr. Daniel. Miss Nanny Herbert was at my house at the same time. She is now here, and has mentioned some particular circumstances, that make me recollect the thing perfectly well.

Sol. Gen. I desire Miss Herbert may be sworn.

Miss Anne Herbert, the elder, sworn.

Sol. Gen. Please to declare to the Court, on what day it was the prisoner went with Mr. Daniel to Mr. Otley's.

Herbert. The day after the sale of Bridgewater's estate I dined in town at my brother's with Mrs. Otley, and we saw Mr. Daniel there, and Mrs. Otley invited him to her house in the country: accordingly he came the next morning after breakfast with Mr. Barbot: they stayed about an hour and a half, and went away again.

Are you sure it was on the 9th of November that the prisoner and Mr. Daniel went to Mr. Otley's?—Yes, I am sure it was on the 9th; for it was on the second day after the sale of Bridgewater's estate.

Prisoner. I desire Mr. William Herbert may be sworn.

Mr. William Herbert sworn.

Prisoner. Please to declare to the Court, Sir, whether you did not dine in company with Mrs. Lowman, at Mr. George Webbe's junior, on the 10th of November last.

Herbert. I remember dining at young Mr. Webbe's, the Thursday after the sale of Bridgewater's estate, in company with Mrs. Lowman; and the next day I dined at Mr. Cole's.

As I was riding to Mr. Cole's, I heard the guns fire, and on asking the reason of their firing, I was told it was the king's birth-day: I remember particularly it was the king's birth-day; for after dinner, I said to Mr. Pemberton, who was one of the company, As you are the oldest man in company, begin with a bumper to his majesty's health.

Sol. Gen. Are you sure it was on the king's birth-day you dined at Mr. Cole's?—Yes, I am sure it was. Mr. James Brodbelt is now in court; he was one of the company.

Can you tell how many guns you heard fired on the king's birth-day?—I think I heard fifteen; but Mr. Weekes the gunner is in court, he can tell positively how many he fired.

Mr. William Weekes sworn.

Sol. Gen. Do you remember firing any guns on the king's birth-day?—*Weekes*. Yes, I remember to have fired fifteen.

Did you fire any more or less than that number?—No, I fired exactly fifteen.

Prisoner. I pray John Cornelius may be sworn.

John Cornelius (a free negro) sworn.

Prisoner. Do you remember on what day it was Bridgewater's estate was sold?—

Cornelius. It was on Tuesday the 7th of November last. I was at work at Mr. George Webbe's that day, and the Thursday after I saw Mr. Barbot at old Mr. Webbe's: he and Mr. Daniel went out in the morning to Mr. Otley's, as I was told, and returned in about two hours; and the next day, which was the king's birth-day, Mr. Barbot dined at old Mr. Webbe's.

Sol. Gen. Did you hear any guns fire that day?—*Cornelius*. No, I heard none.

Were you desired by any body to recollect this?—No.

Did nobody instruct you to say it?—Nobody at all.

Mr. James Brodbelt sworn.

Sol. Gen. Please to declare to the Court, where you dined on the king's birth-day.—

Brodbelt. I dined at Mr. Cole's on the king's birth-day, with Mr. William Herbert, Mr. Pemberton, Mr. Paris, and some other gentlemen. The fort-guns fired on account of the day, and I remember Mr. Herbert proposed to Mr. Pemberton drinking the king's health in a bumper, which we all did.

Prisoner. I desire Samuel Lawrence may be sworn.

Samuel Lawrence sworn.

Prisoner. Do you remember when Bridgewater's estate was sold?—*Lawrence*. I do not remember the day.

Do not you remember the day I came to old Mr. Webbe's?—No.

Do not you know how long I stayed there?—Indeed I cannot tell.

Do you remember the day I wrote a note for

old Mr. Webbe to send to Mr. Craddock for corn?—I do remember you wrote a note to Mr. Craddock for corn for Mr. Webbe, but I do not recollect on what day it was.

Do you not remember I dined at old Mr. Webbe's the day I wrote that note?—Yes, you did dine there the day you wrote the note, but I do not remember what day that was.

Prisoner. I pray Mr. Josiah Webbe, (Dr. Webbe's brother) may be sworn.

Mr. Josiah Webbe sworn.

Prisoner. Pray, Sir, inform the Court, whether I was not at your house on the king's birth-day, and whether I was not sent for, while I was there, to make Mrs. Hickman's will?—*Webbe.* I remember Mr. Barbot came to my house one afternoon soon after the sale of Bridgwater's estate, and while he was there, a messenger came from Mrs. Hickman to him, to desire he would go and make her will.

Was it not on the king's birth-day?—It was one day after the sale of Bridgwater's estate, but I am not certain what day it was.

Pris. I desire Mrs. Dacent may be sworn.

Mrs. Frances Dacent sworn.

Prisoner. Please to declare to the Court, Madam, on what day it was you sent for me to make your mother's (Mrs. Hickman's) will.—*Mrs. Dacent.* I sent for Mr. Barbot to make my mother's will, and I remember he came and made her will, but I cannot be certain what day it was.

Prisoner. I desire Miss Jenny Herbert may be sworn.

Miss Jane Herbert sworn.

Prisoner. Do you remember being at Mrs. Hickman's when she was ill?—*Herbert.* Yes.

Do you remember my making her will?—Yes; Miss Nancy Herbert and myself were witnesses to it.

Do you recollect when Bridgwater's estate was sold?—Yes, it was on Tuesday the 7th of last November.

How long after that was it that I made Mrs. Hickman's will?—I am not certain whether it was the Thursday or Friday after, but I believe it was the Friday.

It was the Friday after?—I think it was, but I am not positive whether it was the Thursday or Friday.

Did you stay at Mrs. Hickman's that night?—No.

Do you know whether young Mr. Payne came there the day following?—I cannot tell whether he did or no.

Pris. I pray Mr. Sommers Payne, junior, may be sworn.

Mr. Sommers Payne, junior, sworn.

Prisoner. Do you remember the day that I was at Mrs. Hickman's?—*Payne.* I remember seeing you there, but I cannot tell on what particular day it was.

Prisoner. I pray Miss Nancy Herbert may be sworn.

Miss Anne Herbert, the younger, sworn.

Prisoner. Do you remember what day it was I was at Mrs. Hickman's to make her will?—*Herbert.* No, I do not recollect the day.

Do not you remember to have heard of a ball being at St. Kitt's, on the king's birth-day?—I remember to have heard there was to be a ball at St. Kitt's, but I cannot tell on what day.

Had you no conversation with any young ladies of your acquaintance about the ball?—Yes, I believe I might have talked about it, but I do not remember the day.

Prisoner. I desire Mr. Julius may be sworn.

Mr. William Julius sworn.

Prisoner. Mr. Julius, you were one of the coroner's inquest; pray, what did Johnson swear before the inquest?—*Julius.* When he came before the inquest, I asked him if it was Mr. Barbot that he saw in the canoe? He said, he believed it was, but he could not swear positively to him, for he was a musket-shot off.

Prisoner. I pray Mansell Wilkes may be sworn.

Mansell Wilkes sworn.

Mr. Fryc. Do you know Johnson?—*Wilkes.* Yes, I know him very well.

Mr. Fryc. What character does he bear?

Sol. Gen. You are to take notice, that you are to speak to the character of the man in general, and not charge him with any particular fact; for he is not come here prepared to defend himself against any particular charge.

Wilkes. Since I have known him, he has always borne a bad character.

Mr. Fryc. Has he been always looked upon as a man of infamous reputation?—

Wilkes. Yes, he is reckoned a bad man.

Mr. President. Have you any more witnesses to examine, Mr. Barbot?—*Prisoner.* No, Sir.

Sol. Gen. May it please your honours, since the prisoner has attempted to prove that he was at Nevis on the 10th of November, in order to invalidate the testimony of Patience Dorset; we beg leave to produce some further evidence of his being actually on this island on that day. Call Martha Scoaper, Mary Sutton, and Mary Cockade (a free mulatto). Who appeared and were sworn.

Sol. Gen. Mrs. Scoaper, do you know the prisoner at the bar?—*Scoaper.* Yes, Sir, I know Mr. Barbot very well.

How long have you known him?—I have known him a great while; he is my near neighbour.

Do you remember seeing him on this island on the 10th of November last?—I do not know what day of the month it was, but I am almost sure I saw Mr. Barbot here on the king's birth-day. To the best of my remembrance, I saw him pass by my house in the forenoon, and his

boy came to my house that morning to beg some water.

Do you know, by any particular circumstance, that it was on the king's birth-day you saw the prisoner?—It was the day that there was a great ball at Manasseh Williams's. I was at the ball myself.

Sol. Gen. That was on the king's birth-day. Mrs. Sutton, do you know the prisoner at the bar?—*Sutton.* Yes, I know him very well.

Please to inform the Court and the Jury, whether you saw him here on the king's birth-day.—Between eleven and twelve o'clock in the forenoon, on the king's birth-day, as I was sitting in my house, I saw Mr. Barbot coming down by Mr. Bunyard's house, and he turned down the alley that leads to Mrs. Philips's.

Do you remember how he was dressed?—He had on a white coat, a green waistcoat, and a silver-laced hat flap.

Are you sure it was on the king's birth-day you saw the prisoner?—Yes, I am sure it was on the king's birth-day.

Sol. Gen. Mrs. Cockade, do you know the prisoner at the bar?—*Cockade.* Yes, Sir, I know him very well.

Pray inform the Court and the Jury, whether you saw him here on the king's birth-day.—Mrs. M'Cabée sent for me on the king's birth-day to help her; for they were to provide an entertainment for a great deal of company: and while I was in the public room below, Mr. Barbot came in, and I heard him ask a man whom I do not know, whether there was a good deal of company up stairs.

Are you sure it was on the king's birth-day you heard him say this?—Yes, I am sure it was.

Sol. Gen. May it please your honours, we have gone through all our evidence. We could produce many more witnesses to prove the prisoner's being actually on this island on the 10th of November, but we think those that have been already examined sufficient to establish that fact, notwithstanding what hath been sworn to by Mrs. Lowman and Cornelius, who are the only positive witnesses to the prisoner's being at Nevis on the 10th of November; and the first of them (Mrs. Lowman) founds her evidence on two circumstances, in both of which she stands flatly contradicted: The first, that of the prisoner's going with Mr. Daniel to Mr. Otley's on the king's birth-day in the morning; and the other, that of her dining on the same day at her brother George Webbe's, in company with Mr. William Herbert. Now, your honours and the gentlemen of the jury must have observed, that, in the first of these circumstances, Mrs. Lowman stands contradicted by the evidence of Mrs. Otley and Miss Anne Herbert, who have both positively sworn that it was on the 9th of November, the day preceding the king's birth-day, that the prisoner and Daniel were at Mr. Otley's; and in the other she is also contradicted by Mr. William Herbert, who has likewise positively sworn, that it was on the 9th of November he

dined at Mr. George Webbe's junior, in company with Mrs. Lowman, and that on the 10th he dined at Mr. Cole's. And this evidence of Mr. Herbert is corroborated by that of Mr. James Brodbelt.

Mr. President. Mr. Barbot, go on with your defence.

Here Mr. Frye got up, and handed some papers to the prisoner, which Mr. Horne, one of the counsel for the king, observing, addressed the Court, in this manner:

Mr. Horne. May it please your honours, I beg Mr. Frye may not be allowed to do this. He is now giving papers to the prisoner to assist him in his defence.

Mr. Frye. They are nothing more than simple notes of the evidence, which I took, in order to help his memory, when he comes to make his defence; and one or two cases that I have writ down for him.

Sol. Gen. It is what they have not a right to; but it is no great matter. You may give him the papers.

Mr. Frye. Here, Mr. Barbot, you are to read from this place to this, (pointing with his finger.)

Prisoner. May it please your honours, the first witness produced against me, in order to prove my having had some resentment against the deceased, is Mr. Carew, who, as you must have observed, says no more, than that on the day Bridgwater's estate was sold at Nevis, he heard me say to the deceased, "That I expected to be treated like a gentleman." If I did say these words, I assure you, gentlemen, they made no impression at all on me, for I have not the least recollection of having said any thing like this to the deceased. But, admitting I had; does the saying to a gentleman, that I expect to be well treated, or treated like a gentleman by him, imply any kind of malice, or resentment, against that gentleman? Surely no!

Mr. Thomas Mills was the next witness produced on this occasion. He agrees with Mr. Carew in the words that passed at the sale of Bridgwater's estate. But, gentlemen, was there any thing offensive, or malicious, in my answer to the deceased; or can any thing be collected from thence, to shew that I had any resentment against him? I think not, and I am confident you will think so too.

Mr. Armour has sworn to a conversation that, he says, passed between him and myself, some time before the sale of Bridgwater's estate. He swears, he heard me say, Mr. Mills had treated me in a manner never to be forgiven. This, I confess, astonishes me; for I have not the least remembrance of it. And it is indeed strange and very improbable, that I should throw out such expressions concerning a gentleman, against whom I never had any reason to conceive the least anger or resentment. It is probable I might, at the time Mr. Armour says he joined company with me, have been talking about Mr. James Daseat's

affairs, and might have said that Mr. Mills's behaviour to Mr. Dasent ought never to be forgotten; for I well knew that Mr. Mills had been a great friend to Mr. Dasent. It is therefore probable, I say, that Mr. Armour might have misunderstood me. And indeed he must have been mistaken, for I am certain I never uttered the words he has sworn to. Besides, it is observable, that Mr. Armour does not swear which of the Millses I spoke of. He believes, indeed, it was the deceased, and for no other reason than because I did not use any Christian name by way of distinction. I might, gentlemen, for any thing Mr. Armour knew, have meant Mr. William Mills, or Mr. Thomas Mills.

The evidence of Patience Dorset, I confess, is more surprizing than any. She has boldly sworn, that she heard me throw out a menace at a public tavern in this town on the king's birth day, in company with two men, whom she says she did not know, nor did she hear any of the conversation previous or subsequent to this menace. Is it not very strange, that this woman should only hear that particular part of the conversation and no other, and not be able to recollect who the people were I was talking to? Besides, admitting I had had any resentment against Mr. Mills, it would have betrayed great weakness in me to have thrown out such a menace. But, gentlemen of the jury, I am confident this piece of evidence will have no weight with you, as it has been sufficiently proved by three witnesses, (one of them a lady, and the other a gentleman, of undoubted characters, and the third a very honest man) that at the time Dorset heard me use this threat she has sworn to, I was actually at the island of Nevis. This, I think, gentlemen, fully sufficient to invalidate her evidence, and I make no doubt will have its proper weight with you.

Doctor James Webbe was called next on the part of the crown. Between the Doctor and myself, there has for a long time past, and still does subsist a very great intimacy; inasmuch, that if I had ever had any quarrel with, or resentment against, the unhappy gentleman deceased, it is extremely probable I should have communicated it to him. And yet, gentlemen, you have heard the Doctor positively swear, that so far from his being acquainted with my having any difference with the deceased, or any intention to fight him, that he never knew, or even suspected, any thing of the kind.

It has been also given in evidence to your honours, and the gentlemen of the jury, that on the 18th of November at night, I went to bed at Dr. Webbe's house about nine o'clock; and Dr. Webbe swears, that about one in the morning, as he was passing through the hall, he spoke to me. This plainly proves, I was at that time at Dr. Webbe's house in Nevis. It has been also proved, that I was at Dr. Webbe's at nine o'clock in the morning of the 19th, the day on which the deceased is supposed to have been killed; and it is observable, that through all the evidence that has been produced against

me, there has not been one witness who could swear that I was even at Frigate-Bay that morning: and I do take upon me to say, it was incumbent on the counsel for the king to prove, by some positive witness, that I was that morning at Frigate-Bay. They have endeavoured indeed, by presumptive evidence, to prove my being there, and for that purpose John M'Kenley and Johnson have been examined. M'Kenley swears the deceased's negro boy Coomy told him, I had killed his master, and that on this he ran to the Bay, and saw a canoe rowing from the shore, with a person in white sitting in the stern. I beg leave to make two observations on M'Kenley's evidence: First, That his information was from a slave, who, by the laws of this country, would have been an incompetent witness, had he been produced as such; and consequently any hearsay from him must be illegal, and ought to have no weight with the jury. Add to this too, the possibility that Coomy might have been bribed to fix the murder on me. And next, That M'Kenley himself cannot positively say that it was even a white person that he saw sitting in the stern of the canoe. Is it not therefore unjust to conclude that I was the person?

As to Johnson's evidence, I beg leave to add only one observation to what I have already said on that matter. It has appeared in evidence to you, gentlemen of the jury, that he is a man of a very bad character, and, had I had timely notice of his being a witness against me, I could have had a copy of the record of his conviction for petty larceny from Montserrat, which would have proved him beyond all doubt an infamous person. But although I have been so unfortunate as not to be able to produce this record, yet from what you have heard of this man's character, I am persuaded you, gentlemen of the jury, will pay no regard to what he has sworn.

The counsel for the king, to prove this fact upon me, have endeavoured, by a number of witnesses, to trace me, as they are pleased to call it, from place to place. This kind of evidence, I hope, will have no weight with you, gentlemen of the jury, as it is at best but very light, presumptive evidence, and as it is absolutely necessary to prove positively that I committed the fact. Great stress has been laid also on my exercising the pistols at Mrs. Dasent's. It has been proved to your honours and the jury, by Dr. Webbe, that this was merely accidental, and that after he had done with the pistols, they were cleaned and put up by a boy of Mrs. Dasent's. Is it not strange that this piece of evidence should be made use of to prove the murder upon me? What had my exercising these pistols (which I did a week before merely for my amusement) to do with the killing Mr. Mills? Did no other person ever fire at a mark with pistols? Now, gentlemen of the jury, if it had happened that a man was found dead of the wound of a sword, and one of you had been exercising a few days before with a case of file;

might it not with equal justice be said that you killed that man?

For my being seen to land out of a canoe, I am sure, gentlemen, that can be no proof of my having been at Frigate-Bay. Besides, the witnesses themselves cannot take upon them to swear I came from Frigate-Bay. For any thing they knew, I might have been a-fishing; and surely that is an innocent action. Was no other person seen that morning in a canoe but myself?

There has been no kind of proof that I had any pistols with me, or that my boy had any. They have indeed now produced a case of pistols which they suppose I used that morning; but I beg leave to observe, that these very pistols were found by Dr. Webbe, under the bed at Mrs. Dasant's, in a pair of holster caps; and it does not appear from any of the evidence, that they had been lately used.

I make no doubt the counsel for the king will lay great stress on the evidence that has been given of my having executed a paper at O'Donnell's, which they have endeavoured to prove was my will. Is it not the duty of every man, as well as a satisfaction to him, to make a will? and is he not at liberty to make it when and where he pleases? Besides, I had very good reasons for making a will; which were to secure Mr. Jacob Saunders for indorsing my bills, as I intended going to England in captain Fleming, who was to sail in a few days.

Mr. Justice Losack. Mr. Barbot, give me leave to interrupt you. I apprehend you are only wasting your time, and doing yourself very little service, by all this. Would it not be much more for your advantage, to prove where you were from the time you went to bed at Dr. Webbe's the night preceding the murder, to the time you were seen to land at Nevis?

Prisoner. That, Sir, would be a hardship indeed. I submit it to you, gentlemen of the jury, whether it would not be very difficult for any of you to prove where you were on any particular night, from nine to six in the morning; and, on failure of such proof, to be supposed guilty of murder? Besides, may it please your honours, I humbly apprehend that in this case the *onus probandi* lies on the crown, and that they must first prove an *ibi*, before I am obliged to prove an *alibi*. But admitting I had been out the night preceding the murder, ought it from thence to be concluded, that I committed the murder? Was no other person out that night but myself?

Gentlemen of the jury, it has been said to you, that presumptive evidence is sufficient to convict a man of murder, and I expect the counsel for the king will labour to prove this point. But I beg leave to assert, that presumptive evidence is by no means sufficient, and that nothing but positive proof ought to be admitted to convict a man of a crime where his life is at stake. It would be of the most dangerous consequence to admit of presumptive

evidence in such cases; for an innocent man might suffer for a crime he never was guilty of. I have some authorities in my hand, to shew how extremely cautious juries ought to be in finding a man guilty, on any but the clearest and fullest proof. Coke's Inst.

"An uncle was correcting his nephew, and the boy was heard to cry out, O Lord, uncle, don't kill me! The boy immediately after absented himself. The neighbours, who had heard the outcry, on missing the boy, suspected the uncle had killed him. The uncle, finding he was suspected to have murdered his nephew, procured a boy very like his nephew to personate him. But it being soon discovered that this was not his real nephew; the uncle was thereupon apprehended, tried for the murder, and convicted. Some time after this the nephew appeared."*

Another case I have, gentlemen, to the same point. I do not immediately recollect the book it is in; but the case is this:

"A man was found dead in a field. Another man happened to pass by and see him, and went and told two persons of it. These two persons, suspecting him to be the murderer, carried him before a magistrate. He was indicted for the murder; and one of the jury that tried him, contrary to the opinion of the other eleven, and of the Court also, would not find him guilty. Upon this man standing out a long time, and absolutely refusing to agree with the rest of the jury, they were called into court, and upon the judge's asking this man his reason for refusing to find the prisoner guilty, he honestly confessed that he himself had killed the man, and that the prisoner at the bar was perfectly innocent."

From hence it appears, gentlemen of the jury, that you ought not to be determined by circumstantial evidence. If former juries have taken upon themselves to judge severely from presumptive evidence, that should be no rule, no example, for you.

I beg leave to trouble your honours, and the gentlemen of the jury, with one case more, to shew the necessity of having positive evidence to convict a man on a trial of this sort.

"It happened at Montserrat, that one captain Watts was indicted for killing of one Oulda. A woman, who was the only evidence, swore she heard the clashing of swords, and saw captain Watts draw a sword out of Oulda's body; but because she could not swear that she saw Watts thrust the sword into his body, the jury acquitted him."

Common fame, gentlemen, I am persuaded,

* The Case is related here not quite exactly. See it in vol. 14, p. 1410. See also Green's Case (to which it is appended), and the Case of the Perrys, p. 1312, of that vol. Hale's P. C. book 2, vol. 2, p. 290. For more as to circumstantial evidence, see the Case of James Stewart, vol. 19, p. 1.

will have no weight with you at all. You must all have been sensible at times, how report is apt to speak untruly. And, in the present case, every art has been tried to raise it to my prejudice. You are sworn to judge by the evidence which is delivered to you, not by what you have heard out of doors. If the evidence is favourable, you must in your consciences judge so; otherwise you introduce a precedent for the greatest evils.

Gentlemen, if you examine the whole tenor of my behaviour for a few days which preceded this unhappy accident, until my commitment, you will find me solely employed about Dr. Webbe's and Mrs. Dacent's affairs, and preparing for a voyage to Europe; and for the moments of recess from business, only employed in passing my time agreeably among my friends. The very night before poor Mr. Mills's death, my behaviour was such, as shewed I harboured no mischievous intentions. And can it be supposed that, if I had been conscious of the crime laid to my charge, I should have dined at colonel Webbe's (the house where I always dined on a Sunday when at Nevis) the very day on which the murder was committed, and behaved there in my usual manner? My circumstances were such as might have made the means of escaping very easy to me, had I been guilty of so weighty a crime as that I am accused of.

Upon the whole, if any presumption can be drawn from evidence like this, it must be favourable for me, as they do most effectually demonstrate the whole of my behaviour to have been most innocent and inoffensive. I shall just beg leave to caution you, gentlemen, against any arguments that have, or may be made use of, to influence your passions on this occasion. Much pains have been taken to stir up in your breasts sentiments of rage and indignation against me, and to make me appear guilty in your eyes, though I could by no means be proved so.

But, gentlemen, I know you are not to be blinded by subtleties of this kind. It is not rhetorical flourishes will move you on this occasion to lay down my life a sacrifice to my prosecutors, however powerful they may be. You are, gentlemen, a jury, judges upon your oaths of matters of fact according to evidence; and, from the personal knowledge I have of every one of you, I am persuaded nothing but full and demonstrative proof will anyways induce you to condemn me: not distant arguments that amount hardly to a possibility; and when they have an equal possibility, that any of the persons in this court may be the guilty person, and not I. For the presumption, I am sure that is altogether in my favour.

I shall say no more to you on this occasion, but commit myself, gentlemen, to your judgments, not doubting a happy issue. May God Almighty incline your hearts in my favour! On his protection I depend; and to him be all honour and glory henceforth and for ever! Amen.

Sol. Gen. May it please your honours;

I shall beg the indulgence of a few words, in reply to the prisoner's defence. I shall not make any recapitulation of the whole evidence; both as the trial has been drawn out into so very great a length, and as that will be done from the bench; but confine myself to the making a few observations which I think necessary, on what has fallen from the prisoner in the course of his defence. In which too I shall not be long; for indeed the prisoner has saved me the necessity of giving you much trouble, by the extreme weakness of his defence; which was indeed so very weak, that his very defence itself seems a proof of his guilt. For has he invalidated any part of the evidence against him? Has he disproved a single fact? Nay, has he even attempted to do it? save in one instance only, where it was not without concern I saw him endeavouring to cover one crime by another, in offering, by a palpable perjury, to take away the force of the evidence of Patience Dorset, by getting it proved, that he was not on this island at the time when she swore she heard him speak the particular words she gave an account of. Could he indeed have fairly and honestly disproved her, it might have been of no small avail to him. But by unsuccessfully attempting to do it, he has only the more established the truth of her testimony; and the very attempt itself shews how strongly he felt the weight of it to lie upon him; and amounts to a sort of confession of his crime, in labouring, by so undue means, to destroy an evidence, which only the consciousness of his guilt could make him so strenuous to invalidate.

But the main of his defence seems to lie in this, that the evidence against him is only circumstantial; and therefore, however strong, ought not to avail to convict him, without absolute and positive proof of his committing the fact, by persons who saw him do it. I indeed expected he would fly to this miserable refuge, the last resort of a guilty man, oppressed by the weight of conviction, and borne down by the force of the plainest evidence against him. I shall therefore beg to be a little particular to this point; not only as being what the prisoner seems to have rested the whole force of his defence upon, and placed all his hopes of an acquittal in; but as I am sensible great pains have been also taken to inculcate this doctrine abroad:—a doctrine the falsest and most dangerous that can be broached, and which plainly contradicts all our reason and experience on this matter. For,

Not only, according to this doctrine, hardly any criminal could ever be convicted at all; but moreover, I am bold to say, out of all those that have been so, by much the greater part were convicted on circumstantial evidence.

So far from being untrue, or even bad evidence, it has ever been allowed that, for the lights it does give, it is the best and surest of all kinds whatsoever, and the least likely to deceive and mislead.

A man may lie; but, as an ingenious gentleman said this morning, facts cannot lie. A well-invented tale may be told and stood to by a wicked and daring witness, in a manner that he knows it is impossible for him to be detected in: but a variety of facts of several kinds, all collected from different and distant persons, places and times, with an apparent impossibility of combination or confederacy, all independent of each other, and with no other connexion or agreement between them, but what arises from their bearing from different and distant points to the same centre of truth; these can never mislead the judgment, or impose upon the belief; but justify and confirm each other, and are the surest and most unerring guides to conduct to truth.

They who affirm, that circumstantial evidence alone cannot be sufficient to convict, must not only be greatly unused to the hearing or reading of trials; but must also be perfectly ignorant of the very nature of a trial, and what it is. For what is a trial, but to hear, examine, and weigh all that is offered on either part; and then from the whole to draw out, or (as the well-known term is) to find the truth?

Is it not the constant and universal practice on trials by juries, for the judge who sums up the evidence, to close the charge with words to this effect? "If, upon the whole matter, you believe in your consciences that the prisoner at the bar committed the fact of which he stands indicted, you are to find him guilty: but if, upon the whole matter, you do not believe in your consciences that he committed it, you are to find him not guilty." Is it not the usual and constant practice, I say, to close the charge with words like these?

But where is the sense or meaning, I pray you, of such an admonition, or of words like these, if strong circumstances alone may not, in any case, be a sufficient evidence to authorize the jury to find the prisoner guilty?

If nothing but positive, ocular, point-blank evidence can be sufficient for that purpose, how trifling and impertinent were it to give such a charge? For,

If there be such positive and absolute evidence, what doubt or difficulty can there be in the case? or how is it then congruous to say, if they believe, upon the whole matter, a thing so plainly and palpably sworn, as to leave no room to talk of the whole matter, or hardly of believing at all? And,

If there be not such positive and absolute evidence, what reason or justice is there in the judge's saying to them, if, upon the whole matter, they believe in their consciences, what he sees there is no foundation, and they can have no right, to exercise their belief or their consciences at all about?

In a word, if nothing less than such positive evidence would avail, how can there ever be any doubt at all? or what occasion can there be, in any case, of having a jury at all? In God's name, what, in that case, is, or can a jury be for?

VOL. XVIII.

If such positive evidence only will suffice, it is immediately seen whether there be such or not: and then the Court, without the mediation of a jury, have no more to do than to acquit or condemn at a single word; and the very swearing a jury were a most unnecessary and idle formality.

But to consider this matter a little further.—How frequently do trials of murder in England last eight, twelve, sixteen hours, or longer? Every body knows that such things have frequently happened.

But, I beseech you, how could this be, if only ocular, downright positive proof could avail to convict a person?

Is it not, and must it not be seen, in one hour of the trial, whether there be such positive and absolute proof or not?

If there be such positive proof, what can there be further to be done? or what occasion to protract the trial to any greater length?

If there be not such positive proof, why are so many fruitless hours wasted in giving in evidence, and laying together circumstances and presumptions, which, though ever so numerous, or ever so powerful, could be of no consequence at all?

What a figure must the judges make in suffering so much time to be mis-spent, in hearing, and permitting to be solemnly given in evidence, what in itself, at this rate, must all be so utterly insignificant and beside the purpose?

And yet, do they not constantly, after trials of so great a length, solemnly and gravely enumerate all the circumstances and presumptions, and then put it to the belief and consciences of the jury, whether they are from them convinced of the prisoner's guilt? and are not prisoners accordingly constantly convicted on them? But,

Were it not the most crying abuse in the judges, and the greatest profanation of justice in itself, thus gravely to set the prisoner's life on such a hazard, if they know in their consciences, that there was no evidence given, which ought to affect him?

Ought they not to tell the jury at once, they are to find the prisoner not guilty, without more ado?

Gentlemen of the jury; though I hope you need no further conviction of the falseness of this doctrine, yet it may not be amiss to tell you what our great oracle of the law, my lord Coke, whose name you have, I make no doubt, often heard of, defines a trial to be: "A trial (says he) is to find out, by due examination the truth of the point in issue."

And is not this, gentlemen, perfectly agreeable to, and a confirmation of, what I have been insisting on? that is, That it is to hear, examine and weigh all that is offered on either side? Is not this, I say, the finding out the truth on due examination?

But, I pray you, would this be an apt or proper definition, or would this exhibit a just or adequate idea of a trial, if nothing but point-

blank proof of the commission of the fact were, or could be, allowed a sufficient evidence to convict a person?

Does it not, on the contrary, suppose an uncertainty? Does it not imply a doubt and difficulty? But,

Where can be the doubt and difficulty, if there is such positive point blank proof? or what is there to be found out, on due examination, if none else be sufficient?

But, gentlemen, to illustrate this matter still further by the same great authority, I beg leave to read you other words, of the same author, extremely pertinent to this purpose; and, gentlemen, they are these: "When the trial is by verdict of twelve men, there the judgment is not given upon witnesses, or other kind of evidence, but upon the verdict; and upon such evidences as is given to the jury, they give their verdict—And many times juries, together with other matter, are much induced by presumptions, whereof there be three sorts, viz. violent, probable, and light or temerary. *Violenta presumptio* is many times *plena probatio*; as if one be run through the body with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house." Thus you hear, gentlemen, the general doctrine he lays down; and the instance he gives by way of illustration of it, and which may serve the better to make it understood.

But, gentlemen, I have another authority in my hand still more explicit of this matter, and which may enable you still the more clearly to judge of it; and that is from a trial which I had occasion to mention this morning to another purpose; which is of Miss Blandy, who (as I make no doubt you have all heard) was tried at Oxford no longer ago than the month of March last, for the murder of her own father; where the learned judge, in the close of his charge to the jury, has the following words, extremely apposite to the present purpose: "In the present case, which is to be made out by circumstances, great part of the evidence must rest upon presumption, in which the law makes a distinction: a slight or probable presumption only, has little or no weight; but a violent presumption amounts, in law, to full proof, that is, where circumstances speak so strongly, that to suppose the contrary, would be absurd."

Thus, gentlemen, it appears in the plainest manner, from the reason of the thing; from constant experience; from the words with which the charge of the judge to the jury is always wont to be closed; from the, otherwise, unpropriety of those words of the charge; from the frequent extreme length of trials of murder in England; from the absolute unnecessaryness of such length on any other supposition; from the definition of a trial by my lord Coke; and lastly, from the express and plain words of the very charge of which I have just now read you a part: from all these, I say, it is plain and clear, that circumstantial

proof may be, and frequently is, sufficient in itself to convict an offender, and prove the charge against him; and that the contrary doctrine is contrary to experience and good sense, and in itself false and absurd.

But, may it please your honours, and you gentlemen of the jury, as absurd as this doctrine is, the absurdity of it is not all.—No; there is still something further to be considered and guarded against; and that is, its dangerous and destructive tendency.

If once it comes to be established into a rule, that nothing but point-blank, positive, ocular evidence shall suffice to convict a man; who can be secure of his life or property but for a single day? What a lesson of encouragement were this to hold out to bloody-minded and ill-disposed men! What a security and indemnity were here promised and insured to them in the commission of their crimes!

Were not this plainly to say to them in so many express words, "See that you commit your crimes with tolerable secrecy and caution, and you may be assured of impunity; only take care that none be present to behold you execute them: and then, though a thousand and a thousand circumstances ever so loudly proclaim your guilt; though it should be evinced by ever so many and ever so glaring tokens; though every body believes, sees, and assuredly knows, that you did, and must have committed the fact; yet all this is but circumstance and presumption, and by no means evidence to convict, or at all affect you; but, with all the plainest and clearest marks of your guilt about you, you may laugh at your prosecutors, and set the whole world at defiance."

Is not this the plain and palpable language. Is it not the necessary and inevitable consequence of such a doctrine? Is it to be supposed, that ill men can be so mighty dull, as not to take so very plain a hint? or is it to be imagined they will be checked and restrained by justice and the laws, when they are taught how they may so easily, and with using so little caution, put themselves out of their reach?

I hope, therefore, we shall hear no more of this senseless and pernicious doctrine; pretended to be grounded on scrupulousness and tenderness of conscience; but the mere effect of falseness of judgment, or perverseness of will. For,

What sort of conscience must that be, which thus combats itself? or by what unaccountable kind of reasoning must it be, that a man persuades himself he is bound in his conscience to find that to be the case, which in his conscience he believes, and is perfectly assured, is not the case?

A man that can argue at this rate, let his pretence be what it will, perversely belies the truth, and equivocates and plays double with God Almighty, and justice, and his own conscience.

But now, if it should be asked, if then any thing less than positive and absolute proof of the commission of the fact will avail, and a man

may be convicted on circumstantial evidence only, how shall we know what circumstances are sufficient to convict an offender? I say, if this be asked, I answer, in the words which I observed to be wont to be used in the close of a charge, "when, upon the whole matter, you believe in your consciences that the prisoner committed the fact of which he stands indicted;" or, (which is still better) when (as it is so happily and ingeniously expressed in the part of the charge I have just read to you) I say, "when circumstances speak so strongly, that to believe the contrary, would be absurd." For,

It is not barely what this or that witness, or these two or three, or any other precise number of witnesses say, that shall acquit or condemn. No; 'tis the joint result of the whole evidence taken and considered together; and what, upon examining and weighing that, shall appear to you, or (as the well-known term is) you shall find to be the truth.

To pretend to lay down any general rule of what is, or is not, sufficient evidence, were ridiculous and absurd.

Every fact is to stand on its own circumstances; and that, and that only, is to be taken to be proved, of which the consciences and belief of the jury are convinced.

The evidence that does not convince their consciences and belief, though it consist of a thousand particulars, is not enough: And,

The evidence that does convince their consciences and belief is enough, though it consist of ever so few.

Gentlemen, you may have observed how strenuous both the prisoner and his counsel were in endeavouring to ward off the force of one piece of evidence, which they perceived made so powerfully against him; and that was, that Coomy, the deceased's negro boy, told M'Kenley, when he came down to the Bay, that it was Mr. Barbot who had killed his master. This, they say, you are to give no heed to; as being what is called hearsay evidence only, and no more than what one person tells another. But, gentlemen, give me leave to observe, there is a distinction in this matter; and that this is, in truth, a very strong evidence indeed. That hearsay evidence is no evidence at all, I do generally allow; and therefore had Coomy the next day, or some hours after, told this to M'Kenley, or any other person, it ought to have no weight at all with you, because in that case it might not be true; but in the present case it ought to weigh with you, and powerfully too, because it must have been true, as the event, and what followed, invincibly demonstrated.

A gentleman is found murdered, and just expiring, and a clamour is made, on the spot and on the instant, that such an one was his murderer; a person is seen flying from the place where the murder was committed; and the person so flying is pursued from the place, and found to be the very same who was alleged on the spot to have been the murderer:

I pray you, does not this prove that the clamour was, and must have been, true? and that the persons who made it spoke from absolute certainty, and were neither deceived themselves, nor deceived others? Therefore, as hearsay is generally no evidence, because it may be false; so what Coomy told M'Kenley is good evidence, because it must be true. And there is no medium between these two things, that either Coomy saw the prisoner kill his master, or he must have been inspired.

The same observation will hold, with regard to what Peter the negro told Cribbe in the morning at Nevis, viz. that he feared Mr. Barbot had done mischief; and against which too the same objection was so strongly pressed, that it was only hearsay, and what one person told another. But as you heard, gentlemen, this was said by Peter before the news otherwise came from this island to Nevis of this unhappy event: and therefore Peter (who, as Jasper Thomas swore, was one of the negroes who rowed the canoe which brought the prisoner to Nevis) could not then speak what he did, from the information of others, but of his own knowledge only; and as the deceased actually was found murdered at that time, either what he said of the prisoner was a necessary truth, or he must have known that mischief was done, by inspiration. And now, gentlemen, as either of these two circumstances singly, speaks so exceeding strongly, what is not the force of them when put together? 'Tis plain there could be no combination or confederacy between these two negroes, Coomy and Peter; and therefore for the former to say, on the spot, and on the instant of the murder committed, that Mr. Barbot had killed his master; and the latter so soon after, at the distance of several leagues, that he feared Mr. Barbot had done mischief; amounts to a demonstration that both must have spoke truth: and when to this we join all the intermediate circumstances, and the tracing the prisoner from place to place, the whole composes the fullest and most invincible proof, without a possibility of perjury or mistake in the matter, that ever was made of any fact whatsoever. And therefore,

It is to little purpose that the prisoner has asked, Did no other person than himself make a will such a day? Did no other person go in a canoe? Was no other person out at such an hour of the night? Did no other person fire at a mark with pistols? For were these questions singly asked, there is no doubt but there might be many persons, of whom each of these matters might with truth have been separately affirmed. But, alas! that is not the matter! For of what avail were this to the prisoner's defence, unless there were other persons of whom all these together might be also affirmed? And therefore, the only way of asking these questions materially to this purpose, were in this manner; Was there any other person who had words of heat with the deceased on the 7th of November?—who made such a decla-

ration on the 10th?—who was firing at a mark with pistols on the 12th?—who hastily made a will at a tavern, and delivered it out of his own custody on the 18th?—who the same night left his bed and house at midnight; and the next morning was seen flying from the place where the deceased was murdered, just after he was so? And then, if there be any one else, of whom only half these circumstances can with truth be affirmed, we may safely allow all these, in the case of the prisoner, to go for nothing.

And here, in speaking of flying from the place of the murder committed, I cannot but observe how vastly stronger is the presumptive proof against the prisoner, than that in the case put by my lord Coke, and which I just now read to you. For there was only that single circumstance; but here is the same accompanied with twenty others, which of themselves had availed to convince any reasonable person's mind, who must have committed the murder, even without the seeing him fly from the spot.

Gentlemen, I shall but just add; the prisoner cautioned you against suffering your passions to be unduly worked upon by the eloquence of the counsel, and being misled by their rhetoric into a belief of his guilt. For my own part, I pretend to no mastery over the passions, or other talent of the sort; and did I even imagine I were possessed of such, I should think myself most warranted to use it on an occasion like this. The present case is a case of blood, where the ornaments of speech, and the arts of rhetoric, to inflame the passions, and blind the reason, however justifiable they may be in a prisoner on his defence, are certainly not candid or allowable on the part of the prosecution. The single question in the case is of mere fact, to wit, whether the prisoner committed the murder? And therefore I have confined myself to such reasonings and arguments only, as I thought conduced to the better finding out the naked truth of that; and can truly say, I have urged nothing to your consciences, which did not seem right and just to my own. For,

I should think the offering to mislead or abuse yours, were doing my own the greatest injury.

You will therefore, gentlemen, consider the whole together; and if, upon the whole, you believe in your consciences the prisoner did not commit this murder, God Almighty forbid you should condemn him; and if you believe in your consciences he did commit it, God Almighty forbid you should acquit him.

Mr. Kerr. May it please your honours; Mr. Solicitor, in his reply, has so fully answered every objection of the prisoner, that it were needless to trouble your honours further on this occasion. I shall only beg leave to observe one thing which has been omitted by Mr. Solicitor, and that is, that the cases which have been quoted by the prisoner, I will venture to affirm, are not in any book of antho-

rity now extant; so that I am really inclined to believe they are cases of Mr. Frye's own making.

Mr. President. Gentlemen of the Jury, this trial has taken up a great deal of time, and been attended with a variety of circumstances. I shall therefore, as briefly as possible, sum up the evidence, and make such observations as occur to me, with as much perspicuity as I am able.

The first witness produced by the counsel for the king, was Mr. Carew, who says, that at the sale of the estate called Bridgewater's, on the 7th of November last, the prisoner and the deceased being present, he heard the prisoner say to the deceased, That he expected to be treated like a gentleman, or words to that effect. These words, the witness says, were spoke, he believes, in answer to something the deceased had said to the prisoner, which the witness did not hear.

The next witness is Mr. Thomas Mills, who was also present at the sale of Bridgewater's estate. He says, that the prisoner objected to the conditions of sale, and that the deceased (apprehensive that he did it with design to protract the time till sun-set, after which the estate could not be sold on that day) said to the prisoner, Mr. Barbot, the conditions of sale are very fair, why will you cavil about them? To which the prisoner replied, I expect to be treated like a gentleman, or words like these: that to this the deceased made no other answer, than that he should always treat him and all mankind as such. This witness says also, that the prisoner's whole behaviour appeared to be calculated to delay the sale. He says too, that he verily believes the prisoner and the deceased never saw each other from the day of the sale, till that of the murder; for that he either saw the deceased, or heard from him, every day after the sale, till he was killed; but he does not know whether they had any other conversation the day of the sale; for he left them together in the room where the estate was sold. You will observe, gentlemen, that the testimony of Mr. Carew and Mr. Mills corroborate each other.

The next witness is Mr. Armour, who says, that between the 3d and the 7th of November last, he was in company with the prisoner at Mr. Constantine's door, and heard him say, that Mr. Mills had treated him in such a manner as ought never to be forgiven. Mr. Armour indeed says, that the prisoner did not particularly mention which of the Millses it was that had treated him thus; but he understood that it was the deceased he meant. I would make one short remark here. The prisoner himself has declared he never had any difference with either Mr. Thomas Mills, or Mr. William Mills; and as there was no other man of the name of Mills in this island but the deceased, you will judge from the event, who it was the prisoner meant in that conversation with Mr. Armour.

The next witness that is called on the part of the crown is *Patience Dorset*: She tells you, that on the king's birth-day she saw the prisoner standing under the gallery at *M'Cabée's* tavern, talking to two persons whom she does not know, and in passing by she heard him say, There was a certain gentleman in this island, that within a fortnight he would either kill or be killed by. She is very positive that it was on the king's birth-day she saw the prisoner, and heard him say these words, from two circumstances; the first, That *Mrs. M'Cabée* sent for her that day to assist in providing an entertainment for the lieutenant-general and his company; and the other, That she heard a great many guns fired. The king's birth-day, you all remember, (I suppose) was celebrated on the 10th of November. Now, if you will compare what the prisoner said to *Mr. Armour* before the 7th, his behaviour to the deceased upon the 7th, and the declaration he made on the 10th, in the hearing of *Patience Dorset*, I think there is too much reason to imagine it was the deceased he meant, when he threw out that menace.

Dr. James Webb is then called. Before this gentleman was examined, I confess, I expected he would have fully proved the fact upon the prisoner; for, from the close connection and intimacy between them, I thought it highly probable he might have known something, if not the whole of this matter. And from the character of the doctor; his education, and rank in life, I took it for granted he would have candidly and ingenuously related all that he knew concerning this unhappy affair. But, I own, I was no less surprized than concerned, to find that every thing which came from him, tending to bring this matter to light, was extorted with seeming violence; and that he readily told all that he thought would obscure and hide the fact. He says, That he has known the prisoner between four and five years; that he has frequently employed him as an attorney; and that he lives in great intimacy with him. That he was present at the sale of *Bridgwater's* estate on the 7th of November last, where the deceased and the prisoner also were; that the estate then belonged to himself, and was sold for his debts. He does not know what were the conditions of sale; but he remembers to have heard the prisoner say, We will be bound as far as by law we can be bound. He does not recollect any other words passing at the sale, only hearing the deceased say to the prisoner, Let us have no school-boy's play, or something to that effect. He did not hear the prisoner make any answer to this; for he was at that time, he says, so distracted and confused at having his estate sold, that he gave very little attention to what passed. He tells you, that the prisoner, at his request, purchased the estate for him. This really seems strange and unaccountable, that a man whose estate was then selling, and who had procured a friend to purchase it for him, should be so inattentive, as not to re-

collect what the conditions of sale were; and it is as extraordinary, that a man should buy an estate without knowing on what conditions. He says, he does not know how long the deceased stayed at *Nevis* after the sale, or whether the prisoner ever saw him after. That the day after the sale he saw the prisoner, but does not recollect that any conversation passed between them on the business of the preceding day, or that the name of the deceased was mentioned by the prisoner. This is very amazing, that a man, in an affair so near his heart, and which had thrown him into such confusion and distraction of mind, should not the next day, on seeing his friend who purchased his estate for him, make some enquiry about the event of the preceding day. But this gentleman's memory is fatally treacherous to him; for he, in almost the same breath, says, he thought the terms of sale too hard, and advised the prisoner not to sign them. From hence it plainly appears, that *Dr. Webb* was well acquainted with the conditions of sale, and must have had some conversation with the prisoner about them, or he could not have thought them hard, nor have advised the prisoner not to sign them. He tells you, that the prisoner came to his house on the 16th of November, and stayed there till the 18th, on which day they dined together at *Jacob Saunders's*, and executed a bond of indemnity to *Saunders*, for having indorsed the prisoner's bills for the deposit of the purchase-money of the estate; that from thence, in the evening, he went with the prisoner to *O'Donnell's* tavern, where the prisoner sat down to write; that the prisoner desired him to get three witnesses to attest the paper he was writing; and that he did procure three witnesses, which were *Potts*, *O'Donnell*, and *Springett*, in whose presence the prisoner executed the paper he was writing; and immediately after delivered it to him (*Webb*). He tells you, that he neither read the paper while the prisoner was writing it, nor since it has been in his own custody: and that he is quite ignorant of the contents of it. In this he is manifestly contradicted by his own deposition which you have heard read, and which, as has been proved to you, was taken before judge *Herbert*, at *Nevis*. In that deposition he swears, that the prisoner made his will at *O'Donnell's* on the 16th of November in the evening, and delivered it to him (*Webb*), informing him at the same time that he had made him a legatee in it. He tells you, that after this paper (for he will not now call it a will, though it has been fully proved he knows it to be so) was executed and delivered to him by the prisoner, they both went home together to this witness's house; that the prisoner at about nine o'clock went to bed; that having occasion to get up at about one o'clock, as he was passing through the hall, the prisoner called to him, and asked him what o'clock it was; but that he did not see the prisoner from the time he went to bed, till the next morning, at about nine o'clock, he saw him riding up to the house on one of his

(Webbe's) horses, attended also by his negro boy Pope; that he had on a white coat, a dark-coloured waistcoat, and a silver-laced hat; that he did not ask the prisoner, nor does he know, where he had been; but thinks there was time enough, from the hour he spoke to him the night before, till the next morning that he saw him riding up, to have been at St. Christopher's and back again; that he knew nothing of the prisoner's taking his horse and boy, but that it was very customary for him to take them whenever he wanted them, without asking his leave. He remembers the prisoner having a red trunk, which he brought from Mrs. Dasent's, on the 16th of November; that he did see the prisoner's boy Nero bring a red trunk to his house the morning of the 19th, at the same time that the prisoner was riding up to his house; but he does not know whether that trunk was the same the prisoner brought from Mrs. Dasent's on the 16th, or whether the trunk now produced to him is the same. He tells you, that on the Sunday before the murder, the prisoner and he were firing at a mark with a pair of pistols that belonged to Mrs. Dasent; that Mrs. Dasent, on missing a pair of her pistols, sent to him, to desire he would come to her house; that he did go and assist her in searching for the pistols; that he found them under the bed in a pair of holster caps; but he knew not of their being in that place, nor who put them there: That at the time he was searching for the pistols in the chamber, he observed a red trunk, which he believes belonged to the prisoner, and which he saw opened afterwards by judge Herbert; in which were found, he says, a coat, waistcoat, and some linen, which were moist; that he cannot tell whether the clothes found in the trunk were the same the prisoner had on the 19th in the morning, when he rode up to his house; that he believes the trunk and clothes now produced to him, are the same which he saw at Mrs. Dasent's the morning after the murder. He tells you, that on the 19th, the prisoner dined at Mr. George Webbe's senior, and he himself dined at Mr. Maynard's; that in the afternoon, while he was at Mr. Maynard's, a negro came to him, and told him the prisoner had killed the deceased; that he went soon after to Mr. Symmonds's; that he did not mention there what the negro had told him, though he had a very good opportunity to do it; for while he was there, he says, Mr. Symmonds received a letter, giving an account of the prisoner's having killed the deceased; that he himself also received a note from the prisoner, pressing him to come immediately to him at John Herbert's; that he did not mention at Mr. Symmonds's, having received such a note from the prisoner, though he heard Mr. Symmonds say, he would go and assist the posse in pursuit of him; that he went immediately after to John Herbert's, where he found the prisoner drinking tea; that the prisoner immediately took him out into the necessary-house, and asked him if he had heard the re-

port of his having killed Mr. Mills; that he answered, Yes; that the prisoner replied, he should not fly for it, for he knew nothing of it. He tells you, that this was all the conversation that passed between them at that time; that while they were in the necessary-house, the officers of justice apprehended the prisoner; that the prisoner took him aside in Mr. Herbert's hall, after he was apprehended, and desired him to get ten pistoles from his uncle Webbe for him; that he saw the prisoner while he was in gaol at Nevis; that all the conversation he had with him there was, desiring him to make over Bridgwater's estate to him. He tells you, that he never knew that the prisoner had any resentment against the deceased; that he knew nothing of his boy Pope's having been at Bridgwater's estate the night before the murder; that he did not send Pope out any where that night, and did not know that he was gone out; that he himself was not sent for by any of his patients that night; and that it was so boisterous a night, as he should not have gone out in for pleasure.

Upon the whole of Dr. Webbe's evidence, his inclination to serve the prisoner very plainly appears: but from his want of candour and ingenuity, from the many prevarications he has been guilty of, and the manifest contradiction between his deposition at Nevis, and his examination on the trial, his evidence, instead of answering the intention of his giving it, serves rather to fix a strong suspicion of guilt on the prisoner.

Mr. O'Donnell, who was the next witness, says, that the prisoner and Dr. Webbe came to his house between seven and eight o'clock in the evening on the 18th of November; that the prisoner called for pen, ink, and paper, and sat down to write; that while he was writing, he called Dr. Webbe to him several times, and they spoke together in a low voice; that Dr. Webbe looked over the prisoner frequently while he was writing; that as soon as the prisoner had finished what he was writing, he went with Dr. Webbe into an inner room; that after some little time Dr. Webbe returned, and desired him, with Potts and Springett, to go in and witness a paper; that the prisoner did execute a paper in the presence of Potts, Springett, and this witness; that he knows not what the paper was, but believes it was a will, because there were three witnesses to it; that the prisoner, after he had signed the paper, put his thumb on the seal, and pronounced some words, but so inarticulately, that he could not distinguish what he said; that the prisoner covered with his hand the place where the attestation is usually written, so that he could not see it. He tells you, that as soon as the prisoner had executed this paper, he delivered it to Dr. Webbe.

Charles Potts is then called. He says, that on the 18th of November last, being at O'Donnell's in the evening, somebody called to him, and told him he was wanted in the inner room; that he went in, and the prisoner desired him

to witness an instrument of writing; that he, together with O'Donnell and Springett, did witness a paper, to which he saw the prisoner sign his name; that the prisoner put his thumb on the seal, and took it off again, but does not recollect that he heard him say any thing; that he took the instrument of writing to be some deed to secure Jacob Saunders, because he met the prisoner and Dr. Webbe coming from Saunders's that day. I cannot help observing, that this is a very weak reason for supposing it to be a deed to secure Saunders; for had it been really so, there could be no necessity for keeping it such a profound secret; and, in the next place, it is very natural to suppose, they would have executed any deed of that kind at Saunders's house, when they executed the bond of indemnity to him. He tells you, that he never knew that the prisoner had any resentment against the deceased, but that, on the contrary, he has heard him often express great regard for him.

The next witness that is called is Thomas Hobson. He tells you, that on Saturday night, the night before he heard the deceased was murdered, Dr. Webbe's boy Pope came with a horse of his master's at midnight, to the house where he (Hobson) lives, on Bridgewater's estate, and said he had been round the island looking for his master; that Pope and the horse were both wet; that Pope put the horse in the stable, and stayed there all night. He tells you, that about eight o'clock the next morning (which was the day on which he heard of the murder) he saw a little man coming up to the house in a white coat, and silver-laced hat; that as soon as he came up to the steps, he called for Pope, and ordered him to saddle the horse; that he asked Pope which road he should take; that Pope shewed him the shortest way to Mr. Pinney's, where Dr. Webbe lives; and that he got on horseback, and rode away: he believes he came from the Bay; and that his shoes were wet. He tells you, that the prisoner at the bar is the very man who came to his house on the 19th in the morning, and whose dress and person, with the other circumstances, he has described to you.

Sarah Hobson, the sister of Thomas Hobson, is called next; but as her evidence agrees in every particular with that of her brother, I think it is needless to repeat it to you.

The next witness on the part of the crown is John M'Kenley. He tells you, that between four and five o'clock in the morning on the 19th of November, as he was lying on his bed, Coomy, a negro belonging to the deceased, rushed into his chamber, and, in great fright, told him, that his master was fighting at Frigate-Bay, with a gentleman from Nevis; that he immediately got up, and ran down to the Bay, where Coomy, being on horseback, had got before him; that he found Coomy supporting the deceased; that he went up to him, and took hold of his hand, and spoke to him; that he made him no answer, nor had no pulse; that he found then he was dead, though still

warm, and was but just expired. He tells you, that on enquiring of Coomy who it was that had killed his master, Coomy told him it was the prisoner, and that he was just gone off in a canoe; that he immediately ran down to the sea-side, and saw a canoe, with four oars and a paddle, making very fast from the shore, and somebody in white sitting in the stern of it, but he could not distinguish whether it was a white person or a negro; that the deceased had on his great coat and gloves; that his pistols were in the holsters on his horse; and his sword in the scabbard, wrapped in the belt, at some distance from him.

The next witness is William Johnson. He tells you, that about six o'clock in the morning, on the 19th of November last, as he was coming down from the Salt-ponds, he saw the prisoner in a canoe, with four oars and a sail, between forty and fifty yards distant from him; that the canoe seemed coming from Frigate-Bay, and was rowing towards Nevis; that the prisoner had on a white coat, a silver-laced hat, and a dark-coloured waistcoat; that he knows the prisoner very well; that he could see all the way between the place where he met the prisoner, and Nevis; and that no other canoe was in the channel, but that in which the prisoner was. The prisoner and his counsel have attempted to discredit the testimony of Johnson, by saying he was publicly whipt for petty larceny at Montserrat; and that he could not positively swear before the coroner's inquest, that it was the prisoner he saw in the canoe. But they should, to have effected their purpose, have produced the record of Johnson's conviction, without which, a bare assertion of his guilt ought to have no weight with you. With regard to his refusing to swear positively to the prisoner before the coroner's inquest, I think he swore as every cautious man ought to do, that he verily believed it was the prisoner he saw in the canoe; but after he had, for his better recollection, seen him in gaol, he was certain, and has now, as you have heard, positively sworn it was the prisoner he saw in the canoe. And besides, Mr. Wilson's evidence does entirely acquit Johnson of any ill design against the prisoner, and does certainly strengthen his evidence; for Mr. Wilson swears, that Johnson brought him a letter from Montserrat the morning the deceased was murdered; that having heard the report of the murder, he told Johnson, that the deceased was killed by the prisoner; at which Johnson expressed a good deal of surprize, and said, that he had met him that morning in a canoe going to Nevis. From this circumstance, I think, Johnson's evidence ought to receive its full credit.

Jasper Thomas, and his son John Thomas, are next called. They both agree in their evidence, and tell you, that between six and seven o'clock in the morning, on the 19th of November last, they saw a canoe belonging to John Cribbe land under the manchineal trees, just under Lowland-Church, at Nevis; that

as soon as the canoe struck the shore, the prisoner jumped out of it; that a little yellow negro boy jumped out at the same time, with a small red trunk on his head, and went towards the town; that Hulburd's Peter, and Deverade's Joe, were in the canoe; that the prisoner had on a whitish coat, and a silver-laced hat; that they saw the canoe about 1,500 yards before she came to land; that she was under sail, and did not strike sail till she landed; and that she seemed coming from the Salt-ponds.

William White is then called. He tells you, that on the 10th of November in the morning, as he was at work at Mr. Woodley's estate, he saw a little man in a brown coat and a laced hat, whom he knew to be the prisoner, walking up the road that leads to Bridgwater's estate; that he believes he came from the Bay; that he knows the prisoner very well, and is certain he is the person he saw.

The next witness is Mr. Bridgwater, who tells you, that between nine and ten o'clock in the morning, on the 19th of November, he saw the prisoner, on a sorrel horse belonging to Dr. Webbe, going the nearest way to Dr. Webbe's house; that on the same day in the afternoon he went to Mr. Symmonds's; that while he was there, Dr. Webbe came in; that presently after, Mr. Symmonds received a letter, giving him an account of the prisoner's having killed the deceased; that as soon as Mr. Symmonds mentioned it, Dr. Webbe changed countenance, and said that the prisoner had lain at his house the night before; that Mr. Symmonds asked Dr. Webbe if he had seen the prisoner that morning; that Dr. Webbe said he had not seen him since the night before; at which this witness expressed a good deal of surprise, and said he had seen the prisoner that morning riding towards his (Webbe's) house, on one of his horses; that to this Webbe made no answer, but, in about five minutes went away, and said he was going up towards the mountain.

John Cribbe is then called, who tells you, that on the Friday before the deceased was killed, the prisoner hired his canoe to carry some letters to St. Kitt's; that she returned the next day in the afternoon, and the negroes that belonged to her took her (as he thought) to go a fishing; that he did not see them again till about eight o'clock the next morning, which was the day he heard the deceased was killed; that he went to Peter, one of the negroes belonging to the canoe, and asked him, What luck? (supposing he had been fishing;) that Peter answered him, Poor luck! and seemed very melancholy and thoughtful; that upon enquiring the reason of it, Peter told him he had been to St. Kitt's with Mr. Barbot, who, he was afraid, had done a great deal of mischief, for he believed he had killed Mr. Mills. He tells you, it was about ten o'clock in the morning when he had this conversation with Peter; that at that time he had not heard, either by common report, or otherwise than from Peter, of the death of the deceased; and indeed from

the evidence of Quin, which immediately follows, he could not have heard it from common report; for Quin tells you, he was the first that carried the news to Nevis, and that he did not arrive there till eleven o'clock. This makes it highly probable, that what Peter said was too true.

Mrs. Dacent is then called. She tells you, that on the 19th of November last, hearing that the magazine was broken open, and of the murder of the deceased, she ordered all the arms in her house to be searched for; that missing a pair of pistols, she sent to Dr. Webbe, who came to her, and after searching a good while, at last found the pistols under the bed; that the prisoner's trunk was in the room where the pistols were found, but she knew not of its being there 'till that day, nor how it came there; that she saw the trunk opened, in which were found a brown waistcoat and a pair of black breeches, which she believes belonged to the prisoner; that she believes the trunk and clothes now produced to her, are the same she saw opened at her house by judge Herbert.

Judge Herbert, who is the next witness, tells you, that the day after the murder he went to Mrs. Dacent's, where he saw the pistols, with the trunk and clothes which have been produced to him; that the clothes were wet, and he believes with salt-water; for, on touching the waistcoat with his tongue, he found it salt. He also tells you, that being at Mr. Colhoum's, where the body of the deceased was brought on the day of the murder, he searched the pockets of the deceased, and found in his breeches pockets three bullets.

Mr. Pringle and Mr. Baker are then called, who tell you, that being at Mr. Colhoum's on the day the deceased was killed, they examined his pistols, which they know to be the same that are now produced; that they could not, upon the most careful examination of them, perceive the least stain of powder on either of them, except about a grain or two, which they supposed to have been bruised by the hammer; that they are convinced neither of the pistols had been lately discharged; for Mr. Baker having put his finger into the barrel, there came off on it a rusty dirt, which he tells you would not have been there, if the pistols had been lately fired out of. They also tell you, that upon examining the clothes of the deceased, they found on the right flap of his coat, and the inside of his great coat, on the right side, a stain of dry powder.

The Counsel for the Crown, to corroborate and support the evidence of Patience Dorset, have produced Martha Scooper, Mary Sutton, and Mary Cockade, with whom they conclude their evidence. The two last swear positively that the prisoner was on this island on the king's birth-day, and are so very circumstantial in their evidence, that I think they cannot be mistaken. For Sutton has very particularly described his dress to you, and Cockade has also sworn to some particular words she heard him say in M'Cabe's tavern on the king's

birth-day. The evidence of Scooper is not so positive as that of the other two, but it serves to strengthen and give weight to what they have sworn.

The prisoner, in his defence, positively denies his having had any resentment against the deceased; says, it was very easy for him to have made his escape, if he had been guilty of the crime laid to his charge, and that it was natural to suppose he would have done so; that the firing the pistols the Sunday before the murder, was merely accidental, and to amuse himself; that he was not on this island on the 10th of November. He then calls his witnesses, the first of which is Mrs. Lowman. She is positive that the prisoner was at her father's on the 10th of November; that in the morning of that day he went with Daniel to Mr. Outley's, and returned and dined at her father's; that on that same day she herself dined at her brother George Webbe's, in company with Mr. William Herbert. In the first of these circumstances she is contradicted by the evidence of Mrs. Outley and Miss Anne Herbert, who tell you, that it was on the 9th of November the prisoner and Daniel came to Mrs. Outley's; in the other she is also contradicted by William Herbert, who tells you, that it was on the 9th of November he dined at young George Webbe's, in company with Mrs. Lowman, and on the 10th he dined at Mr. Cole's; so that Mrs. Lowman must be mistaken in the day. Mr. Josiah Webbe, the brother of Mrs. Lowman, is next called. He cannot swear positively; but he believes the prisoner was at his father's on the 10th of November.

John Cornelius is the next witness. He is positive that the prisoner was at old Mr. Webbe's on the 10th of November; but the contrary has been proved by so many witnesses on the part of the crown, supported with such strong circumstances, that Cornelius must certainly be mistaken in the day.

Mr. Julius was also called upon by the prisoner to prove that Johnson, one of the witnesses against him, could not swear positively to him before the coroner's inquest; but the observations I have already made on that part of Johnson's evidence, will be sufficient, without repeating to you that I think Johnson's evidence a good one, and ought to have its proper weight with you.

These are the witnesses produced by the prisoner, that seem to be any ways material in his favour: He has, indeed, called many others to prove his being at Nevis on the 10th of November; but they have all failed in this circumstance, which would have been of great consequence to him, if he could have established it; as it would have effectually invalidated the evidence of Patience Dorset, and the rest, who swore to his being in this island on that day.

I have, as well as I have been able, gentlemen, given you the substance of the evidence on both sides, in which I hope I have omitted nothing material.

VOL. XVIII.

I must observe to you, that in cases of murder, and the like atrocious crimes, the law has relaxed much of its severity and scrupulousness in the proofs, and does not so absolutely require such positive proof as in matters of *meum* and *tuum*, where they may be had, but in these cannot: For no man who knows, or even imagines, that his life must answer for the perpetration of a deed, will call eye-witnesses to it; but will, with as much secrecy as his invention can supply, execute his intention; and to admit none but positive ocular proof, would be rejecting all, and proclaiming impunity.

It has been justly observed to you by the counsel for the crown, that the law, where the circumstances are so closely connected and linked together, as in this case, and amount so fully to what is called a *violenta presumptio*, admits this as full proof, and in my opinion, more so than any one positive evidence, whose memory may be deceitful, or who may possibly be suborned; but in facts made appear from circumstances which are dumb, we cannot be deceived; nor they falsely charge, or partially excuse.

The circumstances of this unfortunate affair hang so closely together, that they carry too glaring a proof to admit of much doubt, by whose hand Mr. Mills fell.

Mr. Armour declares, that he heard the prisoner say, between the 3rd and 7th of November, that Mr. Mills had treated him cruelly, and in such a manner as ought never to be forgiven: The prisoner has acknowledged, he had never any difference with Messieurs Thomas and William Mills, it then could have been none but the deceased he meant: Though this the prisoner denies, and says, Mr. Armour must have misunderstood him.

Patience Dorset swears, that she heard the prisoner declare, on the 10th of November, that he would either kill or be killed by a person of distinction in this island, in the course of ten days. Mr. Mills is found dead in a remote part of the island on the 19th, within the time limited; and by the evidence now given in court, by the gentlemen who opened the body before the coroner's inquest, it appears that he had been killed by a bullet, or some other substance discharged from a fire-arm. From the evidence of Armour and Dorset, a prepossession malice appears; and a life taken away through such malice prepossession, in the eye of the law and man, is deemed murder in the highest degree.

The prisoner too, in a precipitate manner, and in a tavern, the night before Mr. Mills was found dead, executed his will; in his defence he acknowledges the deed executed at O'Donnell's to have been such: Had he not been conscious that he might have ran some risk of losing his life the next morning, why in such a place, and in such a manner, draw and execute a deed of so nice a nature, and of such consequence, as his will? But the time, by Mrs. Dorset's evidence, which it appears he had limited to his own life, or a person's of distinc-

tion in this island, was near expired, therefore necessary such a deed should be executed.

The next morning Mr. Mills is found dead. The prisoner is declared by Coomy to be the person by whose hand his master fell: And though by law this is not evidence; yet by Mr. M'Kenley's evidence, who declares he saw a person rowing in a canoe, from the place from whence Coomy had told him the prisoner embarked, describing his dress; which person he immediately after met by Johnson, who personally knows him, describes him to be dressed in the same manner, and declares that no canoe was then at sea, but the one in which was the prisoner: that he could distinctly see the whole passage from Frigate-Bay, the place where Mr. Mills then lay dead, to Nevis, where the prisoner was seen to land by Jasper Thomas and his son, who declare that they saw the canoe coming from St. Christopher's, describe his dress to be the same as M'Kenley and Johnson: Jasper is so particular as to name two of the negroes who rowed the canoe, one of which (Peter), as appears from Cribbe's evidence, and which strengthens and is strengthened by Coomy's declaration, says, That he had been that morning to St. Kitt's with Mr. Barbot, who he feared had done a great deal of mischief, for he believed he had killed Mr. Mills. And as this declaration of Peter's was made to Cribbe, before the account of Mr. Mills's death had reached Nevis, as appears from Quin's evidence, who was the express bent up in search of the prisoner, and the two slaves were four or five leagues asunder, and could not have seen each other from the time of the commission of the fact, to this declaration of Peter's; this could not have been by them concerted, and of itself carries so much weight, as to merit some attention. Again, Thomas Hobson and sister declare, that in the morning of the day on which they heard the account of Mr. Mills's death, they saw a little man, whom they know to be the prisoner, coming up from the Bay; that he came to their house, and asked for Dr. Webbe's boy Pope: When the boy appeared, he did not ask if he had got a horse, but ordered him to saddle the horse: From this then it is evident that he knew the horse and boy were there, or he would not have called so immediately for Pope, and ordered saddling the horse. Dr. Webbe too proves that the horse and boy must have been taken out of his stable by the prisoner; for he declares, that he himself had not that night been called out by any patient, nor had he sent that boy on any message. These evidences describe the same dress as the preceding ones. Other evidences have been produced by the king's counsel, who described the same dress, and traced the prisoner to Dr. Webbe's where the doctor acknowledges his arrival, dressed also in same manner, as every other evidence had.

From such a chain of evidences, who were separated from each other in different islands,

persons no ways connected, and so exactly tallying with each other, little room, as I said before, can be left to doubt.

It was essentially incumbent on the prisoner, for his own sake, to prove where he was, from the time he went to bed at Dr. Webbe's on the 18th of November at night, to the time he was seen to land at Nevis, on the 19th in the morning; but this he has not attempted to do.

Lest you should have entertained a notion, that the killing a person in a duel is not murder in the eye of the law, as the life of each in such an encounter runs an equal risk; I assure you, gentlemen, the law makes no such distinction, even in cases of fair duels. If from the evidences you are satisfied, that Mr. Mills fell by the hands of the prisoner, and that he had a malicious intent, the law makes it murder as much in this case as any other.* The prisoner in his defence to clear himself, says, from his known and past conduct in life, there is no reason why he should be even suspected of engaging in a duel: but from the evidences of Messieurs Pringle and Baker, that the pistols of the deceased had never been discharged, or even were they loaded; and from his sword's belt being buckled round the hilt, and at a distance from him, as appears from M'Kenley's evidence; and from the direction of the ball or substance which pierced the body of the deceased, which entered so far backwards, and struck on the opposite side so far forwards; and of which Messieurs Hamilton and Edwards declare, to the best of their knowledge and belief, Mr. Mills died, and that he could not have received the wound in a posture of defence: from these circumstances it must be left to you, upon the evidences, to consider whether this was even a fair duel.

I shall detain you, gentlemen, with but one more observation, which is, that no person but the prisoner has been proved or known to have declared a resentment to Mr. Mills, the deceased; no person but the prisoner was seen going from the place where Mr. Mills was found but just expired; and no person of distinction in this island killed but Mr. Mills.

All circumstances of persons, time and place, must be well considered. It is also your duty to weigh the evidences that have been offered to you, and to judge from thence, whether the prisoner is guilty of the murder wherewith he stands charged, or not guilty; and in considering this matter, let me recommend to you, that you divest yourselves of any impressions that may have been made on you from the relation of this fact out of doors, and that you consider merely the evidence given you here on the trial.

If, upon the whole, you believe in your consciences, that the prisoner committed the fact of which he stands indicted, you will find him guilty: but if, upon the whole, you do not be-

* For the law respecting homicide in duels, see East's Pleas of the Crown, chap. 5, ss. 18, 24, 54.

lieve in your consciences that he committed it; you are to find him not guilty.

Then the jury withdrew, and in about half an hour returned.

Cl. of Arr. Gentlemen, are you all agreed on your verdict?—*Jury.* Yes.

Cl. of Arr. Who shall say for you?

Jury. Our foreman.

Cl. of Arr. John Barbot, hold up thy hand (which he did). Gentlemen of the jury, look upon the prisoner: How say you, is John Barbot Guilty of the felony and murder whereof he stands indicted, or Not Guilty?—*Jury.* Guilty.

Cl. of Arr. What goods or chattels, lands or tenements, had he at the time of the said felony and murder committed, or at any time since, to your knowledge?—*Jury.* None.

Cl. of Arr. Hearken to your verdict as the Court hath recorded it. You say that John Barbot is guilty of the felony and murder whereof he stands indicted; and that he had not any goods or chattels, lands or tenements, at the time of the said felony and murder committed, or at any time since, to your knowledge; and so you say all.

Cl. of Arr. John Barbot, hold up thy hand. You have been indicted of felony and murder. You have been thereupon arraigned, and pleaded thereto Not Guilty, and for your trial you have put yourself upon God and your country, which country have found you Guilty. What have you now to say for yourself, why the Court should not proceed to give judgment of death upon you according to law?

Prisoner. May it please your honours, there is a fault in the indictment. The fact is laid to have been committed at Frigate-Bay, in the parish of St. George Basseterre, and Frigate-Bay is in the parish of St. Peter.

Sol. Gen. May it please your honours, the prisoner, admitting it were as he says, is too late in his exception. That is a matter of fact, and if it had been material, (which it was not) ought to have been shewed on evidence; but cannot be made use of in arrest of judgment. However, the truth is, there is no such mistake as he mentions in the indictment; for Frigate-Bay is actually in the parish of St. George, and if it were necessary we could prove it.

Prisoner. May it please your honours, I have nothing more to say.

Mr. President. John Barbot, you have been indicted for the murder of Matthew Mills, esq. and for your trial, have put yourself upon God and your country: that country has found you guilty.

You have had a long and a fair trial. You have challenged many who were called up as jurors, though not the whole number you were intitled to by law; so that I may with justice say, you have been tried by a jury, to which you yourself had no exception.

I am sorry it falls to my lot to acquaint you, that I am no longer at liberty to suppose you innocent.

You are convicted of a crime the most horrid and dreadful in itself: a crime attended with the most aggravating circumstances. You have deprived the world of one of its most worthy and useful members; and rendered unhappy numbers of persons, who drew the means of subsistence immediately from the bounty and benevolence of the unfortunate gentleman deceased.

It is hard to conceive what provocation you could have received from a gentleman of so mild and gentle a disposition as the deceased was, to induce you to perpetrate an act so shocking. But I would advise you, as some kind of atonement for the crime you have been guilty of, to make a full confession of the whole matter. Let me recommend to you also, to employ the little time you are likely to continue in this world, in endeavouring to make your peace with that great God, whose mercy is equal to his justice.

Nothing now remains but to pronounce the sentence of the law upon you, which is,

‘That you are to be carried to the place from whence you came, and from thence to the place of execution, where you are to be hanged by the neck until you are dead: And may God of his infinite mercy receive your soul!’

The Prisoner then addressed himself to the Court in this manner:

Barbot. May it please your honours; Since it can no longer avail me to conceal the fact, I will make a frank confession of the whole.

That I did kill Mr. Mills, is most true.—That I killed him fairly, is equally true—fairly according to the notions of honour prevailing among men. From these false principles of honour I was induced to engage in the unhappy duel, which in its consequences deprived the world of so worthy a gentleman, and has involved me in these unhappy circumstances. False I am convinced they are, notwithstanding the countenance they receive from the daily practice of the world.

I make no doubt but that the words which Mr. Carew and Mr. Mills have sworn, did pass between the deceased and myself at the sale of Bridgwater's estate, though I cannot now recollect that they did. But this was not the cause of the duel.

The provocation I received from Mr. Mills was this:

After I was declared the purchaser of the estate, I sat down to draw the bills of exchange for the deposite. While I was about them, Mr. Mills came and looked over me, and observing that I had made them payable at ninety days sight, he objected to them, and asked me if I knew what I was about, and insisted on having the bills drawn at a shorter sight: To which I answered, That I was sure he must know it was usual for bills of so large a size to be drawn at a long sight. I told him further, that I apprehended he had no right to object to the bills at all, if the marshal agreed to accept

them as they were drawn. To this Mr. Mills replied, "Sir, you are an impertinent puppy." I took no notice of this till after I had finished the bills, and then I took him aside, and spoke to him to this effect: That I little expected to receive such treatment from a gentleman of his known politeness and good-breeding; that, as I was not conscious of having deserved it, I desired he would make me some apology for it. He replied, That he would not make me any apology; but that, if I thought myself injured, he was at my service when properly called upon. I made him no answer, but immediately left him; and, on the Thursday following, I wrote him a letter, telling him, that since he had done me the honour to assure me he would beat my service whenever I should call upon him, I expected he would meet me by dawn of day the next morning, near Lowland-Church, armed with a case of pistols only. Mr. Mills sent me an answer to this; and there were six letters in all passed between us, three from him, and three from me, which I do not now recollect, for I destroyed them*, though I believe I shall be able to remember the substance of them. The last I received from him was, that he would meet me at the time and place appointed, which was Frigate-Bay. The night before the duel, I made my will at Mr. O'Donnell's, and delivered it to Dr. Webbe. The doctor put it in his pocket without reading it, and we immediately went home to the doctor's house, where I went to bed soon after I arrived. At about one in the morning I heard the doctor up, and called to him: He answered me, and went out; and as soon as he came in and returned to bed, I got up, and went with Pope to the stable, and saddled one of the horses, which I immediately mounted, directing the boy to follow me; and rode very fast 'till I passed Mr. Pinney's, where I was overtaken in a very hard shower of rain, that wet me through all my clothes. I rode with all the speed I could till I came to Molton's-Bay, where I had ordered a canoe to wait for

* The prisoner, in a conversation he had with the publisher, while he was under condemnation in gaol, told him, That he had destroyed the original letters which passed between Mr. Mills and himself; but that he had preserved copies of them, which copies he had put in a bottle, and buried in Mr. Pinney's garden (where Dr. Webbe lives) at Nevis. So remarkable a circumstance as this, had it been true, one would think could hardly have escaped him on his confession in court. The omission of this circumstance therefore very justly calls in question the genuineness of the letters, and inclines one too reasonably to believe, from that and some other observations, that the letters which he has given for those that passed between Mr. Mills and himself, are the effect of an after-thought, and were probably formed, during his condemnation in gaol, and sent up by him with directions to bury them at Nevis. *Former Edition.*

me. At first I could not perceive the negroes; but on looking round, I saw them lying under a sail. They immediately got ready, and I jumped into the canoe, and ordered Pope to carry the horse to Bridgewater's estate. The night was very tempestuous, and the canoe was several times near filling with water. I had a phial of rum with me, which I had filled at Dr. Webbe's, and finding myself excessive cold and chilly, I drank a dram of it. When I got to Frigate-Bay, I jumped out of the canoe, and ordered my boy to follow me with my trunk, in which were my pistols. I then seated myself under a privet-hedge, and sent my boy to the entrance of the Basseterre road, to wait for Mr. Mills's arrival. In the mean time I examined my pistols, and fresh primed one of them. I had no sooner done this, than I heard the footsteps of a horse. I arose immediately, and saw Mr. Mills riding fast up to me. As soon as he came near, we saluted each other; after which he immediately alit, and took his pistols out of the holsters, and primed them. While he was priming his pistols, his horse's head being between me and himself, I told him, I had, as I had wrote to him, brought down the letters he had wrote me, and I doubted not he had likewise with him those I had wrote him. I then took out the letters from my pocket-book, and offered them to him: He made me no answer, but hastily ordered his boy to lead away his horse, and putting himself in a posture of defence, presented his pistol at me. I gave his letters then to my boy, and ordered him, in case I should drop, to give them to Mr. Mills. I immediately then presented my pistol at him; which he observing, cried out, Stay, stay! I instantly dropped my pistol, and Mr. Mills said to me, Stay, let me give the letters to the boy; which he immediately did; and then recovering his posture again, himself on one side the road, and I on the other, we presented our pistols at each other. I observed Mr. Mills drew his pistol near his eye, from which I imagined he was near-sighted. About four or five seconds after I had presented, I fired; and Mr. Mills cried, Sir, you have killed me, you have killed me, Sir. I was extremely shocked to see him fall, and I went up to him and said, Sir, I am heartily sorry, I pray God to bless you, but I can stay no longer here. I then ordered his boy to take care of him, and immediately went down to the canoe and jumped in, and ordered the negroes to row as fast as ever they could. I asked my boy, when we were in the canoe, whether Mr. Mills's pistol had snapped. He told me it had; but for my own part, I neither heard it snap, nor saw the flash.

The letters Mr. Mills wrote me on this unhappy occasion were extremely polite; and those I wrote him were in as respectful terms as I was master of. It was Mr. Mills's character, his rank and distinction in life, that engaged me in this unfortunate business; for I should not have accepted a challenge from any man inferior to him.

For myself, my concern for the unhappy fate I shall soon meet with is little, compared to that I feel for the sorrow and affliction it will bring on a tender parent; and the grief and anguish the consequences of this unfortunate duel will occasion to an unhappy lady, when she hears the shocking news of her husband's death.

I must, in justice to Dr. Webbe, acquit him of any concern in the matter. He is perfectly innocent of the cause of my quarrel with Mr. Mills; neither did he know any thing of the duel, either before or after it. One gentleman was acquainted with it; a gentleman whom I asked to be my second, which he refused. I beg to be excused mentioning his name, but he is neither of this island, nor of Nevis.

I am obliged to your honours for the candour and impartiality you have shewn in the course of my trial. You, gentlemen of the jury, I must acknowledge, have acted like upright honest men. Had I been in your place, I should have found the same verdict you have done.

I have nothing now to ask of your honours, but that you would please to allow me a little time to settle my affairs, and to make my peace with God.

To which Mr. President replied, To be sure, you shall have a proper time allowed you.

On Saturday the 20th of January, 1753, the prisoner was executed at the town of Basseterre, according to the sentence pronounced against him.

At the place of execution he delivered the following Paper to the Provost-marshal.

"My friends and fellow-subjects;

"You see me this moment a dreadful instance, how much the human mind may be led away and imposed on by false and empty notions affecting reputation in the estimation of weak and fallible men; even so far as to commit the highest crimes in the sight of God, and daringly to violate all human laws, calculated for the good and safety of society. Let my example be a means to teach men to act more consistently with their reason; and let my punishment deter them from the commission of crimes like mine. And then my death, and that of the unhappy gentleman who fell by my hand, will, I hope, by the benefit the world will receive from the example, make some amends to the community for the loss of two subjects, who might, had it not been for the unhappy fate which attended them, have lived not unuseful members of society."

Mr. Barbot was born in London, where his father, who is a working silversmith, (a man of some substance in the world, and, as it is said, of a good character) still lives. At about fourteen years of age, he was put clerk to Mr. Delaport, an attorney in Staples-inn in London;

with whom he served a clerkship for the usual term of five years. After that time expired, he came from England, in the year 1746, in character of clerk to a gentleman of the profession of the law in Antigua. With this gentleman he lived near two years; and then, having not been very prudent in his conduct, and having besides contracted some debts there to the amount of 2 or 300*l.* currency, he came to Nevis; where he made a very close acquaintance with the family of the Webbes. Having for some time lived a very idle life there; and given away and otherwise unprofitably disposed of, a considerable part of a small cargo of goods, of about the value of 4 or 500*l.* sterling, which his father had sent him to sell, and spent the produce of the rest of it; and being at length reduced to extreme necessity, he came, about three years ago, to this island; where, by a critical scarcity of attorneys at law, he got himself admitted one in the ordinary court of common law; and in the very first year, had such a run of business as to enable him to clear off what debts he owed in the West Indies; which amounted to near 400*l.* currency; and to put a handsome sum of money in his pocket besides. The first year of his being here, he behaved with industry and fairness; but soon after, from a natural dislike to business, and too great a disposition to get money by the most likely means that offered, he greatly neglected his clients' affairs, and fell into a way of buying up desperate debts; which he commonly found means to turn and twist about, as to make them good in the end; by getting still better and better security for them every time he sued for them, and by adding each time the interest and costs: By which means he made them at once larger and more secure. Thus, by the dissatisfactions of many who employed him, and some small imputations he drew on his character; as also by persons of less questionable reputation, and more industry, coming to practise as attorneys in the same court, his practice was greatly reduced: And yet, by one means or another, he became at length worth, as he says, (and, I believe truly) about 800*l.* sterling. His age, by the plate on his coffin, appeared to be but 25: Though I should think he must have been two or three years older: But of this I have no certainty.

For the rest, he had a good school education; and knew Latin, and spoke French, very well. He had made some progress in the mathematics; and knew, and was very apt in figures, and was a tolerable proficient in music. He had a pretty good taste of literature in general; and a good deal of general light reading: But his judgment was by no means solid; and his mind of a romantic cast; though not without something of ingenious in it, and some considerable sprightliness of parts. To which I must add, he was a very ready writer, in either sense of the word; having both great freedom and quickness of hand, and fluency of expression. He was remarkably courteous

in his common behaviour; but his politeness and deportment were of that sort, which is usually distinguished by the name of priggiam: which the littleness of his person (a circumstance well worthy the attention of persons of the same size and turn) contributed to make

much more observable, and thereby to set him in a more ridiculous and contemptible light; as a certain pertness in his manner, and forwardness in his behaviour, with a vanity conspicuous in all he said and did, rendered him often very troublesome and disgusting. *Former Edit.*

527. The Case of Pressing* Mariners, on the Trial of ALEXANDER BROADFOOT, for Murder, Bristol, August 30: 15 GEORGE II. A. D. 1743.

✧ This Case is taken, as was mentioned in the preceding Edition of the State Trials, from the second Edition of Sir Michael Foster's Reports, published by his Nephew Michael Dodson, esq. who added some References and Notes.

ADVERTISEMENT

OF MR. JUSTICE FOSTER.

[This Case, though already in print, hath been thought to deserve a place in this Collection. It is therefore here inserted.

If it be asked, where are the adjudged cases on which the author groundeth his opinion? he freely confesseth, that he hath not met with one, in which the legality of pressing for the sea-service hath directly come in judgment. What this is to be imputed to every reader will judge. A few modern cases there are, from which the legality of the practice may be inferred. [Kel. 59. 136, 137. Comb. 245.] But the author chose to ground himself on much better authorities than inferences from modern reports.]

AT the gaol-delivery holden for the city and county of the city of Bristol, August 30, 1743, Alexander Broadfoot was indicted for the murder of Cornelius Calahan, a sailor belonging to his majesty's ship the Mortar sloop.

The case was thus: Captain Hanway, commander of the Mortar sloop, had a warrant from the lords of the admiralty, grounded on an order of his majesty in council, empowering him to impress, or cause to be impressed, seamen for his majesty's service. The warrant expressly directeth, "That the captain shall not intrust any person with the execution of it, but a commission-officer; and shall insert the name and office of the person intrusted on the back of the warrant."

The lieutenant of the Mortar sloop, (the only commission-officer on board besides the captain) was deputed by him to impress according to the tenor of the warrant.

On the 25th of April last captain Hanway, being at anchor in King-road within the port and county of Bristol, ordered the ship's boat down the channel in order to press as they

should see opportunity. But the lieutenant stayed in King-road, on board with the captain.

Towards evening, the boat came up with a merchantman, the Bremen Factor, homeward-bound, in that part of the channel which is within the county of the city of Bristol, but some leagues from King-road; and some of the crew went on board, in order to press; who being informed that one or two of the Bremen's men were concealed in the hold, Calahan, with three others of the boat's crew, went thither in search of them. Whereupon Broadfoot, one of the Bremen's men, (who had before provided himself with a blunderbuss and pistols for his defence against the press-gang) called out and asked them what they came for: he was answered by some of the press-gang, 'We come for you and your comrades.' Whereupon he cried out, 'Keep back, I have a blunderbuss loaded with swan-shot.' Upon this the others stopped, but did not retire. He then cried out, 'Where is your lieutenant?' And being answered, 'He is not far off,' he immediately fired among them. By this shot Calahan was killed on the spot, and one or two more of the press-gang wounded.

The case being thus, the Recorder (Mr. Sergeant Foster) was of opinion, that the boat's crew having been sent out with a general order to impress as they should see opportunity, and having, in pursuance of that order, boarded the vessel without a proper officer, expressly against the terms of the captain's warrant, every thing they did was to be looked upon as an attempt upon the liberty of the persons concerned, without any legal warrant: and he accordingly directed the jury to find Broadfoot guilty of manslaughter. (a) But this being a case of great expectation, and uncommon pains

(a) As to homicide in the case of an officer acting under an insufficient warrant, or exceeding his duty in the execution of a sufficient warrant, see the cases of Reason and Tranter, vol. 16, p. 1, of Porteous, vol. 17, p. 923, and of Stevenson, 4, p. 1759.

* As to pressing, see Scots Act against wrongous imprisonment 1701.

having been taken to possess people with an opinion that pressing for the sea-service is a violation of Magna Charta, and a very high invasion of the liberty of the subject, the Recorder thought proper to deliver his opinion touching the legality of pressing for the sea-service; provided the persons impressed are proper objects of the law, and those employed in that service come armed with a proper warrant for that purpose.

Captain HANWAY's WARRANT with the IN-DORSEMENT.

By the Commissioners for executing the office of Lord High Admiral of Great Britain and Ireland, &c. and of all his majesty's plantations, &c.

"In pursuance of his majesty's order in council dated the 19th day of January 1742, we do hereby empower and direct you to impress or cause to be impressed so many seamen and seafaring men and persons whose occupations and callings are to work in vessels and boats upon rivers (b) as shall be necessary not only to complete the number of men allowed to his majesty's ship under your command, but also to mann such others of his majesty's ships as may be in want of men; giving unto each man so impressed one shilling for press-money. And in the execution hereof you are to take care that neither yourself nor any officer authorized by you do demand or receive any money, gratuity, reward, or other consideration whatsoever, for the sparing, exchanging, or discharging any person or persons impressed, or to be impressed, as you will answer it at your peril. You are not to intrust any person with the execution of this warrant but a commission-officer, and to insert his name and office in the deputation on the other side hereof, and set your hand and seal thereto. This warrant to continue in force till the 31st day of December

(b) It appears by the report of the proceedings upon the action for false imprisonment which was brought by Dryden Leach against three King's Messengers A. D. 1765, that the four Judges of the King's-bench thought that in ordinary cases, general warrants to seize persons, who were not therein named and described, were illegal. And, by lord Mansfield, C. J. "It is not fit that the receiving of the information should be left to the discretion of the officer. The magistrate ought to judge and should give certain directions to the officer."

It appears by the Case *ex parte Soffly*, Pasch. 41 Geo. 3, 1 East's Reports 466, that by the order of council of December 3d 1800, the Lords Commissioners of the Admiralty were ordered to issue warrants for pressing "seamen, seafaring men, and others, whose occupations and callings are to work in vessels and boats upon rivers." The same is stated to have been the form of the warrant in the case of *Rex v. Tubbs*, Mich. 17 Geo. 3, Cowp. 512.

1743. And in the due execution of the same, and every part thereof, all mayors, sheriffs, justices of the peace, bailiffs, constables, head-boroughs, and all other his majesty's officers and subjects whom it may concern, are hereby required to be aiding and assisting unto you and those employed by you, as they tender his majesty's service, and will answer the contrary at their perils. Given under our hands and seal of the office of Admiralty the 31st of January 1742.*

"By command of
their lordships,
THOMAS CORBETT.

JO. COCKBURN.
GEO. LEE.
J. TREVOR.

"I do hereby depute A. B. a lieutenant belonging to his majesty's ship the Mortar Sloop under my command, to impress seamen, seafaring men, and persons whose occupations and callings are to work in vessels and boats upon rivers according to the tenor of this warrant. In testimony whereof I have hereunto set my hand and seal this—day of ———"

The RECORDER's ARGUMENT. (c)

This question touching the legality of pressing mariners for the public service is a point of very great and national importance. On one hand, a very useful body of men seem (d) to be put under hardships inconsistent with the temper and genius of a free government. On the other, the necessity of the case seemeth to intitle the public to the service of this body of men, whenever the safety of the whole calleth for it.

Before I speak directly to the point, it will be necessary to throw out of the case every thing which doth not enter into the merits of the present question.

We are not at present concerned to inquire, whether persons may be legally pressed into the land-service, or whether landmen may be legally pressed into the sea-service. The present question, I say, is not, whether people may be taken from their lawful occupations at home, and sent against their wills into a remote and dangerous service; into a service they are

* This date is according to the old style I suppose.

(c) This argument of Mr. Justice Foster is examined with very little reverence, and criticised with much acuteness and severity by Dr. Franklin. See his Essays.

In support of Foster was published, "An Essay on the Legality of pressing Seamen:" against him, "A Discourse on the Impressment of Mariners wherein Judge Foster's Argument is considered and answered," and also a Postscript. Many other tracts were published on each side of the question.

(d) It might have been expected that this phrase would give offence to the sanguine friends of the personal liberty of the subject; and accordingly it is censured with much asperity of indignation by the author of "A Discourse on the Impressment of Mariners," &c.

utterly unacquainted with, and possibly unfit for: No; the only question at present is, whether mariners, persons who have freely chosen a sea-faring life, persons whose education and employment have fitted them for the service, and inured them to it,—whether such persons may not be legally pressed into the service of the crown, whenever the public safety requireth it, ‘*Ne quid detrimenti respublica capiat.*’

For my part, I think they may. I think the crown hath a right to command the service of these people, whenever the public safety calleth for it. The same right that it hath to require the personal service* of every man able

* This personal service in cases of extreme necessity is a principal branch of the allegiance every subject of England oweth to the crown. See 11 H. 7, c. 1; and 1 E. 3, c. 5, and 16 and 17 Car. 1, c. 28. Foster.

Of the three statutes to which the learned judge has here referred the first mentioned, (11 Hen. 7, c. 1, “a law” says Bacon, “of a strange nature; rather just than legal, and more magnanimous than provident.” See Bacon’s pithy and quaint reflections on this statute in his life of K. Henry 7. See also Barrington’s Observations on the statute) is already inserted in this Collection, vol. 6, p. 121. The statute next mentioned (1 E. 3, c. 5.) is thus exhibited in the recently published first Volume of “The Statutes of the Realm, Printed by command of his majesty king George the 3d, in pursuance of an Address of the House of Commons of Great Britain; from Original Records and Authentic Documents.”

“Ex magno Rot. Stat. Turr. Lond. m. 29, 1mo Edw. 3, stat. 2, c. 5.

“Item le Roi voet q’ desormes nul soit charge de soi armer autrement qil ne, soit entemps de ses auncestres Roys Deffendre; Et q’ nuls soient destreintz daler hors de leur Countee, si noun p’ cause de necessite de sodeyne venue des straunges enemys en roialme; et adonques soit fait come ad este fait avant ces heures pur defens du Roialme.

“Item, The king will that no man from henceforth shall be charged to arm himself, otherwise than he was wont in the time of his progenitors kings of England; and that no man be compelled to go out of his shire, but where necessity requireth, and sudden coming of strange enemies into the realm;” [see below the translation of stat. 4 H. 4.] “and then it shall be done as hath been used in times past for the defence of the realm.”

This statute was confirmed by stat. 4 H. 4. c. 13, of which so much as relates to the matter before us is as follows:

“A Confirmation of the Statutes of 1 Edw. 3, Edw. Stat. 2, c. 5. 18 Edw. 3, c. 7, and 25 3, Stat. 5, c. 8, touching service in war.

“Item ordeignez est et establiz qe lestatut fait lan primere le Roy Edward Aiel nostre

to bear arms, in case of a sudden invasion or formidable insurrection. The right in both cases is founded on one and the same principle,

Seigneur le Roy qorest contenant qe nuls soient distreintz daler hors de leur countees sinoun pur cause de necessitee de sodeigne venue de strangers enemys en Roialme et lestatut fait lan disoetisme du dit Aiel qe gentz darmes hobelers et archiers esluz pur aler en le service du Roy hors d’Engleterre soient as gages le Roy du jour qils departiront hors de countees on ils feurent esluz et auxint lestatut fait lan vint et quint le dit Aiel qe nul homme soit arte de trover gentz darmes hobelers narchiers autres qe ceux qi tiegnent par tiel service sil ne soit par commune assent et grante faite en parlement soient fermement tenuz et gardez en touts pointz.”

“Item, it is ordained and stablished, That the statute made the first year of king Edward, grandfather to our lord the king that now is, containing, That none shall be constrained to go out of their counties, but only for cause of necessity of sudden coming of strange enemies into the realm; and the statute made the 18th year of the said grandfather, That men of arms, hoblers, and archers chosen to go in the king’s service out of England, shall be at the king’s wages from the day they do depart out of the counties where they were chosen; and also the statute made the 25th year of the said grandfather, that no man be compelled to find men of arms, hoblers, nor archers, other than these which do hold by such service, unless it be by common assent and grant made in the parliament, shall be firmly holden and kept in all points.”

[Of the word *Hobleris* (plur. subst.) Dr. Jamieson in his very learned Etymological Dictionary gives the following explanation:]

“1. A species of light-horsemen, chiefly calculated for the purpose of reconnoitring, carrying intelligence, harrassing troops on a march, tercepting convoys, and pursuing a routed army; the smallness of their horses rendering them unfit to stand the shock of a charge.” Grose, Hist. E. Arm. 1, 106.

Ane hundre thowsand men, and ma;
And XL thousand war of tha
Armyt on hors, baith heid and hand.—
And L thousand off archeris
He had, for owtyne *hobleris*.

Barbour, XI. 110. MS.

“These, according to Spelman, were soldiers serving in France, under Edward 3rd of England, provided with light armour, and horses of a middling size capable of very quick motion. He brought over these troops for the war against R. Bruce.”

“Spelm. derives it from *hobby*, a small horse; or rather from Fr. *hobille*, a coat of quilted stuff, which they were instead of a coat of mail; vo. *hobellarii*.”

the necessity of the case in order to the preservation of the whole.

It would be time very ill spent to go about to prove, that this nation can never be long in a

"Some," says Grose, "have derived the term *hobiler* from a Danish word signifying a mare, not considering that any number of mares could not have been suffered in an army where the men at arms were chiefly mounted on stoned horses, and that besides, in the days of chivalry, it was considered as a degradation for any knight, or man at arms to be seen mounted on a mare." Hist. ut sup. p. 107. He derives the word from *hobby*.

"2. The word is sometimes explained as merely signifying 'men lightly armed.'

"Sometimes the word signifies those who need bows and arrows, viz. 'pro warda maris tēpore guerræ pro hoberariis sagittariis inveniepdis,' &c. Thorn. A. 1364. Grose, ut sup. N.

"Hence Bullet derives the term from Cambro-Britannic *hobel*, an arrow."

See also the first volume of the *Archæologia* p. 4, and Camden as there cited.

Lord Coke, § Inst. ch. 22, fol. 29, translates *Hobelarius*, a light-horse-man.]

The remainder of this statute of confirmation provides that persons bound by tenure to do any service to the king shall not by the statute be excused from doing such service.

The other two statutes which are confirmed by 4 H. 4, c. 13, are thus exhibited in the national publication from which I transcribed the stat. of 1 E. 3, st. 2, c. 5.

18 Edw. 3, stat. 2; [part of] c. 7.

Ex magno Rot. Stat. in Turr. Lond. m. 19, d.

"Et q' gentz darmes hobelers et archers eslus p'r aïer en le s'vice le Roi hors Dengleterre, soient as gages le Roi du jour q'ile dep'tiront hors des Countees, ou ils a'ront esutuz."

"And that all men of arms, hoblers and archers chosen to go in the king's service out of England, shall be at the king's wages from the day that they depart out of the counties where they were chosen, till their return."

25 Edw. 3, stat. 5, c. 8.

Ex magno Rot. Stat. in Turr. Lond. m. 16.

"Auxint acorde est et assents, q'aul homme soit arte de trover gentz darmes, hobellers marchers aut's q' ceux q' tiegnent p' tiele s'vice, sil ne soit de co'e assent et g'ant fait en p'le ment."

"Item it is accorded and assented, that no man shall be constrained to find men of arms, hoblers, nor archers, other than those which hold by such services, if it be not by comūten assent and grant made in parliament."

As to the third statute (16 and 17 Car. 1, c. 28, I apprehend 29 of Scobell) referred to by the learned judge, see a subsequent note to this case.

VOL. XVIII.

state of safety, our coast defended and our trade protected, without a naval force equal to all the emergencies which may happen. And how can we be secure of such a force? The keeping up the same naval force in time of peace, (c) which will be absolutely necessary for our security in time of war, would be an absurd, a fruitless, and a ruinous expence.

The only course then left is for the crown to employ upon emergent occasions the mariners bred up in the merchant's service.

By this means the trade of the nation becometh a nursery for her navy; and the merchant, while he is increasing the wealth of the kingdom, is at the same time training up the mariner for its defence.

And as for the mariner himself, he when taken into the service of the crown only changeth masters for a time: his service and employment continue the very same (f); with this advantage, that the dangers of the sea and enemy are not so great in the service of the crown, as in that of the merchant. (g)

I am very sensible of the hardship the sailor suffereth from an impress in some particular cases, especially if pressed homeward-bound after a long voyage. But the merchants who bear me know, that an impress on outward-bound vessels would be attended with much greater inconveniencies to the trade of the kingdom; and yet that too is sometimes necessary. But where two evils present, a wise administration, if there be room for an option, will choose the least.

War itself is a great evil; but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war bringeth with it. But it is a maxim in law, and good policy too, that all private mischiefs must be borne with patience for preventing a national calamity. (h) And as no greater calamity can befall us than to be weak and defenceless at sea in a time of war, so I do not know that the wisdom of the nation hath hitherto found out any method of manning our navy, less inconvenient than pressing; and, at the same time, equally sure and effectual.

The expedient of a voluntary register, which was attempted in king William's time, had no effect. (i)

(c) I do not find that any one of the many persons who have projected schemes for providing a sufficient supply of sailors for the royal navy ever proposed this measure.

(f) Query, as to the very sameness of the service and employment on board a merchant ship, and of those on board a ship of war.

(g) As to this, see Franklin's Essay.

(h) Franklin proposes to substitute as a preferable and more intelligible maxim, "That private mischiefs, which prevent a national calamity, ought to be generously compensated by the nation."

(i) By stat. 7 and 8 W. 3, c. 21, it was enacted, that sea-faring persons therein described, not exceeding 30,000, who might re-

4 Q

And some late schemes I have seen appear to me more inconvenient to the mariner and more inconsistent with the principles of liberty, than the practice in pressing: and, what is still worse, they are in my opinion totally impracticable.

Thus much I thought proper to say upon the foot (*k*) of reason and public utility, before I come to speak directly to the point of law. Which I shall now do.

According to my present apprehension, (and I have taken some pains to inform myself) the right of impressing mariners for the public service is a prerogative inherent in the crown, grounded upon common law, and recognized by many acts of parliament.

A general immemorial usage not inconsistent with any statute, especially if it be the result of evident necessity, and withal tendeth to the public safety, is, I apprehend, part of the common law of England. If not, I am at a loss to know what is meant by common law, in contradistinction to statute-law. And therefore it is a great mistake in this case, as indeed it would be in any other, to conclude that there is no law, because perhaps there may be no statute that expressly and in terms empowereth the crown to press. For the rights of the crown, and the liberties of the subject too, stand principally upon the foot of common law; though both have been in many cases confirmed, explained, or ascertained by particular statutes.

As to the point of usage in the matter of pressing, I have met with a multitude of commissions and mandatory writs to that purpose conceived in various forms; and from time to time directed to different officers, as the nature of the service required.

It would be tedious for me to cite one half of them; but I will endeavour to range them

gister themselves for service in the royal navy, in offices to be appointed for the purpose, should, whether in actual service or not, receive a bounty of 40s. per ann. over and above the pay and allowances of such as should be in actual service, and should have other advantages mentioned in the act. And farther provisions concerning the registration of sea-faring persons were enacted by stat. 8 and 9 W. 3, c. 23.

What was done in execution of these acts I know not, but by stat. 9 Anne, c. 21, § 64, reciting, that the said acts have not had the good effects which were intended thereby for the service of the crown, or for the encouragement of seamen, but on the contrary, have occasioned much charge, vexation, and trouble, the said acts so far forth as they concern the registering of seamen are repealed.

(*k*) Upon this expression, which was much in use in Foster's time, and which seems to have been a favourite with him, Franklin thought it worth while to remark, "that though falsehood, like this reasoning, rests on one foot, truth stands upon two."

under some general heads, and then cite a few.

Some are for pressing ships.

Others for pressing mariners.

And others for pressing ships and mariners.

In some, the parties to whom they are directed are required to make a general impress upon certain great and emergent occasions.

In others, they are confined to a certain number of ships and mariners for special services.

And in others, they are still farther confined to certain places on the coast.

Some commissions, particularly those conferring the admiralty-jurisdiction and the rights of admiralty, warrant an impress as often as there shall be occasion.

Others empower commanders of fleets or squadrons intended for certain expeditions, to press for that particular service.

And others empower masters of particular ships to press for manning their respective vessels.

This general view will be sufficient to let us into the nature of these precedents. And though the affair of pressing ships is not now before me, yet I could not well avoid mentioning it; because many of the precedents I have met with and must cite go as well to that, as to the business of pressing mariners; and taken together, they serve to shew the power the crown hath constantly exercised over the whole naval force of the kingdom, as well shipping as mariners, whenever the public service required it.

This however must be observed, that no man served the crown in either case at his own expence. Masters and mariners received full wages, and owners were constantly paid a full freight. But whether the pay in either case commenced from the time of pressing, or from the time of actual entry into the service, is not so clear.

There is in Cotton's* records [Cott. 118. No. 38. Rot. Parl. 47 E. 3. No. 28.] a note of a petition of the Commons, and of the king's answer upon this subject, in the 57 E. 3, which inclineth me to think that the latter was the case. The petition, as abridged by Cotton, is thus; "The masters of ships may be paid the wages of them and their mariners from the day of their being appointed to serve the king." The answer is, "that taking of ships shall not be but for necessity, and payment shall be reasonable as heretofore."

In the same parliament an attempt was made to obtain for owners of ships an allowance for wear and tear in the king's service.

The petition is thus abridged: "The masters of ships require an allowance for the tackling of their ships worn by the king's service." [End. Rot. No. 29 Cott. 118. No. 29.]

The answer is, "Such allowance hath not been heretofore made."

* The citations from Cotton have been found to agree with the record. Foster.

In the 2 R. 2, an attempt of the like kind was made and with the like success. The petition is, "That owners of ships taken up for the king's service, for their losses in the same, may be considered; and that mariners may have the like wages as archers have." The answer is, "It shall be as it hath been used." [Cott. 172. No. 50. Rot. Parl. 2 R. 2, Pars secunda. No. 50.]

These petitions, though stiled in the record the petitions of the Commons, as having probably begun in that House, were really the acts of both Houses; otherwise they could not have been offered to the king in a parliamentary way: for the ancient method of passing bills was, that the matter of the bill was tendered to the crown for the royal assent of both houses in form of petitions; and according to the answers from the throne, they passed into laws or were rejected.

I cannot but observe, that when we see every branch of the legislature speaking of the subject of pressing in the manner they do in these petitions and answers, it is not easy to conceive, that the legality of the practice was then questioned. It is plain at least, that it was in those early times treated in parliament as an ancient and well-known usage.

I come now to the commissions and mandatory writs I speak of. I will cite a few from Rymer's *Fœdera* (1) out of a great number of the like kind which may be met with in that valuable collection of public records.

William Barret, commander of the ship Julian, had a commission to make choice of and take up in the counties of Kent, Essex, Surrey, and Sussex, as well within liberties as without, 36 mariners, and to put them on board his ship, in order to proceed with the prince of Wales on an expedition to Gascony†. [29 E. 3, (5 Rym. 815.) Ad Eligendum et Capiendum.]

(1) Mr. Barrington (Obs. on 13 Ric. 2.) seems to regret that Foster did not print from Rymer the whole records at length, as "an abridgment often mis-states or misleads;" upon which Mr. Dodson observes that as the records, "have long been in print, and copies of them are in many hands, I see no necessity for printing at length all the records which it was proper to cite; and I believe, that, as in this case the abridgment was made by a person of so much learning and integrity, few readers would be under any apprehension of finding the records mis-stated in such a manner as to mislead." See somewhat more relative to pressing in Barrington, *ib. sup.*

† See Madox's *Hist. of the Exchequer* 262, in *notis*, y, a writ to the sheriff of Kent for the like service; 'eligi facias 50 nautas,' &c. 9 E. Foster.

As to this Commission, Mr. Barrington (Obs. on Stat. 13 Ric. 2), notices, that Mr. Justice Foster has omitted the following passage: "Et ad omnes quos in hac parte contrarios invenerit seu rebelles capiendum et in prisonis nostris mancipandum, in eisdem moraturos quous-

The like commissions were given at the same time to the commanders of seven other ships for manning their respective vessels for the same service. [5 Rym. 816.]

There is a commission to John Orewell, one of the king's serjeants at arms, to arrest and take up 60 able mariners in the Thames and Medway and parts adjacent, as well within liberties as without, and to cause them to be at Sandwich within 15 days for the king's service. [1 R. 2. (7 Rym. 196.) Ad Arestandum et Capiendum.]

John Elingham, a serjeant at arms, is empowered to arrest and take up in the counties of Somerset, Gloucester, Bristol, Devon and Cornwall, and in South Wales, [15 R. 2. 7 Rym. 718.] as well within liberties as without, so many ships, barges, and other vessels, and also mariners sufficient for manning them, as should be found sufficient for an expedition to Ireland under the king's uncle the duke of Gloucester. And all sheriffs, mayors, bailiffs, masters of ships and mariners are required to be assisting to him in that service. [See also 7 Rym. 195, 391, 453, 501, 504, 506, 507, 789, 839.]

In the same year the like commissions issued to two other serjeants at arms for the same service, in Wales, Ireland, Lancashire, and Cheshire‡. [7 Rym. 718.]

John Kingston, commander of the ship Katharine, is commissioned by himself or deputies to arrest and take up, as well within liberties as without, as many mariners as should be necessary for manning his ship, and to put them on board for the king's service. And all sheriffs, mayors, &c. are required to be assisting to him in that service. [3 H. 5. 9 Rym. 238. See also 9 Rym. 91, 104, 144, 310.]

Commissions went at the same time to six commanders of other vessels, for manning their respective vessels in the same manner, and for the same service. [9 Rym. 239.]

A mandatory writ issued directed to Thomas College serjeant at arms, and to Ralph Ingoldesby, and to the customers of the port of Sandwich, and of every port from thence to Southampton, [21 H. 6. 11 Rym. 21.] requiring them to arrest and take up for the king's service all and singular ships, barges, and other vessels capable of transporting men or horses, of what burden soever; and also all masters and mariners who could be found in any of the ports mentioned before, and to put

que de eisdem aliter duxerimus demandandum;" and Mr. Dodson, in his Preface, adds, that the like power is given by many other commissions in Rymer.

Mr. Barrington (Obs. on 3 Hen. 6), mentions a Commission of Sewers in the 6th year of that king's reign, in which the commissioners are empowered to press into their service as many labourers as they should think necessary.

‡ See Mr. Dodson's Note at the end of this Argument.

the said masters and mariners on board the said vessels for an expedition to the duchy of Aquitain; any royal letters of licence theretofore granted to any person or persons, or any other matter notwithstanding: and all sheriffs, mayors, and other officers are required to be assisting to them in that service. [See also 10 Rym. 449, 685.]

At the same time the like writs issued to the customers and other officers of almost all the port-towns in the kingdom. [11 Rym. 92.]

There is a commission to the master and purser of the Mary Grace, empowering them to arrest and take up, as well within liberties as without, wheresoever they could be found, as many mariners as should be sufficient for manning their vessel, and to put them on board at the king's wages and for his service. [14 E. 4. 11 Rym. 843. See also 11 Rym. 839.]

At the same time the like commissions issued to four other masters for manning their respective ships in the same manner. [11 Rym. 843.]

The like commissions to masters of six vessels. [15 E. 4. 12 Rym. 4, 5.]

The like to eleven masters in the same form. [20 E. 4. 12 Rym. 139, 140.]

I will now mention a few precedents of another sort; which, because they relate in great measure to one and same service, I will place together, to avoid as much as possible a needless repetition in matters of form.

These are either special commissions for commanding fleets or squadrons intended for certain expeditions mentioned in the commission; or the general commissions conferring the whole admiralty-jurisdiction with the rights of admiralty, whether to one person under the stile of high admiral, or to two under the character of admirals of the north and west. Which latter was the usual manner of conferring the admiralty-jurisdiction before the office of lord high admiral of England came much in use.

As to the special commissions, sir William Bardolph was appointed admiral of a fleet then intended to be fitted out; his commission empowereth him among other things to make choice of and take up for the king's service a sufficient number of mariners and others, and to put them on board the fleet, and to punish and chastise such mariners who should be disobedient or refractory in that respect. [8 H. 5. 10 Rym. 68. Eligendi et Capiendi.]

The lord Willoughby de Broke was appointed commander in chief of the fleet and army then intended for an expedition to France; he hath the same powers with regard to the manning the fleet as sir William Bardolph had. [5 H. 7. 12 Rym. 455.]

Sir Robert Poyntz is appointed to command the fleet in the absence of the lord Willoughby, and hath the same powers with regard to manning the fleet. [8 H. 7. 12 Rym. 484.]

Sir Martin Frobisher had a commission, which, after reciting that the command of a small squadron intended against the Spaniards

in the West Indies had been given to him, goeth on thus: "We therefore let you to wit that we have authorized and appointed, and by these presents do give full power and authority unto the said sir Martin Frobisher, and to his sufficient deputy or deputies, wheresoever he shall have need, to press and to take up for our service, to the furniture of such ships as are committed to his charge, in any place upon our coasts of England or Ireland, any mariners, soldiers, gunners, or other needful artificers:" and then requireth all justices and other officers to be assisting to him in the premises. [31 Elis. 16 Rym. 92.]

I would not be understood to say, that all commanders of fleets or squadrons for special services have had the same powers as these I have mentioned. The truth is, the greater number of these special commissions, which I have met with, and those too of the latest date, are silent as to that point.

I come now to the general commissions conferring the whole admiralty-jurisdiction and the rights of admiralty.

And those I have met with, though I apprehend they all agree in substance with regard to the present question, yet differ a little in point of form.

In the 10th E. 3, and in the 12th of the same reign, the admirals (for at that time there were two, one for the north, the other for the west) are empowered to make choice of, as well within liberties as without, able-bodied men fit for the service, and to put them on board the fleet. [4 Rym. 727. 5 Rym. 3, 6, 83, 84.] The word *Eligendi*, made use of in these commissions, is the word used to the same purpose about that time in all the commissions for pressing for the land-service, which was then likewise practised. You have the word in relation to the land-service in the statute of the 18 E. 3, stat. 2, c. 7. "Men of arms, hoblars and archers, chosen to go in the king's service out of England, shall be at the king's wages from the day that they depart out of the counties where they were chosen, till their return."

In the 50th E. 3, the admirals' commissions, with regard to this matter, run thus, "*Necnon naves et naviculas guerrinas, quot necessarie, cujuscumque portagii fuerint, quotiens necesse fuerit, congregandi; et marinarios et alios pro navibus et naviculis illis necessarios eligendi, capiendi, et in eisdem ponendi; et hujusmodi marinarios qui rebelles vel contrariantes fuerint in hac parte, debite compescendi et castigandi; et omnia alia, quæ ad officium admiralli pertinent in hac parte, faciendi et exercendi; prout de jure et secundum legem maritimam fuerit faciendum.*"

And all sheriffs, mayors, bailiffs, ministers, owners of ships, masters and mariners, are required to be aiding and assisting to them in the premises. [7 Rym. 127, 128.]

The admirals' commissions run exactly in the same form. [1 R. 2. 7 Rym. 171.]

So doth Thomas of Lancaster's commission of high admiral. [6 H. 4. 8 Rym. 388.]

So doth the earl of Warwick's commission of high admiral. [49 H. 6. 11 Rym. 679.]

And so doth the duke of Richmond's. [17 H. 8. 14 Rym. 42.]

The lord Seymour's commission of high admiral expresseth the matter a little differently: the words are, "Ac ad nautas et marinarios ac alios, pro omnibus et singulis navibus et naviculis conducendum et gubernandum necessarios, eligendum, capiendum et apprehendendum, atque eodem in dictis navibus et naviculis ponendum et retinendum." [1 E. 6. 15 Rym. 127, 128.]

In the same year the lord Seymour had another commission in fuller terms, with all the jurisdictions and rights of admiralty particularly enumerated and set forth at large: the words with regard to the present matter are, "Et insuper tam naves et naviculas guerrinas quam quascumque alias naves et naviculas seu vasa quascumque, pro quibuscumque viagiis et negotiis nostris vel expeditione eorundem; necnon navigeros sive pilotas, ac navium magistros, nautas, nauceros, vibrellatores sive bombardatores et marinarios ac alias personas quascumque, pro navibus et naviculis seu vasibus hujusmodi aptos et idoneos, de tempore in tempus quotiens necesse fuerit, ubique locorum infra regna et dominia nostra prædicta, tam infra libertates quam extra, congregandum, deligendum, retinendum, capiendum, arestandum, deputandum et assignandum abque interruptione seu impedimento per quemcumque alium in contrarium, fiendo; cum plenâ jurisdictione et potestate ad exequendum omnia alia et singula quæ in eâ parte, per magnum admirallum nostrum et prefectum generalem classis et marium, *jure fieri debent, possint, vel solent.*" [15 Rym. 157—163.]

The earl of Warwick had a commission of high admiral in the same form. [3 E. 6. 15 Rym. 194.]

And so had the duke of Buckingham* [16 Jac. 1. 17 Rym. 134.]

And now, when I consider these precedents,

* The earl of Northumberland's commission, in the time of king Charles the first, is silent with regard to these powers; and I am inclined to think they were not inserted in any commission in the latter part of that reign. But that matter is sufficiently accounted for towards the end of this argument.

The high admirals since the Restoration have had all the powers for pressing conferred upon them, in as full a manner as in any of the commissions I have cited; and nearly in the same terms as in lord Seymour's second commission. And during such commissions, whenever an impress hath been ordered, it hath been by warrants from the high admiral. But when that office hath been put in commission, the same service hath been constantly carried on by warrants from the admiralty-board, grounded on orders made from time to time by the king in council, as the exigency of affairs hath required. Foster.

not fetched from dark, remote, and unsettled times, but running uniformly through a course of many ages, all, as I conceive, speaking to the same purpose, though in different forms of expression; some for making choice of, others, and those the much greater number and of the latest date, for making choice of and taking up, or for arresting, pressing and taking up, mariners, and putting them on board for the public service: when I consider these precedents, with the practice down to the present time, I cannot conceive otherwise of the point in question, than that the crown hath been always in possession of the prerogative of pressing mariners for the public service. Which prerogative hath been carried into execution, as well by virtue of special commissions, issued as the exigency of affairs required, as by the persons who from time to time have been intrusted with the whole admiralty-jurisdiction.

And indeed the words, touching the manning the fleet, empowering the admirals to do and execute all other matters and things touching that service which belong to the office of admiral, seem to imply either that those powers were deemed to be inherent in the office, or that they had been constantly by express words in the commissions annexed to it.

To this purpose I will mention a very remarkable transaction in the parliament of the 7th and 8th H. 4.

Complaint was made in parliament, that the sea-service had been greatly neglected, and that depredations were daily committed. To remedy this evil a very extraordinary expedient was offered, to which the necessity of the king's affairs obliged him for the present to submit. It was, that the naval force of the kingdom should, for a time, be put under the direction of the merchants themselves.

Accordingly an act passed, that the merchants should have the keeping of the seas from the 1st day of May 1406 to Michaelmas 1407: and to defray the expence of this service they were to be entitled by writs of privy seal to certain duties mentioned in the record, as I find it abridged by Cotton. [452, 453. Rot. Parl. 8 H. 4. No. 19, to No. 26.]

Among other provisions touching this matter, it was enacted, that the merchants should name two persons, one for the north and the other for the south, who by commission should have 'the like powers as other admirals have had.'

In pursuance of this act, Nicholas Blackburn was named by the merchants for the north, and Richard Cliderow for the south.

One might reasonably hope, that no powers deemed illegal or oppressive, no powers hurtful to trade or grievous to the mariners, should be inserted in the commissions of admirals nominated by the merchants: but it happeneth that Blackburn's commission is extant, and runneth in the very words of those I have cited from the 50th of E. 3, to the 17th of H. 8.

You have it in 8 Rymer 439. It reciteth the act of parliament, and that Blackburn had been nominated by the merchants for the north,

and then goeth on in the usual form empowering him to make choice of, take up and put on board such mariners and others as shall be found necessary for the service, and to punish and chastise such as shall be disobedient and refractory in that behalf.

The commission was to continue as long as the merchants should have the keeping of the seas; which indeed was not long: for before that parliament rose, this novelty came to an end, the merchants were eased of a service they were found to be very unequal to, their admirals' commissions dropped, and the whole direction of the marine returned to its proper channel.

I think it may safely be inferred from this record, [8 Rym. 455. Cmt. 462.] that in the judgment of those times, and in a concern of the merchants themselves, the practice of manning the navy by the methods mentioned in these commissions was esteemed to be necessary for the service, and a branch of admiral jurisdiction†.

I come now to the statutes which speak of this matter.

And I do admit, that I know of no statute now in force, which directly and in express terms empowereth the crown to press mariners into the service: and admitting that the prerogative is grounded on immemorial usage, I know of no necessity for any such statute; for let it be remembered, that a prerogative grounded upon general immemorial usage not inconsistent with any statute, nor repugnant to the public utility, is as much part of the law of England, as statute law. You will be pleased to carry this observation too along with you, that the statutes which mention pressing as a practice then subsisting and not disallowed, are at least an evidence of the usage, if they go no farther, I mean if they do not amount to a tacit approbation of it.

For it is hard to conceive, that the legislature should frequently mention a practice utterly illegal, and repugnant to the principles of the constitution as subsisting, without some mark of disapprobation.

The first statute I have met with is that of the 2 R. 2, stat. 1, c. 4. It is an act against mariners deserting the service; not to be met with in the later editions of the Statutes at Large, which give us only the title of this act, with a note that it is altered by the 18th H. 6, and 5th Eliz. (m)

† The parliament roll placeth this parliament in the 8th of H. 4, whereas Rymer, Dugdale, and the printed statutes place it in the 7th. It was, to speak in modern language, a parliament of the 7th and 8th of that reign: it began in the 7th and ended in the 8th. Foster.

(m) "From what he [Foster] here says, and from the words of the statute which he subjoins in the very words of the English translation as given in Pickering's Edition of the Statutes, it is evident he is guided in all he says by the translation of the statute, and pro-

It is however still in force, and as such is inserted by Rastal in his Abridgment under title Mariner No. 1. My worthy friend Mr. Cay

bably never once referred himself to the original French. The words of the original are these, "Item pur ceu qe plusieurs mariners apres ce qils sont arestuz et retenuz pur service du Roi sur la mer en defence du roialme et en ont receux leurs gages appartenants consequent hors du dit service sans conge." The great mistake and impropriety consists in the translator's having rendered the French word above *arestuz*, by the English word *arrested*; now by *arrested* is implied the detention of a man's person contrary to his will and inclination; but this is by no means the implication of the word *arestuz*, as the sense from the context and the whole tenor of the statute plainly evinces. The old French word *arestu* (in modern French *arrêté*) is a participle of the verb *arestre* of the fourth conjugation modernized into the first and written *arrester* or rather *arrêter*. This verb hath a variety of significations, besides that which implies in English to *arrest*; and among others, one, very obvious, and in general use, especially in former times, and implied 'to bargain with, to hire, to agree 'for' in the way of bargaining, or hiring. It was, and still is employed in the hiring of servants, houses, or the like: *arrêter un domestique*, is to bargain with, or to hire a servant; and is perfectly synonymous to the modern term *louer*; and it is in this very sense that the word is used in this statute. But though the French speak with the strictest propriety, when they say *arrêter un domestique*, yet to express the same idea in English we cannot say *to arrest a servant*, but *to bargain with or to hire a servant*; so in this statute the word *arestuz*, applied as it is to mariners is as improperly rendered in the translation by the word *arrested*, as it would be if applied to servants, as observed above; for it by no means conveys the same idea with the original word as it there stands in the statute. These mariners were persons *bargained with*, they were *hired*, government made *agreement* with them or *contracted* for the voyage, and *thereof* paid them 'the wages pertaining,' as the statute expressly says. What do the words of the statute, 'and thereof have received their wages 'pertaining' refer to, but to the preceding words, 'the king's service upon the sea, 'thereof,' or, 'for which they had received 'their wages pertaining,' so stands the construction. What is implied by 'the king's 'service on the sea?' but a proposed and intended voyage; and these voyages were generally, at the period we are speaking of, to some part of the coast of France, and were so short, that at this time they would be termed 'trips,' in the language of sailors: and mariners of those times could pretty nearly calculate the time such a voyage would require, and accordingly *bargained* with government for the voyage, after which they are said to be *re-*

hath likewise inserted it in his Abridgment under title Seaman No. 1. I will give you the words

retained, and 'received their wages pertaining' in advance. This is the true sense of the statute, from the words of the statute itself; and, in my apprehension, there cannot be a more unwarrantable conceit than to suppose these mariners, instead of being *bargained* withal, were *impressed* for the voyage, and their wages paid down to them in advance. A government acting so imprudently would hardly gain confidence enough to be entrusted with the public money.

"The crime of these mariners was not that being *impressed* men they fled the service; but that having voluntarily *bargained* with government, and freely let themselves to *hire* for the service, and received their wages for the voyage in advance, they had defrauded government of that money, and at the same time of their proffered and bargained service. What would be the crime of an impressed man fleeing away? How could he be supposed capable of paying double wages? How should government trust such a man with his wages in advance? But the case is the very reverse when we consider this mariner as having made his *bargain* with government, as the statute describes it when properly understood, and as having voluntarily let himself to *hire*: then indeed he might, as the custom then was, be entrusted with his wages in advance, because there was ground for confidence; and if he did not fulfil his agreement, but went off with the money, he justly incurred and merited the severe penalties of the statute for so wilful a fraud and injury." * * * * *

"Whoever will consider this statute with attention must perceive that the sense and even the justice and equity of the statute do demand this interpretation of the words. It is a statute against 'mariners *retained* to serve the king 'on the seas, which do depart without licence' as the title expresses it. Such *retained* mariners, as the statute declares, received their wages beforehand for the voyage, or in the words of the statute, 'and thereof have received 'their wages pertaining'; and the complaint against them is, that after receiving their wages, they 'do flee out of the said service 'without licence of the admirals, &c.' and the penalty of such of them as in future shall be guilty of the like, as enacted by this statute, is thus expressed, 'it is ordained and established, 'That all those mariners which from henceforth shall do in such manner, and that truly 'found and proved before the admiral, or his 'lieutenant, shall be holden to restore to our 'said sovereign lord the king, the double of 'that they have taken for their wages; and 'nevertheless shall have one year's imprisonment, without being delivered by mainprize, 'bail, or any other way.'" A Discourse on the Impressing of Mariners.

If the preceding remarks be just, it will be

of the act as far as concerneth this point, as I find it in an edition of the Statutes at Large,† ending with the last year of H. 7. "Item, because that divers mariners after that they be arrested and retained for the king's service upon the sea in defence of the realm and thereof have received their wages, do flee out of the said service without license of the admirals or their lieutenants. It is ordained and established, that all those mariners, which from henceforth shall do in such manner, shall be holden to restore to our said sovereign lord the king the double of that they have taken for their wages, and nevertheless shall have one year's imprisonment without being delivered by mainprize, bail, or by other way."

The act then goeth on to direct how fugitive mariners shall be apprehended and dealt with; and concludeth with this clause: "And like punishment shall be made of sergeants of arms, masters of ships and all others that shall be attainted before the admiral or his lieutenant aforesaid, that they have any thing taken of the said mariners for to suffer them to go at large out of the said service after that they have been arrested for the same service."

You will be pleased to observe, that the word 'arrest,' twice used in this act, is made use of in the precedents I cited of the 1st and 15th of this very reign, and in most of those of later date: it is likewise used in ten other commissions in the same reign touching this very service, all likewise directed for execution to sergeants at arms, which for brevity sake I have omitted. [7 Rym. 391, 433, 501, 504, 789, 839.]

So that if it be asked, who are the persons subjected to the penalties of this act, it must be answered, mariners arrested and taken into the service by virtue of commissions from the crown, in case of their desertion; and sergeants at arms, masters of ships and others executing such commissions, who for lucre shall suffer them to go at large after such arrests.

Mariners indeed were not subject to the penalties of this act, unless they had received wages.

But might not a mariner so arrested have reasonably said, "I was compelled against law into the service; I did my duty, while I continued in it, and dearly earned the wages I received;" might not a mariner have said this, and much more upon a supposition of the illegality of an impress? Certainly he might. But you see mariners, though taken into the service by com-

observed that they extend to nullify what Foster a little farther in his argument says of the word 'retained,' to which, not without some violence of interpretation, he has affixed the meaning of 'detained.'

† It is likewise in a collection of the statutes at large, called Rastal's Statutes, printed 1618, and in an old collection of the statutes called the Great Book of Statutes; and in every edition antecedent to Pulton's in 1618. Foster. It is now printed in several of the modern editions of the statutes. Dodson.

pulsion, are by this act made liable to pecuniary and corporal punishment too, in case of desertion*. This doth more than imply the legality of such compulsion.

It may possibly be objected, that the word 'retained' is used in the act, and that a retainer implieth a mutual contract for some service to be done. It may, when it standeth alone, have received that sense in modern language, but in strict propriety it meaneth nothing more than the taking a person into some service; and is in truth the act only of the person retaining or taking. And therefore when I see the word 'retained' connected with one, which hath no other meaning in the English (u) tongue than what carrieth with it the idea of compulsion, I cannot conceive that the legislature, speaking of persons arrested and retained, should mean no other, than persons taken into the service with their own consent.

That there was a practice then subsisting of taking mariners into the service by compulsion cannot be denied: the parliament could not be ignorant of it. Is it possible then to imagine, that they could use a word which manifestly signifieth compulsion, and yet mean nothing more than a mutual contract? Besides, it cannot be conceived, that sergeants at arms, who, as I before observed, were the persons about that time usually employed in the service of pressing, could be expressly and by name subjected to the penalties of the act, if no mariners but such as voluntarily entered into the service were comprehended in it.

The next act is that of the 2d & 3d Ph. and Mar. c. 16, (o) which layeth a penalty on

* See Statuta de Officio Admiralitatis Anglie, published by Dr. Simpson in the year 1743, at the end of Clark's Praxis Supremæ Curie Admiralitatis—Articles 10, 37, 39; and the learned doctor's notes on those articles touching ships and mariners pressed into the king's service. Foster.

(u) "This is full evidence that Foster argues from the translation of the statute, and probably he never saw or at least examined the original."—Discourse on the Impressings of Mariners, &c.

(o) "This statute," says the author of the 'Discourse on Impressings,' &c. "regards only watermen, or as the act expresses it, 'persons exercising the occupation of rowing, betwixt Gravesend and Windsor.' Here is but one short section of the statute which treats of this matter. And first, I must observe that watermen are not mariners, nor doth any thing in this statute relate or extend to mariners. In the next place, it speaks only of watermen rowing between Gravesend and Windsor, and none other, and lastly, it doth not expressly declare, that even these watermen are liable or subject by the law to be impressed: it only declares, that if they "in the time of the execution of any commission of pressing that shall be had for the king's or queen's majesties, and the heirs and successors of the queen's

watermen plying between Gravesend and Windsor, who, to speak in the language of the act, in the time of pressing by commission for the service of the crown upon the sea, do

majesties in their affairs, shall willingly, voluntarily and obstinately, withdraw, hide or convey him or themselves in the same time of pressing, into secret places and out corners, and when after such time of pressing is overpast, shall return and come again to the said river Thames, to row betwixt Gravesend and Windsor aforesaid, and that duly proved, &c. that then he or they so doing or offending shall suffer imprisonment by the space of two weeks, and be banished any more to row from thenceforth upon the said river Thames by the space of one whole year and day then next following." We see then, this statute extends only to watermen, and to watermen only of a particular district, such as ply between Gravesend and Windsor, and none other. These alone are subject to the penalty of this statute and even that is conditional. Of all which Foster says nothing. If a waterman as before described, absconds during the time of impressing, and returns and plies after that impressing be over, he is liable to two weeks imprisonment, and is debarred plying on that part of the Thames for one year and a day; but if he absconds, and afterwards doth not return to ply there, he is then subject to no penalty whatever. He may ply at Reading, at Oxford upon that river Thames, or in any other river as a waterman; or may take to any other occupation in any part of the kingdom, and this statute shall not affect him. It should seem therefore from the nature of this statute, that the watermen plying between Gravesend and Windsor, had in former times, stipulated with government for certain immunities granted to them as a corporation, voluntarily to enter a certain number of their body, as the exigency might require, on board the navy; that they had been called upon aforesaid to perform their covenant, and had been remiss in the performance; in consequence of which government had issued warrants to take or impress them, and to compel them to do that by force, which they ought to have done voluntarily; that on issuing such warrants to impress them, it had been customary for them to abscond till the bustle had subsided, and then return to pursue their occupation in quiet. To prevent which in future, this statute seems to have been enacted, laying a penalty on such of them as should abscond on such occasions and afterwards return to participate in the immunities granted. Without some previous contract of this kind, I say it is not easy to conceive how government became vested with a right in the service of these watermen in particular, more than in that of all other watermen, so that this statute should be particularly directed against them, and should subject them to penalty in case only that they returned and plied again. If the right had not arisen from particular contract with them, it

willingly and obstinately withdraw, hide and convey themselves into secret places and out- corners; and after, when such time of pressing is overpassed, return to their employments.

This provision, it is true, extendeth only to watermen on the Thames, and may be considered as one of the many wholesome regulations those persons are brought under by this act: and it is mentioned in that light in an act (4, 5 A. c. 19, s. 18), passed in the late queen's time. But at the same time it sheweth, that commissions for pressing were then in use. And, in my opinion, it likewise supposeth the legality and utility of such commissions, and that these people are the objects of them: otherwise why are they subjected even to the slightest punishment, for absconding at the time of the execution of those commissions?

The acts which come next to be considered are some made since the Revolution; a most auspicious period! when the principles of liberty were well understood, and most gloriously asserted. (p)

These are the 7th and 8th of king William, the 2d and 3d, and the 4th and 5th of the late queen.

The first, 7 and 8 W. 3, c. 21, is intitled, An Act for the increase and encouragement of seamen.

It enacteth, sect. 15, among other things, that licences may be given, by his majesty, or the lord high admiral, or commissioners of admiralty, to any landmen willing to enter into the merchant's service; which shall be to them a protection against being impressed for the space of two years.

had been a general right over all watermen whatever in the kingdom, and all without exception had been subject alike to some penalty of a general statute. This, therefore, is a statute of a private nature, and the impressing here spoken of is of the same kind, and affects only a particular set of watermen within a particular district, and as I observed before, there is but this short section of the whole statute which treats of the subject we are speaking to, all the other parts of this statute concern the settling and establishing certain regulations relative to bargemen and watermen rowing and plying between the places before-mentioned, and not a word is any where beside mentioned concerning impressing."

(p) The following passages I have extracted from the Commons' Journal:

"Jovis, 2^o die Februarii, 1692.

"A complaint being made to this House, that one Thomas Gwillim, a servant to Mr. Mansell, a member of this House, coming in his livery to receive his letters, was pressed, and shipped off for Harwich, to go into Flanders;

"Ordered, That the commissioners for transportation do search all transport ships for the said Thomas Gwillim; and if they find him, that they do send him to the said Mr. Mansell."

VOL. XVIII.

Provided such landmen bring two credible persons to vouch for them. But if any person shall vouch for any one as a landman, who shall afterwards appear to have been a seaman, he shall forfeit twenty pounds.

The 2d and 3d of the late queen, c. 6, is intitled, An Act for the increase of seamen and better encouragement of navigation and security of the coal-trade. To these ends (s. 4 and 5,) it empowereth parish-officers to bind out poor boys to sea in the merchants' service; and enacteth, that boys so bound out shall not be compelled or impressed or permitted to enter into the service of the crown at sea till they attain their age of eighteen, and that certificates of such binding shall be transmitted by the collectors of the respective ports to the admiralty; and that thereupon such protections shall be made for such apprentices without fee or reward.

And, for encouraging other persons to bind themselves apprentices in the merchants' service, it further enacteth, (sect. 15.) that persons so binding themselves shall not be compelled or impressed into the service of the crown for three years from the time of such

"Martis 7^o die Februarii.

"A complaint being made to this House, that a servant of Mr. Lutterell, a member of this House, going about his master's business, was lately pressed, and detained in custody, in breach of the privileges of this House.

"Resolved, That a committee be appointed to examine the said complaint; and also to enquire into, and examine the great abuses daily committed by press-masters; and to report the same, with their opinions thereon, to the House."

"Jovis 9 die Februarii.

"Sir Edward Seymour acquaints the House, that he had laid before his majesty the letter from the mayor of Harwich, in answer to the order of this House: and his majesty had been graciously pleased to take notice of the great violation of justice that has been made in kidnapping of his subjects under the pretence of pressing them into foreign service; and that his majesty had a very great resentment, that his subjects should meet with such usage; and would take all care possible for the future to punish the authors of it; and that in the first place his majesty was pleased to call before him the officers of the army, and gave them a strict charge, that they should receive no men that were impressed; for as they themselves had no power to press, they should not receive any man that was pressed. And that his majesty would cause it to be made public, by having it printed: And that in the next place his majesty gave orders to the admiralty to examine the press-masters that had committed those abuses; and that there should be such exemplary punishment inflicted on them, that others should be deterred from doing he like."

4 R

binding, and that, upon certificates of such binding from the collectors of the respective ports, the admiralty shall grant protections without fee or reward.

And, for encouraging the coal-trade, it farther enacteth, (sect. 20.) that during the war there shall be allowed to every vessel employed in that trade, besides the master, mate, and carpenter, one able seaman for every one hundred ton of the vessel, not exceeding three hundred ton, free from impressing.

The 4th and 5th of the late queen (c. 19, s. 17.) reciteth that clause in the act of the 2d and 3d, which exempted voluntary apprentices for three years, and saith, "Whereas such exemption for three years, which was intended for the encouragement of handmen to bind themselves, hath been manifestly abused for the exempting and protecting of seamen from the service, to the great hindrance and prejudice of her majesty's sea-service: Be it therefore enacted and declared, that no person or persons of the age of eighteen years shall have any exemption or protection from her majesty's sea-service, who shall have been in any sea-service before the time they bound themselves, any law or statute to the contrary notwithstanding."*

Let us now take a short view of these acts.

Persons under certain special qualifications are exempted from being impressed.

To that end, in one case, licences are to be granted by his majesty or from the admiralty, but under proper cautions to prevent abuses.

In other cases, certificates are to be returned from the chief officers of the ports, and protections thereupon granted without fee or reward.

And in every case these exemptions, as they are confined to persons under certain limited qualifications, so are they limited too in point of time, and withal given by way of encouragement. And lastly, the extending the benefit even of a temporary exemption beyond the original intent of the legislature is declared to be an abuse, and an abuse tending to the great hindrance and prejudice of her majesty's sea-service.

Do not these things incontestibly presuppose the expediency, the necessity, and the legality of an impress in general? If they do not, one must entertain an opinion of the legislature acting and speaking in this manner, which it will not be decent for me to mention in this place.

For the very notion of an exemption, when granted by statute to particular persons, and this too by way of encouragement, implieth,

* N. B. Other acts to the like purpose which did not occur to the author when this argument was delivered are, 1 Annæ, sess. 1, c. 16, s. 2; 6 Anne, c. 31, s. 2; 13 Geo. 2, c. 17, s. 1, 2, 3, and c. 28, s. 5. Foster. See also 19 Geo. 2, c. 30. Dodson. See also 2 G. 3, c. 15, s. 22; 19 G. 3, c. 38, s. 1; 26 G. 3, c. 41, s. 17; 38 G. 3, c. 46, s. 1; 42 G. 3, c. 22.

that, without such exemption, the parties entitled to the benefit of it would by law be liable to the duty or burden which is the subject-matter of that exemption: otherwise the statute doth nothing; it operateth upon nothing, if no legal duty or burden be removed by it. And consequently the granting exemptions to seamen under certain limited qualifications, and for a limited time only, supposeth that all seamen in general, without such exemption, were by law liable to the duty or burden which is the subject-matter of that exemption.

And the many provisions the legislature hath made to prevent abuses with regard to these exemptions, attended with a plain, full and express declaration, that such abuses, namely the extending the benefit of exemptions beyond the intent of the legislature, tend to the great hindrance and prejudice of the sea-service, imply, that the duty or burden, which is the object of all this care and caution, is expedient and necessary to the service.

And this burden is plainly an impress in time of war.

Which, from the authorities I have cited, appeareth to me to be grounded on common, and statute law; in other words, upon a general immemorial usage, allowed, approved, and recognized by many acts of parliament.

Against what I have said it hath been objected, that the practice of pressing is inconsistent with the liberty of the subject, and a breach of Magna Charta.

I readily admit, that an impress is a restraint upon the natural liberty of those who are liable to it: but it must likewise be admitted on the other hand, that every restraint upon natural liberty is not *eo nomine* illegal, or at all inconsistent with the principles of civil liberty. And if the restraint, be it to what degree soever, appeareth to be necessary to the good and welfare of the whole, and to be warranted by statute-law, as well as immemorial usage, it cannot be complained of otherwise than as a private mischief: which, as I said at the beginning, must, under all governments whatsoever, be submitted to for avoiding a public inconvenience.

As to Magna Charta, it is not pretended that the practice of pressing mariners for the public service is condemned by express words in that statute; and if it be warranted by common and statute-law, it cannot be shewn to be illegal by any consequences drawn from Magna Charta; in like manner as pressing for the land-service could not be deemed illegal or inconsistent with the principles of our constitution, while there were temporary acts (as there were many in the late war) to warrant it.

Besides, we know that Magna Charta hath been expressly and by name confirmed by many acts of parliament, my lord Coke saith 52; and yet the practice of pressing mariners still continued through all ages, and was never, that I know of, once mentioned in any of those acts as illegal or a violation of the Great Charter.

In a similar case, I mean the practice of

pressing soldiers for foreign service, there are statutes of an early date, [1 E. 3, stat. 2. c. 5; 25 E. 3, stat. 5. c. 8.] which I conceive, were intended against it; though it was practised long afterwards. But those acts extend only to the case of pressing for the land-service, not a word do I find in them touching the sea-service. One reason of the difference, among others, may be, that the land-service was thought to be sufficiently provided for in ordinary cases by the military tenures; and extraordinary cases, cases of necessity, such as that of a foreign invasion, were expressly excepted. In those cases, saith the 1 E. 3, it shall be done as in times past; which we know was by commissions of array; whereas no competent provision was made by law for the ordinary sea-service. There were no naval services due to the crown, except those of the cinque ports and a very few others; which, all together, were too inconsiderable to be mentioned, and bore no sort of proportion to the common exigencies of the public in time of war.

But there is another objection, which deserveth to be considered. It is, that temporary acts have from time to time been made, authorizing the pressing mariners for the sea-service; from whence it is argued, that the legislature, which is supposed to do nothing in vain, would not have given those powers for a time, if the king by his prerogative could have provided for the service without the aid of such temporary acts.

The gentleman who had the care of publishing lord chief justice Hale's History of the Pleas of the Crown referreth [1 Vol. 679, in margin] to several temporary acts made in the late queen's time, authorizing, as he supposeth, the pressing of soldiers and mariners. I have looked into all those acts. They are solely for pressing soldiers and 'marines'; not a single word that concerneth the pressing of 'mariners' do I find in any of them.

There was indeed an act made in that reign [4, 5 Anne, c. 19.] for compelling mariners into the service, by methods which, it was then thought, the prerogative alone could not warrant. To that end it authorized and required justices of the peace, and other magistrates to cause privy searches to be made from time to time for mariners, who, as the act expresseth it, did lie hid, withdraw, and conceal themselves, and to deliver them when apprehended to conductors for the service of the crown: and constables and other officers were, by warrants from the magistrates, to make privy searches by night, and were empowered to enter houses and open doors in execution of such warrants, and were required to give an account of their proceedings from time to time to the magistrates on oath, and, in case of negligence or remissness in the premises, were subjected to pecuniary punishments. This is the substance of the first nine sections of the act; which sections, continuing in force only till the first of March 1706, are not printed in the later editions of the Statutes at Large.

But it cannot, I conceive, be inferred from the new powers given by this act, that an impress by commission from the crown or by admiralty-warrants, which was practised at that very time, was illegal. All that can be inferred is, that the ordinary methods then in use were found ineffectual; and therefore the legislature had, for that time, recourse to an extraordinary one, for compelling into the service those, who could not be come at by the ordinary methods; those, who, in the language of the act, lay hid, withdrew, and concealed themselves. And to that end, civil magistrates and civil officers are required and authorized to do, what, in the judgment of the legislature, without the aid of that act, they could not have done, or at least were not compellable to do.

And whoever readeth and considereth the 17th and 18th sections of this act, which I have already cited to another purpose, will hardly conceive, that that parliament had any doubts concerning the legality of an impress by the ordinary methods of law.

Indeed the temporary acts of the 16th and 17th of Car. 1, [c. 5, 23, 26.] come directly to the point. They authorized an impress by admiralty-warrants for a limited time. And had temporary acts of that kind been frequent, or had the practice of pressing been discontinued from the time of Charles 1, unless when revived by subsequent temporary acts, I think what hath been said upon the foot of antient precedents could, after all, have had very little weight. For I freely declare, that antient precedents alone, unless supported by modern practice, weigh very little with me in questions of this nature; I mean, in questions touching the prerogative. But we all know, that the practice of pressing by admiralty-warrants hath continued, now, near a century since the expiration of those acts of king Charles 1, without one statute of the like kind to authorize it.

These acts of king Charles 1, do indeed shew, that the prerogative of pressing mariners into the public service was at that time doubted of. And whoever considereth the peculiar circumstances of that time, when the prerogative had in too many instances been carried to great lengths, and when the nation was at the very eve of a civil war upon the subject of liberty and prerogative, and considereth withal that a naval force must in all events, as things then stood, be provided;—whoever, I say, considereth these things, will not wonder, that the prerogative of pressing mariners should, at that very critical time, be called in question; or that, in order to procure an universal submission to a measure necessary at that time, the authority of parliament should be called in, in aid of the prerogative.

There was a temporary act made in this very session [c. 23.] for pressing for the land-service. It reciteth that a rebellion was on foot in Ireland, and then declareth, almost in the words of 1 E. 3, before cited, That by law no man is compellable to go out of his county

to serve as a soldier, except in case of necessity of sudden coming of strange enemies into the kingdom, or except he was bound thereto by tenure. (q)

(q) I am somewhat surprised that Foster did not take more particular notice of this statute, (which I apprehend to be 17 Car. c. 29, agreeably to Scobell). In its progress it caused much disagreement between the two Houses, and bitter altercation between the king and parliament. (See 2 New Parl. Hist. 968, 991, and also the numerous entries respecting it in the Journals). Lord Clarendon (book 4, vol. 1, p. 326, 8vo edit.) gives the following history of it:

"The slow levying of men was imputed to the difficulty of getting volunteers; their numbers who had commission, upon beating drums, rising very inconsiderably: and therefore, they prepared a bill for pressing; which quickly passed the Commons, and was sent up to the Lords. It cannot be supposed, that there could be then a scarcity of men, or that it could be hard, within three months after the disbanding the northern army, to bring together as many men as they had occasion to use: but their business was to get power, not men; and therefore, this stratagem was used, to transfer the power of pressing men from the king to themselves; and to get the king, that he might be now able to raise men for Ireland, to disable himself from pressing upon any other occasion. For, in the preamble of this bill which they sent up to the Lords (as they had done before, the first act for tonnage and poundage) they declared, 'That the king had in no case, or upon any occasion, but the invasion from a foreign power, authority to press the free-born subject; which could not consist with the freedom and liberty of his person.'

"This doctrine was new to the Lords, and contrary to the usage and custom of all times; and seemed to them a great diminution of that regal power, which was necessary for the preservation of his own subjects, and assistance of his allies; which in many cases he was bound to yield. And the attorney general took the courage, 'to desire the Lords' (as he should often have done in other cases) 'that he might be heard, on the king's behalf, before they consented to a clause so prejudicial to the king's prerogative.' This necessary stop was no sooner made, than the Commons laid aside the consideration of Ireland; ordered their committee to meet no more about that business; the levies which were then making of volunteers stood still; and they declared, That the loss of Ireland must be imputed to the Lords. On the other side the Lords too well understood that logic, to be moved by it; and were rather sensible of the inconveniences they had incurred by their former compliance, than inclined to repeat the same error.

"In the mean time, letters came every day from Ireland, passionately bemoaning their condition; and multitudes of men, women, and

It is worth observing, that no such declaration saving the rights of the subject is to be found in any of the acts of this session for pressing mariners. And the different pressing

children, who were despoiled of their estates, and forced into this kingdom for want of bread, spoke more lamentably than the letters. In this strait, they knew not what to do, for whatever discourse they pleased themselves with concerning the Lords, it was evident the fault would lie at their own doors; besides that, his majesty might make use of that occasion, to take the whole business out of their hands, and manage it himself by his council: which would both lessen their reputation and interest, and indeed defeat much of what they had projected.

"Hereupon, Mr. Saint John, the king's solicitor (a man that might be trusted in any company) went privately to his majesty; and seemed to him much troubled at the interruption given by the Commons; and to grant, that the preamble was unreasonable, and ought to be insisted against by the Lords, on the behalf of his majesty's prerogative: however, he told him, since he thought it impossible to rectify the Commons in their understandings, it would be a great blessing to his majesty, if he could offer an expedient to remove that rub, which must prove fatal to Ireland in a short time; and might grow to such a disunion between the two Houses, as might much cloud the happiness of this kingdom; and undoubtedly, could not but have a very popular influence upon both, when both sides would be forwarder to acknowledge his majesty's great wisdom and piety, than they could be now made to retract any thing that was erroneous in themselves; and then advised him to come to the Houses; and to express his princely zeal for the relief of Ireland; and taking notice of the bill for pressing, depending with the Lords, and the dispute raised concerning that ancient and undoubted prerogative, to avoid further debate, to offer that the bill should pass with a *salvo jure*, both for the king and people, leaving such debates to a time that might better bear it.

"Which advice his majesty followed; and coming to the House said the very words he had proposed to him. But now their business was done; (which truly, I think, no other way could have been compassed) the divided Lords and Commons presently unite themselves in a petition to the king; acknowledging his royal favour and protection to be a great blessing and security to them, for the enjoying and preserving all those private and public liberties and privileges which belong unto them; and whensoever any of those liberties or privileges were invaded, they were bound with humility and confidence to resort to his princely justice for redress and satisfaction, because the rights and privileges of parliament were the birthright and inheritance, not only of themselves but of the whole kingdom, wherein every one of his sub-

of these acts, made in the same session, and touching cases of so similar a nature, strongly intimateth, that the point was not, even at that critical time, thought equally clear in the one

jects was interested. That among the privileges of parliament, it was their ancient and undoubted right, that his majesty ought not to take notice of any matter in agitation and debate in either House of Parliament, but by their information and agreement, and that his majesty ought not to propound any condition, provision or limitation to any bill or act in debate or preparation in either House of Parliament, or to declare his consent or dissent, his approbation or dislike of the same, before it be presented to him in due course of parliament. They declared that all those privileges had been lately broken to their great sorrow and grief, in that speech which his majesty had made to them, wherein he took notice of a bill for pressing of soldiers not yet agreed upon, and offered a *salvo jure* and provisional clause to be added to it before it was presented to him, and therefore they besought him by his regal power to protect them in those and the other privileges of his high court of parliament, and that he would not for the time to come break or interrupt them, and that for the reparation of them in that their grievance and complaint, he would declare and make known the name of such person by whose misinformation and evil counsel his majesty was induced to the same, that he might receive condign punishment. And this they did desire, and as his greatest and most faithful council did advise his majesty to perform as a great advantage to him, by procuring and confirming a confidence and unity betwixt his majesty and his people," &c.

"And having delivered this petition, they no more considered Ireland till this manifest breach should be repaired, which they resolved nothing should do but the passing the bill; and therefore when the king offered, by a message sent by the earl of Essex, 'That he would take care, by commissions which he would grant, that 10,000 English volunteers should be speedily raised, for the service of Ireland, if the Houses would declare that they would pay them;' the overture was wholly rejected: they neither being willing that such a body of men should be raised by the king's direction (which would probably be more at his devotion than they desired) nor in any other way than they proposed: and so in the end (after other ill accidents intervening, which will be remembered in order) he was compelled to pass the bill concerning pressing which they had prepared."

To this bill on February 14, 1641-2, the royal assent was given by lord keeper Littleton, who on the occasion used these expressions, "in which bill there is contained a clause tending much to the security of the persons of the subjects of this kingdom, in declaring that by the law no man ought to be impressed, nor otherways compelled to go out of his coun-

case as in the other. The same observation occurreth with regard to the different penning of all the acts of the late queen for pressing soldiers and marines, and of that for pressing

try to serve as a soldier without his own particular assent, and by common consent of parliament wherein he is involved, unless it be upon necessity of the sudden coming in of strange enemies into the land, as heretofore it was ordained by a statute made in the first year of the reign of the noble king Edward 3, or that he be thereunto obliged by tenure, the contrary whereof hath been practised many ages *vid facti*." See the New Parl. Hist. vol. 2, pp. 1087, 1088; and also p. 1362, *infra*.

It may be not improper to mention that lord Clarendon in many passages of his History represents the said lord keeper Littleton as being a man of most eminent knowledge of the law. I select for insertion here the following extract, because the noble writer's praise is qualified by more unfavourable expressions than he in any other place (so far as I recollect) applies to the conduct of the Lord Keeper.

"The king was very much unsatisfied with the lord keeper Littleton; who did not appear so useful for his service as he expected, and, from the time of the accusing the members, had lost all his vigour, and instead of making any oppositions to any of their extravagant debates, he had silently suffered all things to be carried; and had not only declined the performing the office the king had enjoined him, with reference to the earls of Essex and Holland (before mentioned) but very much complied with, and courted that party of both Houses, which frequently resorted to him; and of late in a question, which had been put in the House of Peers, in the point of the militia, he had given his vote both against the king and the law, to the infinite offence and scandal of all those who adhered to the king.

"He was a man of great reputation in the profession of the law; for learning, and all other advantages, which attend the most eminent men; he was of a very good extraction in Shropshire, and inherited a fair fortune, and inheritance from his father; he was a handsome, and a proper man, of a very graceful presence, and notorious for courage, which, in his youth, he had manifested with his sword; he had taken great pains in the hardest, and most knotty part of the law, as well as that which was more customary, and was not only very ready and expert in the books, but exceedingly versed in records, in studying and examining whereof, he had kept Mr. Selden company, with whom he had great friendship, and who had much assisted him; so that he was looked upon the best antiquary of the profession, who gave himself up to practice; and, upon the mere strength of his own abilities, he had raised himself into the first rank of the practisers in the common law courts, and was chosen Recorder of London before he was called to the bench, and grew presently into the

mariners; the former declare, that it was necessary at that time of war that soldiers and marines should be raised by the methods prescribed in the acts, 'by common consent and grant in parliament.' These are the words of the acts, and they are the very words made use of to the same purpose in the 25th E. 3, already cited. The latter, without any such declaration, barely empowereth and requireth

highest practice in all the other courts, as well as those of the law. When the king looked more narrowly into his business, and found that he should have much to do in Westminster-hall, he removed an old, useless, illiterate person, who had been put into that office by the favour of the duke of Buckingham, and made Littleton his solicitor general, much to his honour, but not to his profit; the obligation of attendance upon that office, depriving him of much benefit he used to acquire by his practice, before he had that relation. Upon the death of my lord Coventry, Finch being made keeper, he was made chief justice of the Common Pleas, then the best office of the law, and that which he was wont to say, in his highest ambition, in his own private wishes, he had most desired; and it was indeed the sphere in which he moved most gracefully, and with most advantage, being a master of all that learning and knowledge, which that place required, and an excellent judge, of great gravity, and above all suspicion of corruption."

Beside the statute 17 Car. c. 29, and the numerous other acts which gave authority for impressing or pressing, during limited periods, other parliamentary proceedings connected with the matter were had in those times.

Thus Mr. Pym, in his speech on Nov. 7th 1640, (four days after the meeting of king Charles the first's Long Parliament) exhibiting a summary of the national grievances, after laying down that "military charges ought not to be laid upon the people by warrant of the king's hand, nor by letters of the council table, nor by order of the lords lieutenants of counties, nor their deputies," proceeds, "The first particular brought into a tax was the muster master's wages, which being but for small sums was generally digested, yet in the last parliament it was designed to be remedied: but now there follows pressing of men against their wills, or to find others."

So two days afterwards lord Digby, member for Dorsetshire, (See his Case, vol. 4, p. 134), by the unanimous desire of his constituents complained of (*int. al.*) "the many great abuses in pressing of soldiers, and raising monies concerning the same." He was supported by sir John Colepepper, member for Kent, who said, "Last summer was twelvemonth, a thousand of our best arms were taken from the owners, and sent into Scotland. The compulsory way was this, 'if you will not send your arms, you shall go yourselves.'" See the New Parl. Hist. vol. 2, pp. 642. 652. 655.

In one of the debates concerning the militia,

magistrates and other peace officers to make search for and apprehend mariners, who then lay hid, withdrew, and concealed themselves, and to send them into the service.

Lord Chief Justice Hale, in his History of the Pleas of the Crown, [1 Vol. 678,] speaking of the legality of pressing, which he indeed seemeth to doubt of, (r) saith, 'He that looks upon the acts enabling pressing of soldiers

Whitelocke said, "By our law as declared by the stat. 1 Edw. 3, and by divers subsequent statutes, the king can compel no man to go out of his country, but upon the sudden coming of strange enemies into the realm; and how many of our parliament rolls do record, that the king advised with his parliament about his foreign wars, and could not undertake them without the advice and supplies of the parliament?"

"All the power of the militia is exercised either in offence or defence; defence is either against the invasion of enemies from abroad, or against insurrections at home.

"Against insurrections at home, the sheriff of every county hath the power of the militia in him, and if he be negligent to suppress them with the *passu comitatus* he is finable for it.

"Against invasions from abroad, every man will be forward to give his assistance, there will be little need to raise forces, when every man will be ready to defend himself, and to fight *pro aris et focis*.

"As to offensive war against a foreign enemy, if the king will make it of himself, he must of himself pay his army, which his own revenue will hardly afford, nor can he compel any of his subjects to serve him in those wars; none can by law be pressed to serve in that war but by act of parliament." See 2 New Parl. Hist. 1079, 1080.

(r) A larger report of what lord Hale says, may be not unacceptable: "The compulsion of men to go beyond or upon the sea, or otherwise imprisoning of them, or compelling men to take prest money or otherwise to imprison them, hath been, I confess, a practice long in use; how far it is justifiable or not, the books that have treated of it are to be consulted, *vide* the argument of Calvin's Case, 7 Co. Rep. 7. b. (See in this Collection, vol. 2, pp. 619, *et seq.*) He that reads the comment of my lord Coke upon Confirmatio Chartar', cap. 5, and his observations and conclusions there upon the statutes of 1 E. 3, cap. 5, and 7; 18 E. 3, cap. 7; 25 E. 3, cap. 8; 4 H. 4, cap. 13, may reasonably think he varied his opinion." [Here lord Hale's editor, Emlyn, notes, 'In Calvin's case he was of opinion, that the subject is bound to serve the king in his wars both within and without the realm; and in his comment upon Confirmatio Chartar', cap. 5. 2 Instit. 528, he says, that the statutes abovementioned (which provide that none shall be compelled to go to the king's war out of his shire except in case of necessity, nor shall be constrained to find men of arms except by consent

'and mariners for foreign service upon or beyond the sea, namely 17 Car. 1, c. 12, 25, '25.* may think that those times made 'some doubt of it. But of this,' saith he, 'I deliver no opinion.'

That learned man, you see, carrieth the inference from these temporary acts no farther than to render the matter doubtful: and so he

of parliament) were but declarations of the ancient law of England. And again in his comment on Magna Charta, cap. 29, 2d Institute 47, he says, that the king cannot send any subject against his will to serve him out of the realm, not even into Ireland, for then under pretence of service he might send him into banishment.'] "And he that looks upon the Acts enabling pressing of soldiers and mariners for foreign service or beyond the sea, namely, 17 Car. 1, cap. 12, 25, 26, may think that those times made some doubt of it." ['Or rather were clear that it could not be legally done without a special act of parliament for that purpose; the like may be argued from some other temporary statutes enacted since our author's time, for authorising the pressing of soldiers and mariners, viz. 2 & 3 Ann, c. 19; 3 & 4 Ann, cap. 11; 4 Ann, cap. 10; 5 Ann, cap. 15; 6 Ann, cap. 10, &c. &c.' Emlyn.] "But of this matter, I deliver no opinion." ['The reason why our author declines delivering any opinion was, because he did not concur with the then prevailing practice, a practice which seems repugnant to the liberties of an Englishman, and irreconcilable to the established rules of law, viz. that a man without any offence by him committed, or any law to authorize it, should be hurried away like a criminal from his friends and family, and carried by force into a remote and dangerous service.' Emlyn].

Emlyn slightly mentions the subject in the Preface to his edition of the State Trials. See it in vol. 1, p. xxvii.

Mr. Hargrave possesses in MS. an unfinished treatise of lord Hale (*Incepta de Juribus Coronæ*), in which the extent of the right of the crown to the compulsive service of the subject is examined. Unfortunately the MS. is in some places torn. Mr. Hargrave also possesses a treatise (transcribed from the Black Book of the Admiralty) maintaining the right of impressing. But he does not speak of it as being executed with very great ability.

* The chapters are misnumbered, they are 5, 23, 26. Foster.

I know not upon what investigation Mr. Justice Foster makes this correction of lord Hale's numbers. In Scobell's Acts and Ordinances, the three statutes which it may seem that my lord Hale means, appear to be 16 and 17 Car. cap. 5, cap. 30, cap. 32. They are numbers 1, 19, 22, in the second part of the roll of the year in Chancery, from which Mr. Tomlinson has favoured me with a transcript of them: Scobell does not give them at large.

leaveth it.(s) But had he lived to see the practice of pressing mariners continue near a century longer, and especially had he seen this practice treated by the legislature in the manner the acts made since the Revolution treat it, I think what was then but matter of doubt would have now appeared to him in a different light. I confess it doth so to me. For rights of every kind, which stand upon the foot of usage, gradually receive new strength in point of light and evidence from the continuance of that usage; as it implieth the tacit consent and approbation of every successive age, in which the usage hath prevailed. But when the prerogative hath not only this tacit approbation of all ages, the present as well as the former on its side, but is recognized, or evidently presupposed, by many acts of parliament, as in the present case I think it is, I see no legal objection that can be made to it.

I make no apology for the length of my argument, because I hope the importance of the question will be thought a sufficient excuse for me in that respect. For it is no more nor less than, whether the only effectual method yet found out for manning our navy in time of war, for raising that number of mariners which the legislature from time to time declare to be necessary for defending our coast and protecting our trade,—whether this method be legal or not. This I say is the question. And therefore I could not satisfy myself without entering as far into the merits of it as I could.

And I have delivered my opinion upon it without any reserve.

N. B. The authorities for pressing mariners for the public service, to be found in Rymer's *Fœdera*, are so numerous, that the learned author purposely left many of them unquoted by him. To some of those in the reigns of Richard 2, Henry 5, Henry 6, and Edward 4, I have referred in the margin of his argument. But as amongst the commissions and mandatory writs cited in pages 162 and 163, he hath given none which were issued in the reign of Henry 4, I think it not improper to take particular notice in this place of two commissions granted in that king's reign. The first of them was issued in the 12th year of his reign; and being a remarkably strong authority for the practice, it deserves to be here transcribed. It is in the following form. [8 Rym. 700.]

"Rex dilecto sibi Roberto Spellowe serrienti suo ad arma, salutem.

(s) In later times attempts have been made to abolish or diminish the practice of impressing mariners. In 1749 was proposed to the House of Commons a bill for such purposes: but of that bill the professed object, and as it seems the real motive, was not to alleviate the hardships suffered by sailors, but to prevent the distress which it was alleged was caused to traders by impressing their mariners.

"Scias quod assignaviinus te, tam ad omnes et singulas naves, bargeas, et balingeras, ac alia vasa portagii triginta doliorem et ultra, in quibuscunque portubus et locis regni nostri Angliæ inveniri poterunt, quam ad tot magistros et marinarios, quot pro gubernatione navium, bargearum, balingerarum et vasorum prædictorum necessarii fuerint, infra libertates et extra, pro denariis nostris prompte et rationaliter solvendis, arestandum et capiendum, et usque portum civitatis nostræ Londoniæ,

"Ad proficiscendum nobiscum in propria persona nostra in præsentis viagio nostro versus partes transmarinas,

"Duci faciendum,

"Et ad omnes illos quos in hac parte contrarios inveneris seu rebelles arestandum et capiendum, et prisonis nostris mancipandum, in eisdem moraturos quousque pro eorum deliberatione aliter duxerimus ordinandum ;

"Et idem tibi præcipimus quod circa præmissa diligenter intendas, ac ea facias et exequaris in forma prædicta :

"Damus autem universis et singulis vicecomitibus, majoribus, ballivis, constabulariis, ministris, possessoribus, magistris et marinariis navium, bargearum, et balingerarum, et aliorum vasorum quorumcumque, ac aliis fidelibus et subditis nostris, tam infra libertates quam extra, tenore præsentium, firmiter in mandatis, quod tibi in executione præmissorum pareant, obediant, et intendant, prout decet.

"In cujus, &c.

"Teste Rege apud Westmonasterium Tertio die Septembris.

"Per ipsum regem."

By the other, which issued in the 13th year of the same reign, (8 Rym. 730.) John Drax, a serjeant at arms, is impowered, by himself and his deputies, to arrest and take up one hundred mariners in the county of Suffolk, one hundred in the county of Kent, and thirty in the county of Essex. And all sheriffs, mayors and other officers are required to be assisting to him in that service. Dodson.

The following collection of modern dicta and decisions concerning Impressment, may perhaps not improperly be subjoined to this case :

In the Case of *Rex v. Tubbs*, Cowp. 512, lord Mansfield said, "The power of pressing is founded upon immemorial usage allowed for ages. If it be not so founded and allowed for ages it can have no ground to stand upon, nor can it be vindicated or justified by any reason but the safety of the state. And the practice is deduced from that trite maxim of the constitutional law of England 'that private mischief had better be submitted to than that public detriment and inconvenience should ensue.' To be sure there are instances where private men must give way to the public good. In every case of pressing, every man must be very sorry for the act and for the necessity which gives rise to it. It ought therefore to

be exercised with the greatest moderation, and only upon the most urgent necessity."

In the Case of *J. Fox*, Pasch. 33 Geo. 3, 5 Term Rep. 276, it was decided, that a seafaring man serving the office of headborough, was not thereby exempted from being impressed, and in that case lord Kenyon said, "The right of pressing is founded on the common law, and extends to all persons exercising similar employments with the defendant's," [meaning, as it appears, by 'the defendant,' the party impressed]; "any exemptions therefore which such persons may claim, must depend upon the positive provisions of statutes;" and Buller, Just. added, "I believe the only excepted case in the books which does not rest on the statute law, is that of a ferryman, who, it is said in one old case, is exempted from being impressed."

In the Case of *Drydon*, Mich. 34 Geo. 3, 5 Term Rep. 417, it appears to have been held, that the stat. 6 & 7 W. 3, c. 18, § 19, was still in force, which seems to have been doubted on a former day in the case of one *Atkinson*, cited in a Note to *Drydon's* Case.

In the Case of *Gallile or Gallery*, Trin. 38 Geo. 3, 7 Term Rep. 673, it was held, that the stat. 6 & 7 W. 3, c. 18, § 19, was not in force.

In the Case of the *King and Edwards*, Trin. 38 Geo. 3, 7 Term Rep. 745, though the Court held in conformity to a former Case (*Rex v. Reynolds*, 6 Term Rep. 497), that the master of an impressed apprentice was not entitled to a Habeas Corpus to bring him up in order to his discharge, but that the application for the writ must be made by the apprentice himself; yet it is said that the Court noticed, "that the Lord Chief Justice had the power under an old statute, passed in the reign of Henry the 8th, [7th or 8th. See 1 Burn's Just. p. 135, 21st ed.] of granting warrants for the purpose of bringing up apprentices in this situation, and that lord Mansfield had frequently exercised that power. And lord Kenyon added, that though the Court would make the rule absolute to quash the writ of Habeas Corpus, he should issue his warrant to bring Gabriel [the apprentice] before him to be discharged, unless the Admiralty agreed to release him."—Note, I have not found any such statute of Henry the 8th. Query, if 5 Eliz. c. 4, be the statute intended. See Chitty on the Law relative to Apprentices, &c. ch. 4, pp. 91, 92, and also the Appendix.

In the Case of *Softly*, lord Kenyon said, "I have frequent applications made to me as chief justice out of court, for discharging persons who have been improperly impressed; a power which, as lord Mansfield said, had been exercised by lord chief justice Holt, and long before his time; but I have never considered myself at liberty to discharge persons of this description." 1 East's Rep. 471.

In the same Case of *Softly*, in which it was decided that a keelman, employed in navigating down the river Tyne to the port of Shields at the mouth of that river, is liable to be impressed

lord Kenyon said, "the power for pressing persons for the sea service is not general, it goes as far only as the safety of the country requires that it should, and there it stops. It extends to persons whose employment is upon the sea and in navigable rivers." 1 East's Rep. 471.

In the Case of Douglas, 5 East's Rep. 477, it was decided that a seaman, serving in the merchant service, is not exempt from being impressed because he is a freeholder.

The author of the "Discourse on the Impressing of Mariners," seems to have supposed that such persons as the above-mentioned Fox and Douglas would not be exempted from impressment.

"If," says he in the Postscript to his Tract, "the impress be admitted, it sweeps all mariners away at pleasure, except an inconsiderable number exempted by statute. No qualification of fortune, or of birth, or of being a burgher, or of a right to vote in the election for representatives in parliament can by him who has once been a mariner be pleaded against it. The impress is paramount over all mariners in all cases wherein individuals are not protected by special acts of the legislature."

In the Declaration of the Prince Regent dated Westminster, January 9th, 1813, the impressment of British seamen, when found on board American merchant ships, was denominated "the exercise of a right which she [Great Britain] has felt to be essential to the support of her maritime power." So also in lord Castlereagh's letter of August 29th, 1812, to Mr. Russell, "the ancient and accustomed practice of impressing British seamen from the merchant ships of a foreign state" is denominated "the exercise of a right upon which the naval strength of the empire mainly depends." See also the Parl. Debates, Feb. 18, 1813, on the American Question; and a very able article in the Edinburgh Review N° 21, vol. 11, p. 1.

N. B. By stat. 13 Geo. 2, c. 3, s. 2, "For better encouraging of foreign mariners and seamen to come and serve on board ships belonging to this kingdom of Great Britain," all such persons having served two years during time of war on board his majesty's ships, or merchant ships, or privateers, shall be intitled to all the rights of natural born subjects, subject however under § 3 to the exceptions of being of the Privy Council or either House of Parliament, holding offices, &c. agreeably to the restrictions of stat. 12 W. 3, c. 2, as to denizens and naturalized persons. And by stat. 13 G. 2, c. 17, every foreigner serving in any merchant ship or privateer belonging to British subjects is exempted from impressment.

In the celebrated "Letter concerning Libels, Warrants, Seizure of Papers, &c." one topic of most vehement and caustic attack upon the conduct of lord Mansfield, was the method which

appears to have been introduced while he was Chief Justice, of procedure upon applications, particularly by impressed persons, for writs of Habeas Corpus. With respect to this method of procedure, and to the Writ of Habeas Corpus itself, much learning is to be found in lord chief-justice Wilmot's Opinions on the Writ of Habeas Corpus and in the Case of the King against Almon. (Notes of Opinions and Judgments delivered in different courts by sir John Eardley Wilmot, pp. 77, 243, 4to. 1802.) See, also, New Parl. Hist. Vol. 15, p. 897, *et seq.*

The reasonings of Franklin and the author of the 'Discourse, &c.' concerning the right from alleged necessity, particularly in so far as such necessity is connected with trade, and concerning the rate of payment to impressed persons, are no doubt of considerable weight. I understand that within the last sixteen years the condition of seamen in the Royal Navy has been considerably improved, and the rigours of impressment have been much abated. I am informed upon very sufficient authority, that the late admirable Mr. Windham entertained the wish that a plan of service for a limited time might be adopted in the British navy. Concerning impress of soldiers, something is to be found in "A Discourse of Tenures," said to be written by sir Walter Raleigh, (Gutch's Collectanea Curiosa, vol. 1, No. VII.)

The author of the 'Discourse on the Impressing, &c.' censures the stat. 5 Eliz. c. 5, s. 27, (extending to mariners and gunners the enactments of stat. 18 H. 6, c. 19, that soldiers who having received part of their wages, &c. should depart from their captains, &c. were to be punished as felons,) because it artificially suggests a doubt, whether the stat. 18 H. 6 extended to mariners and gunners serving on the seas; whereas according to him "it is past all doubt that the last mentioned statute could not possibly be made to extend to them;" in which opinion I apprehend that every person who shall read the statute will concur.

Since p. 1354 was sent to the press, I have inspected the statute, which is on the Roll, 16 Car. 1, p. 3, No. 1. It is intitled, "For the better raising and levying of soldiers for the present defence of the kingdoms of England and Ireland:" and the words of the recital are, "Whereas by the laws of this realm none of his majesties subjects ought to be impressed or compelled to go out of his country to serve as a souldier in the wars, except in case of necessitie of the sudden coming in of strange enemies into the kingdome, or except they be otherwise bound by the tenure of their lands or possessions." And the act proceeds to authorize during eleven months the pressing of soldiers for the king's service in Ireland. Thus it will be observed that this act is *in terminis* confined to land forces.

528. The Trial of Mr. DANIEL TAYLOR,* Preacher in an Episcopal Meeting-House, and others, for not presenting their Letters of Orders, and for not praying for his Majesty King George: 2 GEORGE I. A. D. 1716.† [Now first published from the Records of Justiciary at Edinburgh.]

CURIA JUSTICIARIE, S. D. N. Regis tenta in prætorio burgi de Edinburgh, undecimo die mensis Junij millesimo septingentesimo decimo sexto, per honorabiles viros, Dominos Gilbertum Eliot de Minto, Jacobum Mackenzie de Roystoun et Gulielmum Calderwood de Polton et magistros Jacobum Hamilton de Pancaitland et Davidem Erskine de Dun, Commissionarios Justiciarj dict. S. D. N. Regis.

Curia legitime affirmata.

THE Lords Commissioners of Justiciary, in respect of two certificates produced for Mr. Alexander Sutherland junr. and Mr. Adam Peacock, two episcopal ministers, being both upon soul and conscience, that they are not able to attend, in respect of their indisposition, they therefore continue the dyet against them till Monday next.

Intra'

Mr. Daniel Taylor, preacher sometimes in the episcopal meeting house, in Harts-closs in Edinburgh.

Mr. William Abercrombie, and Mr. David Freebairn, preachers in the episcopal meeting house in baillie Fife-closs.

Mr. George Johnstoun, preacher in the episcopal meeting house in Barrengers-closs.

Mr. George Graham, preacher and user of the English liturgy in his own house, to which many do resort as an episcopal meeting house in Canongate-head.

Mr. Jasper Kellie, preacher in the episcopal meeting house below the Fountain-well.

Mr. Henry Walker, preacher in the episcopal meeting house in Todricks-wynd.

Mr. Patrick Home, preacher in the said episcopal meeting house in Todricks-wynd.

Mr. Robert Calder, preacher sometimes in Edinburgh, and sometimes in Tranent.

Mr. William Milore, and Mr. William Cockburn, preachers in the episcopal meeting house in Blackfrier-wynd.

Mr. Alexander Sutherland, sen. and Mr. Robert Chein, preachers in the episcopal meeting house at the back of Bel's-wynd.

Mr. Andrew Cant, Mr. David Lambie, Mr. David Rankine, and Mr. Patrick Midletoun, preachers in the episcopal meeting house in Skinners-closs.

Mr. Andrew Lumsdain, preacher in the episcopal meeting house in Barrengers-closs in Edinburgh.

Mr. James Walker, preacher in the episcopal meeting house in Dicksons-closs in Edinburgh.

Mr. Robert Marishall, preacher in the episcopal meeting house in baillie Fyfes-closs.

Mr. Robert Wyllie, preacher in the episcopal meeting house in baillie Fyfes-closs.

Mr. — Keith, preacher in the episcopal meeting house in Barrengers-closs.

Mr. Thomas Rind, preacher in the episcopal meeting house in Sandilands-closs, all within the city of Edinburgh and Cannongate.

Mr. Arthur Miller, preacher in the episcopal meeting house in Leith.

Mr. Robert Coult, and Mr. James Hunter, episcopal preachers in the meeting house of Musselburgh,

Indicted and accused at the instance of sir David Dalrymple of Hailes baronet, his majesties advocat for his highnesses interest, for not producing of their letters of orders, and for not praying for his majesty king George in manner mentioned in the criminal letters raised against them thereanent, making mention, That whereas by an act of parliament of Great Britain, past in the tenth year of the reign of her late majestie queen Ann, of happy memory, intituled, An Act to prevent the disturbing of those of the episcopal communion in that part of Great Britain called Scotland, in the exercise of their religious worship, and the use of the liturgy of the church of England, and for repealing the act passed in the parliament of Scotland, intituled, An Act against irregular baptisms and marriages. It is enacted, That it shall be free and lawful for all those of the episcopal communion in that part of Great Britain called Scotland, to meet and assemble for the exercise of divine worship, to be performed after their own manner by pastors ordained by a Protestant bishop, and who are not established ministers of any church or paroch, and to use in their congregations the liturgy of the church of England if they think fitt; Provided alwayes, That none shall presume to exercise the function of a pastor in the said episcopal meetings and congregations, except such who have received holy orders from the hands of a Protestant bishop, and that every person who shall be called or appointed to be a pastor or minister of any episcopal congregation, before he take upon him to officiat as pastor of the said con-

* See a like Case, vol. 17, p. 781.

† This report was not obtained in time for insertion in chronological order.

gregation, be, as he is thereby bound and required to present his letters of orders to the justices of the peace, at their general or quarter sessions, to be held for the shyre, stewartry, city or town, or other place in which the said episcopal congregation or meeting is, or shall be, and that the said letters of orders be there entered on record by the register or clerk of the said meeting of the justices. And whereas, it is also thereby further enacted, That every minister or preacher of the episcopal communion in Scotland, protected and allowed by the said act, shall at some time during the exercise of divine service, pray in express words for her majestie queen Anne then reigning, and for the most excellent princess Sophia electress and dutchess dowager of Hanover while living, and all the royal family, and every such minister neglecting so to do, shall for the first offence forfeit the sum of 20*l*. sterling, and for the second offence every such minister being thereof convicted by the oaths of two sufficient witnesses before the Lords of Justiciary, shall from thenceforth forfeit and lose the benefit of the said act, and be declared incapable of officiating as pastor of any episcopal congregation, for the space of three years. And further, whereas the said provisions made in the foresaid act, ordaining prayers to be made for her said late majestie queen Anne, and all the royal family, did upon the demise of her said late majestie, nevertheless remain as perpetual conditions of the protection and toleration by the said act indulged. And therefore in pursuance thereof upon the death of the most excellent princess Sophia electress and dutchess dowager of Hanover, her said late majestie in council was pleased to order, That every minister and preacher in his respective congregation or assembly, should pray in express words for his majestie, then designed elector of Brunswick by an order of council, dated at Kensington the 21st of June 1714 years. And in like manner after the demise of the said act, did order, That from thenceforth every minister or pastor should in his respective church, congregation, or assembly, pray in express words for his majestie king George, under the designation of his most sacred majestie king George, and for their royal highnesses the prince and princess of Wales, and all their royal issue, by order of council, dated at St. James's, the first of August 1614 years. Coppies of both which orders were given out, and other subsequent orders. Yet nevertheless, the said Mr. Daniel Taylor, Mr. William Abbercrombie, Mr. David Freebairn, and baill other persons above complained upon, or one or other of them, upon the 4th, 11th, 18th and 25th days of December, 1715 years, being all Sundays, and upon the 1st, 8th, 15th, 22nd and 29th days of January, and upon the 5th, 12th, 19th and 26th days of February, and upon the 4th, 11th, 18th and 25th days of March, the 1st, 8th, 15th, 22d and 29th days of Aprile, the 6th, and 13th days of May, 1716 years, or one or other of these days, all

Sundays, have presumed to exercise the function of a pastor in each of their respective assemblies and congregations above mentioned, all within the said city of Edinburgh, and suburbs thereof, and Leith and Musselburgh and Tranent, or in one or other of the said meeting-houses, without producing their said respective letters of orders by a Protestant bishop, at the general or quarter sessions, held for the said city of Edinburgh, shires of Mid and East Lothians, within whose bounds, liberties or jurisdiction to the said city and shires respectively belonging the said episcopal meeting houses be, to the end that the same may be entered on record by the register or clerk of the said meetings, which being a prohibition to their opening of their said meetings, or exercising the function of a pastor in their said meeting houses respectively, except on condition of producing their orders, in manner and to the effect foresaid, the same being omitted by each of them respective, their presuming to exercise the function of a pastor in their said respective meeting houses or congregations, is against the said law, and contrary to the establishment of the church, contained in the acts of parliament made in Scotland before the Union, and confirmed and further established by the treaty of Union past in the parliament of Scotland and England. And in like manner, each of the said persons or one or other of them, in their several meeting houses, congregations or assemblies, or in one or other of the saids places, did upon the 6th, 13th, 20th and 27th days of March, and upon the 3d, 10th, 17th and 24th days of Aprile, and upon the 1st, 8th, 15th, 22d, and 29th days of May, and upon the 5th, 12th, 19th and 26th days of June, and upon the 3d, 10th, 17th, 24th and last days of July, and upon the 7th, 14th, 21st and 28th days of August, and upon the 4th, 11th, 18th and 25th days of September, and upon the 2d, 9th, 16th, 23d and 30th days of October, and upon the 6th, 13th, 20th and 27th days of November, and upon the 4th, 11th, 18th and 25th days of December, 1715 years, being all Sundays, and upon the 1st, 8th, 15th, 22d and 29th days of January, and upon the 5th, 12th, 19th, and 26th days of February, or upon the 4th, 11th, 18th and 25th days of March, the 1st, 8th, 15th, 22d and 29th days of Aprile, and upon the 6th and 13th days of May, 1716 years, being all Sundays, or one or other of the said days, officiat as pastors and exercise divine service in their respective meeting houses lybelled, or in one or other of them, and did neglect and omitt to pray in express words for his majestie, under the foresaid name of his most sacred majestie king George, and for their royal highnesses the prince and princess of Wales and their royal issue, during the whole exercise of divine worship, but on the contrary pretending to use the liturgy of the Church of England, in virtue of the Act of Toleration above-mentioned, each of them on the dayes foresaid, or one or other of them, in their respective meeting houses, whierein they did officiat as pastors, wilfully and contemptuously

omitted every prayer, petition, or part of the said liturgy and service of the Church of England, where his majesties said name, or the name of their royal highnesses the prince and princess of Wales and their royal issue, are by authority expressly appointed to be named or mentioned, and in place thereof, made use of certain general and equivocal words, to the dishonour of God and true piety, and contrary to their profession of following and making use of the Liturgy of the Church of England, and duty of praying for his majestie as supreme christian magistrate, manifestly in contempt of his authority, and tending to excite sedition, and alienate the affection of his people, from his majesties person and government, stirring up thereby his subjects to misliking, sedition, unquietness and to cast off their obedience to his majestie to their evident perill, tinsel and destruction. By which the haill forenamed persons complained upon and each of them, or one or other of them, were guilty actors or art and part of the neglects contempts and crimes abovementioned. Which or any part thereof being found proven by the verdict of an assize before the lords justice general, justice clerk and commissioners of justiciary, they and each of them ought to be punished for the same with the pains contained in the said acts of parliament, particularly and generally above mentioned, and other pains of law, to the example and terror of others, to commit the like in time coming. And their several meeting houses ought to be shut up for not production of their orders respective, and for their contemptuous neglecting and passing over, the petitions and parts of the liturgy of the Church of England, wherein his majesties name, or the prince and princess of Wales and their royal issue are expresst, and using of general and equivocal terms in manner foresaid.

Pursuers—Mr. Duncan Forbes his majesties advocate depute; Mr. John Elphinston and Mr. Robert Dundas Advocats.

Procurators in Defence.—Mr. James Graham, Mr. Alexander Hay, Mr. John Falconer, Mr. Adam Coutt, Advocats.

The lybel being read and fully debate *vind voce* in presence of the said lords, pannells and assizers, the Lords Commissioners of Justiciary ordain both parties to give in their Informations to the clerk of court, the pursuer to give in his betwixt and Wednesday next to come, at six a clock at night, and the pannells to give in theirs against Friday thereafter at six a clock at night, in order to be recorded, and coppies to be put in the lords boxes, against Friday afternoon, and continue the dyet of the said cause till Monday next, and ordain assyzers and witnesses to attend then, each under the pain of one hundred merks.

INFORMATION

For Sir DAVID DALRYMPLE, of Hailes, baronet, his Majesties Advocate,

AGAINST

Mr. DANIEL TAYLOR, Mr. WILLIAM AMERCROMBIE, and others, Pannells.

The pannells stand accused of crimes the least consistent with the character of clergymen or subjects, and the most pernicious in their consequences that can well be thought of.

As early as the late happy Revolution, several ministers of the episcopal persuasion, declared their enmity at that settlement by refusing to acknowledge, or pray for their late majesties king William and queen Mary of glorious memory, upon which they were deprived of their churches. But continuing to officiat as pastors, without praying for their sovereigns, the parliament 1690, by the 35 act, declared their performing public service, without praying for their then king and queen, to be a manifest contempt of public authority, a stirring up and fomenting the disaffection of the people to their majesties and to the government, and an encouragement of all their enemies, therefore prohibiting them to exercise any part of the ministerial function, either in churches or elsewhere, without application to the privy council, taking the Oath of Allegiance, and engaging themselves under their hand to pray for their then majesties king William and queen Mary, certifieing them, that if they did in the contrary, they should be proceeded against as enemies to the government with all rigour.

This act notwithstanding, some of the clergymen aforementioned continued their disaffection, exercising the ministerial function without praying for the sovereigne, rather pitied for their folly, than prosecuted with the pains of law, until 1712, that the parliament, willing to deall tenderly with scrupulous consciences, enacted the Toleration Bill, whereby those of the communion of episcopacy in Scotland were protected in the exercise of their religious worship. But so sensible was that parliament of the abuses committed in the admission of clergymen by supposed bishops, who perhaps derived their title from the Pretender, and so conscious of the danger that might ensue, if the people were taught by pastors who had always stood out in opposition to the present happy settlement of the crown, that by an express clause they prohibited any person to presume to officiat as pastor except such as had received holy orders from the hands of a Protestant bishop, and required every such pastor to produce and record his letters of orders with the justices of the peace at their quarter sessions. And by another clause, they required every minister and pastor, as well of the established church as of the episcopal communion, to pray at some time during divine worship in express words for the sovereigne, and the heirs of the crown, as it then stood entailed, under the

penalty of twenty pounds sterling for the first offence, and deprivation with incapacity for three years for the second.

Though nothing could be more favourable for Protestant subjects of the episcopal communion than this Act of Toleration, experience quickly showed how dangerous the abuse of it was, for no sooner had the disaffected clergymen got the shelter of a toleration, then meeting houses were sett up, where divine service was publicly performed without the least obedience given to the law, either in respect to the production of the pretended ministers letters of orders, or to the praying for their sovereign expressly; but on the contrary, general and equivocal words were used, to the dishonour of God, and promoting of these seditious principles, which soon broke forth into open rebellion, and it is but too well known, that almost every one who had the misfortune to be concerned in the late unnatural treason within Scotland, was of communion with the pannells, or other episcopal ministers in their circumstances.

Patience and forbearance have been too long exercised, his majestie can no longer suffer his royal authority and the laws to be contemned, or see his loving subjects in hazard of being seduced from their alledgiance, and filled with disliking and disaffection of his person and government, to the evident peril, tinsel and destruction, wherefore necessary it is, that the laws in that case made and provided, be put to execution, q'ch is the intention of the prosecution now depending.

The lybell sets forth, That by the act anno 10mo Annæ Reginæ intituled, An Act to prevent the disturbing those of the episcopal communion, &c. it is provided and enacted, That none shall presume to exercise the function of a pastor in episcopal meetings or congregations, except such as shall have received holy orders from the hands of a Protestant bishop: and that every person who shall be called or appointed to be a pastor or minister of any episcopal congregation or assembly, before he take upon him to officiate as pastor of the said congregation, be thereby obliged and required to present his letters of orders to the justices of peace at their general or quarter sessions, and to enter the same on record.

It subsumes, That the pannells have presumed to officiate as pastors, without producing or recording their said letters of orders, and therefore concludes, that they should be adjudged guilty of a manifest contempt of the law; that they should be found to have no title to the toleration in the act, and of consequence be subjected to penalties contained in the acts formerly made in Scotland against the practices wherewith they are charged.

Against this part of the lybell, it was objected for the pannells, Primo, That the clause was not simply preceptive (as they called it) or prohibitory: but on the contrary a condition whereby in recording their letters of orders, they became entitled to the protection of the

act; and thence it was urged, that their omitting a proviso introduced in their own favours, could not be construed a contempt of the law, so as to infer any punishment.

And 2do, Allowing the clause to be prohibitory, simply it was argued, tho' the prohibition in the first part of the clause was absolute; discharging all persons to exercise the function of a pastor, except such as were admitted by a Protestant bishop, yet the second part of the clause requiring the recording of their letters of orders, before officiating as pastors, regarded only such preachers as should after the date of the act be appointed pastors; wherefore it was contended, that none could be found guilty of a contempt of the act for not recording their letters of orders, but such as had received orders since the date of the act.

To both which it was answered, 1mo, That the words of the clause are expressly prohibitory discharging all without distinction, to presume to exercise the function of pastor, except such as shall have received holy orders from the hands of a Protestant bishop, and that upon good ground to prevent the danger of having ignorant people taught by pastors who had their ordination either from Popish bishops, or such as were instituted by the Pretenders.

2do, As the designe of the first part of the clause was to guard against such teachers, there is no dispute that the intention of the second part of it was to make that prohibition effectual, by ordaining all pastors who should claim right to preach by virtue of that act, to produce their letters of orders, to the end that the fraud might be discovered, and therefore seeing the second part of the clause is equally extensive as the first, it must be concluded, that all who have officiated as pastors, without regard to the date of their letters of orders, must be found guilty of a contempt of the statute, unless they have previously recorded them.

3tio, The clause being simply prohibitory, there is no colour for arguing, that the pannells could without a trespass dispense with it, as being introduced in their favours: It is true indeed that by their wilful neglecting and refusing to obey the directions given them by the law, they ought to forfeit all claim and title to the protection of it. But there is no inconsistency in supposing that the same contemptuous neglect of a form required by any law to entitle one to the benefit thereof, may not at the same time be adjudged a forfeiture of the privilege, and punished as a contempt or trespass against the law.

The second part of the lybell is founded on another clause of the same statute, Anno 10mo Annæ Reginæ, which provides, That every minister and preacher, as well of the established church in that part of Great Britain called Scotland, as these of the episcopal communion, protected and allowed by this act, shall at some time during the exercise of divine service in such respective church, congregation, or assembly, pray in express words for her most sacred majestie queen Anne,

and the most excellent princess Sophia, electress and dutchess dowager of Hanover, while living, and all the royal family, under the penalty of twenty pounds sterling for the first offence; which provisions of praying for the sovereign by name, the immediat heir of the crown, and the royal family, became perpetual conditions of the Toleration by the said Act indulged, and in consequence whereof, upon the demise of the late queen, their excellencies the lords-justices, did by their order libelled on, dated at St. James's, the 1st of August 1714, direct, That every pastor or minister performing divine worship should pray in express words for his most sacred majestie king George, his royal highness the Prince, and all the royal family. The lybel subsumes, that the pannells have performed divine worship in their several congregations, without praying expressly for his majestie king George, his royal highness the Prince, and the royal family, wherefore it concludes, that they should be decerned to pay the penalty in the act.

To this second article of the lybel, it was objected for the pannells, 1mo, That the clause required express mention to be made of her late majestie queen Anne, was personal, and did not extend to her successors on the throne, which being supposed, neither the queen in council nor the lords justices by any proclamation or order could direct the praying expressly for the successor under a penalty.

And 2do, Allowing the pastors and preachers mentioned in the act, Anno Decimo Regine, were obliged to pray for his majestie king George nominatim, and the royal family, yet the pannells did not conceive themselves to be subjected to the penalty of that law, because the act concerned only such as were tolerated and protected by it; whereas in not producing their letters of orders, which is charged upon them in the first part of the lybel, as they were not entitled to the protection of the act, they cannot be subjected to its penalties.

To the first of these, it is answered, That as the Toleration law is perpetual, the provisions of it must be construed so too; no duty is more natural and necessary than for clergymen tolerated to pray for the supream Christian magistrate, from whom their protection flows, nor is there any thing further meant in the act, by mentioning her majestie queen Anne, and the most excellent princess Sophia, than to express the necessity of praying for the sovereign for the time being, and the apparent successor by name; wherefore their excellencies the lords justices were well warranted by the act of parliament to direct upon her late majesties demise, that prayers should be made for his present majestie king George by name, and for his royal highness the prince of Wales, and it is upon the act of parliament itself, as it is explained by the orders of council, that the present prosecution is founded, and not upon the sanction of the act of council by itself, agreeable to which the lords have already decided.

To the second objection, it is answered, That the pannells mistake it mightily, if they think their contempt of the Toleration law and forfeiting the protection of it, upon such contempt, can free them from the penalties incurred by trespassing against other articles of it.

The clause founded on requires, That every minister and preacher shall pray for the sovereign by name, and these words, "as weel as of the established church, as those tolerated by this act," are meant not to save such as shall be so perverse as not to comply with the terms of the Toleration, from the necessity of praying for the sovereign, but to show that these of the established church were comprehended under the clause, as well as those of the episcopal communion, for whom it was chiefly designed, and indeed it would not have been proper to have calculated a separate clause for such of the episcopal communion as did not embrace the Toleration, because the legislator could not have supposed that these would have presumed to exercise the function of ministers.

But 2do, It is not the question, whither by a punctual compliance with the terms of the Toleration Act, the pannells are or are not entitled to its protection; if they are not it's worse for them; one thing is certain, that since they behaved as preachers tolerated by that act, and exercised the ministerial function accordingly, they became lyable to the penalties provided by it. And separatim, the pannells will take notice, that the penalties of the law above mentioned, are not only sued for at present, but that the lybel likewise concludes the pains of law made of before in Scotland concerning the stirring up of subjects to misliking, sedition and unquietness, which necessarily must take place, upon the supposition, that the pannells are not intitled to the protection of this act. By the 35 act, session 2d, parliat. 1st William and Mary, performing public service without praying for their majesties, is declared to be a stirring up and fomenting of disaffection in the people, and an encouragement to their majesties enemies, and is ordained to be punished accordingly.

Nor is it possible for the pannells to avoid the punishment of these crimes, all concluded in the lybel, if they are not sheltered by the Toleration Act.

Special defences were proponed for some of the pannells, of equal weight with these proposed in general against the lybel: and, first, it was alledged, That though some of them did preach and use worship, it was only in their own families, whither certain neighbours repaired, which nevertheless, did not merit to be called a meeting-house.

To which it was answered, That a meeting-house is no otherwise defined in the law, than as it is an assembly or congregation for religious worship; and the proof will discover whither those mentioned were such.

The second special defence is, That some of the pannells have no proper meeting house of their own, (that is,) That they have not been

called and appointed pastors to any particular congregation.

I suppose it will not be argued, that this can be any defence against the second part of the lybel, which proceeds upon the pannels neglect to pray for the king; nor can it well be against the first, unless the pannel who pleads that defence will prove, that before he presumed to officiate as pastor, he did record his letters of orders at quarter sessions for this, or some other county.

A third special defence argued for two of the pannels, against the first article of the lybel was, That whereas their meeting house is within the shire of Edinburgh, they were under an absolute inability of recording their letters of orders, in as much as there was no commission of the peace made out for the shire since his majesties accession to the throne.

To which it is answered, That the words of the statute being express, discharging any person from officiating as pastor, unless he produce letters of orders at the quarter sessions, and that without any exception of what case soever, the pannels have trespassed against the statute, in not delaying their exercising the function of a pastor, until a commission of the peace were appointed. In respect whereof, &c.

Sic Subscribitur,

DUN. FORBES.

INFORMATION

For Mr. TAYLOR, and others, Ministers of the Gospel, Pannels;

AGAINST

HIS MAJESTIE'S ADVOCAT, Pursuer.

It has pleased his Majestie's Advocate to insist in a criminal lybel, against the pannels, narrating, That, by an act of parliament of the 10th of the late queen, it is enacted, That it shall be lawful for those of the episcopal communion in Scotland, to assemble for the exercise of divine worship, without any lett, hindrance or disturbance, provided, that none exercise the function of a pastor, save such as have received holy orders from a Protestant bishop, and that every person who shall be called or appointed a pastor of any episcopal congregation, before he take upon him to officiate, present and registrat his letters of ordination before the justices of the peace, and that every minister of the episcopal communion, protected and allowed by the said act, shall some time during the exercise of divine service, pray in express words for her majestie queen Anne, and the princess Sophia while living, and all the royal family, under the penalties mentioned in the said act. Which provisions in the foresaid act, did upon the demise of her majestie, nevertheless remain perpetual conditions of the protection and toleration by the act indulged; and in pursuance thereof, the lords justices by their order, dated the 1st of August 1714, appointed every minister and pastor in his respective church, congregation or assembly, to pray in express words for his most sacred majestie king George, his royal

highness the Prince, and all the royal family. The like alteration in the foresaid act of parliament, having been before made by her late majestie and council, upon the death of the princess Sophia, and subsuming, That the pannells upon several Sundays of the year 1715 and 1716, specified in the lybel, have presumed to exercise the function of pastors in each of their respective assemblies, without producing their letters of ordination by a Protestant bishop, before the justices of the peace, to the end the same might be entered on record; which being (as the lybel says) a prohibition to the opening of the said meetings, or exercising the office of a pastor, except on condition of producing and registering their orders in manner foresaid, The same being committed, and their exercising as a pastor in their meeting houses or congregations is against law.

And further subsuming, That the saids pannels did on the several dayes lybelled, or one or other of the same, exercise divine service in their meeting houses, and did omit to pray in express terms for his majestie king George. But using the Liturgy of the Church of England did omit every prayer, petition or part of the said liturgy, where his majesties name, and the name of their royal highnesses, and the name of the royal issue, and by authority expressly appointed to be named. And concluding, That the saids pannels and each of them, ought to be punished with the pains contained in the saids acts of parliament and other pains of law.

At the hearing of the cause the pannels before they entered upon their particular defences against the lybel, made this general observation, That the first branch of the lybel proceeded against them, as if they were not such persons as fell under the description of the Act of Toleration by reason they had omitted to produce and registrate their letters of orders. But in the second branch of the lybel, from which the penalties for not praying, are concluded, the pursuer insists against the pannels, as protected and allowed by the statute lybelled upon, and consequently falling under the description of the Act. Which being a manifest contradiction, and the lybel thereby rendered vague, and altogether uncertain, the pannels did, and still do with all deference humbly submit to the Court, if such a lybel can be remitted to the knowledge of an inquest.

The pannels in the next place, pled, as to all the facts lybelled proceeding two moneths, the last clause of the foresaid act of parliament, whereby it is provided, That no minister or preacher offending herein shall suffer such penalties, or either of them, unless they be prosecuted for the same within two moneths after the offence is committed. And to this the pursuer having in his information made no objection, the pannels take it as granted, they yield the relevancy as to the whole lybel, as in a great measure they seemed to do in pleading.

This being premised, the pannels without noticing the preambles of the pursuer's reason-

ing, and the warmth with which the laws therein mentioned, and which noway concern this lybel are enforced, do proceed to reply to the answers made by the pursuer, whereby it will appear, that the further defences proposed for the pannels stand relevant, notwithstanding of what was objected, and that they therefore ought to be acquitted.

It does appear both from the circumstances the episcopal clergy were in before this act of the 10th of the late queen, and from the rubrick, and indeed the whole import of the act itself, that nothing further was intended than to prevent the disturbing of those of the episcopal communion from the irregular attacks, and some insults were made upon them in the exercise of their religious worship, providing they complied with certain qualifications prescribed in the statute, for the rubrick runs in these very terms, An Act to prevent the disturbing of those of the episcopal communion, &c. and the statutory part enacts, That it shall be free for them to assemble for their religious worship, and have the protection, aid and assistance of the magistrats, then immediately follows the proviso or condition (as the lybel itself terms it) where the qualifications necessary to intitle them to this protection are contained: and then is subjoined penalties against the disturbers of such congregation or assembly for religious worship permitted by this act; and lastly, the injunction as well to the ministers of the established church, as to those of the episcopal communion protected and allowed by this act, of praying in express terms under the penalties therein mentioned. The pannels therefore did, and do plead, That seeing they are only conveyed upon this statute, and that by the first branch of the lybel, they are expressly insisted against as not falling under the description of persons intituled to the benefit of it, by reason they have not complied with the qualities requisite to entitle them to that benefit, they cannot, whither for exercising the function of a pastor, for not praying in express terms for his majestie king George, be upon this act convicted, and no other is lybelled or insisted on from whence the conclusion of the lybel can be inferred.

The pannels further pled, That though this clause of the act, requiring the several qualifications therein mentioned, was not provisional, but simply prohibitive, yet even in that view the lybel was wrongously laid, as subsuming, that the pannels ought to have produced their respective letters of orders by a Protestant bishop, at the general or quarter sessions, and to have entered the same on record by the register or clerk of the peace, without lybelling, that the pannels were after the date of the said act, called or appointed to be pastors or ministers of their respective episcopal congregations or assemblies; for it is such only as shall be so called or appointed, whom that part of the act directs to qualifie by production, and recording of their letters of orders.

As for all other ministers and pastors, the

law enjoins, That they shall not presume to exercise their function in the episcopal meetings and congregations, unless they have received holy orders from the hand of a Protestant bishop. But as to the production of these orders, or entering them upon any record, nothing is said, and when the pannels are duly called for exercising the function of a pastor, without receiving orders from the hands of a Protestant bishop, they will be able to vouch their orders, and are now willing to do it: but that the lybel not subsuming on this clause of the act, the forms do not allow the pannels to give the Court unnecessary trouble.

Stio, Whereas the lybel says, That the not producing and entering upon record the letters of orders, is a prohibition to the opennings of the episcopal congregations and meetings, and to the pannels or either of them, exercising the function of a pastor in their said meeting houses.

The pannels did and do plead, That there is no ground from the statute lybelled upon to draw this consequence, there being no penalty whatsoever adjoined to that clause of the act of parliament, where the pannels in the case of this clause of the statute that is called or appointed pastors or ministers of an episcopal congregation, in time subsequent to the statute, and were they as such pleading in any court the benefit of this statute, they behoved necessarily to show, that they were intituled to it by letters of orders produced and entered on record, as the law directs. And this is the only case, where the producing and entering the letters of orders and recording is requisite; but from thence to infer, that the law simply prohibits the exercise of the ministerial function, through the not complying with the provision, which would have intituled them to the benefit of being protected from being disturbed and insulted in the exercise of their religious worship, seems to be no good argument, at least it is an argument that can never be founded in this statute.

As to the separate branch of the lybel, concluding the penalty for not praying in express words for his majestie king George, the pannels did, and do plead, That that part of the statute, which only enjoins the praying in express words for queen Anne, determined by her demise, and their being no clause in the statute, empowering the lords justices to appoint the successor to be prayed for in express terms, under the penalties in the act contained: these specifick penalties, for such only are lybelled, cannot be applied against the pannels, for the neglecting or omitting to pray, as by that order is directed, however otherwise they might be censurable in a proper process.

The pursuers answered to the first defence, That the clause of the act is not conditional, but simply prohibitive, in these terms, Be it enacted by the authority aforesaid, that none shall presume to exercise, &c. And the reason of the law, which was to prevent people being taught by pastors who had their ordination

from Popish bishops, and that this might be discovered these letters are ordained to be presented and recorded, necessarily concludes the law ought to be taken in these terms.

The pursuers further said, That altho' it was a very just consequence from this clause of the act, that those were not intitled to the benefite of it, who did not comply with the conditions, yet there is no inconsistency in arguing that the same neglect may be punished as a contempt of trespass against the law.

But here the pursuers much mistake the matter, for the question is not, whither there would have been any inconsistency in forfeiting the benefite of the act, and likewise being punished upon contempt of the law, had the act enacted the non compliance with the qualifications as a contempt, and annexed a penalty: but the question is, Whither it is so enacted? And the pannels say not. It is true the word 'enacted' is found in the clause, but then it is only enacting a provision or condition, as appears from the commencement of the clause, *Provided alwayes*.

And this appears to be the true intent of the act through the whole, and particularly by that clause which bears, That every episcopal minister protected and allowed by this act, being convicted, shall from thence forth be forfeited and lose the benefite of this act, and be declared incapable of officiating as pastor of any episcopal congregation during the space of three years; for there the penalty is only statute against such episcopal ministers as claim the protection of the act, the penalty itself is the forfeiting and losing the benefite of it, which can never be applied against such who are not intitled to it. And the further incapacity of officiating as the pastor of any episcopal congregation, does plainly intimate, that there may be some episcopal congregations, which are not intitled to the benefite introduced by this statute, in favours of such who comply with the conditions required by the act.

For clearing that this is the true import of the statute, the pannels proposed a case, That if an offender were prosecute upon that clause of the statute, whereby it is enacted, That he who disquiets or disturbs any assembly of religious worship permitted by this act, upon proof by two or more sufficient witnesses, shall forfeit the sum of 100*l.* sterling, whether or not upon pleading the words of the statute, that the assembly for religious worship so disturbed, was not permitted by that act, the pastor not having complied with the conditions in the provisional clause, could the party so indicted be convicted? And it is certain he could not. If then such persons are not intitled to the benefite of the act, it is against reason to pretend, that they should be only lyable to the penalties.

But that which ought to put this matter out of dispute, is the lybel itself, which expressly owns, that the producing and entering the letters of orders upon record, is the condition on which the ministers are entitled to the bene-

fit of the act, tho' it does noways follow, that the not producing and entering the foresaid letters on record, is a prohibition of the pannels opening their meetings, and exercise the function of a pastor, for that this statute has no where said, nor has the pursuers shewn or lybelled any other act of parliament, enacting such prohibition, as the pannels have already more fully shown in the third number of their defence.

From all which the pannels do as they hope with evidence plead, that there is no occasion for recurring to a pretended reason of the law, where the law itself, even in the pursuers opinion, is plainly conditional.

As to that part of the defence, touching the not praying in express words, the pursuers say, that these words which enact the penalty only against such ministers of the episcopal communion, as are protected and allowed by that act, were not intended to save such as should not comply to the conditions of the tolerations, but to show that these of the established church were comprehended under the clause as well as those of the episcopal communion.

The pannels need make no answer, but refer to the words of the act; neither need they notice what is further said, that the pannels behaving as preachers tolerated by that act, and exercising the ministerial function, became lyable to the penalties provided by it, for that is begging the question. And as to the further part of the answer, wherein the pursuer insists upon the 35th act, sess. 2nd, parl. 1st William and Mary, which prohibits and discharges ministers deprived to preach or exercise any part of the ministerial function, untill they present themselves before the privie council, and take the Oath of Alledgiance and engage themselves to pray for king William and queen Mary.

The lords will notice, that this is quite foreign to the present question, such act being no part of the lybel. For altho' the lybel says, the presuming to exercise the function of a pastor is against the foresaid statute 10th of the late queen, lybelled upon, and is contrary to the establishment of the church contained in the acts of parliament made in Scotland before the Union, and confirmed and further established by the treaty of union past in the parliament of Scotland;

Yet it is plain that this 35th act is none of these laws so confirmed, and it's observable, that these words of the lybel, are only subjoined to that branch of it, which concerns the exercising the ministerial function, and noways to that branch of the lybel concluding a penalty for not praying in express words; besides it only relates to such ministers as were deprived, and the pannels neither were, nor are lybelled to be of that number; and indeed it appears by the whole tenor of that act that it is long since determined and expired; and so, supposing it had been lybelled upon, could never concern the case.

As to that part of the defence touching the order of the lords-justices, the pursuers have

answered nothing in their Information, and therefore the pannels may well take it that the pursuers have admitted the defence is good; and indeed it cannot but be admitted, when our other laws, with respect to cases of the like nature are considered, and particularly that, Anno Sexto Annæ Reginæ, intitled, Act for the security of her majesties person and government, and of the succession to the crown of Great Britain in the Protestant line, whereby it is enacted, That from and after the demise of her majesty, without issue of her body, instead of the oath appointed to be taken by the act intitled, An Act for the further security of her majesties person, and of the succession in the Protestant line, and for extinguishing the hopes of the pretended prince of Wales, and all other pretenders, &c. the following oath shall be taken by all persons required by the said act, to take the oath therein mentioned, and hereby altered and changed, (that is to say) and then follows the Oath of Abjuration, with blanks, after which the act goes on. The blanks of which oath shall be filled up with the name of her or him, as king or queen, who shall be next in succession, according to the said act, for the further limitation of the crown, when the said oath is to take place, and with other proper additions of the words off, her his or him, and from and after the death of the said pretended prince of Wales, these words following, viz. (and I do solemnly and sincerely declare, &c.) shall be left out, and also the words, (against him the said James) shall be omitted, and instead thereof shall be inserted, (against all persons whatsoever.)

By all which it appears, that an act of parliament is requisite to the makeing of such changes, as future events may make necessary, and that if such changes are not made by authority of parliament, dissabilities and other penalties are not incurred, nor to be prosecute on the former laws.

There were other special defences at the pleading insisted on, with respect to the several circumstances of the respective pannels, which being fully repeated in the pursuers Information, the pannels humbly begg leave to referr themselves to the same. As to these points, conceiving the force of them nowayes eloided by what the pursuer has offered in answer, and therefore need no reply. In respect whereof, &c.

Sic Subscribitur,

JAMES GRAHAM.

June 18th, 1716.

Intran'

Daniel Taylor, and others, (names and designations as in the first sederunt).

Indicted and accused at the instance of his majesties advocate for his highness interest for not praying for his majestie king George and others, *ut in die præcedenti*.

Pursuers.—Mr. Duncan Forbes, his majesty's advocate depute, Mr. John Elphinston, and Mr. Robert Dundas, advocates.

Procurators in Defence.—Mr. James Graham, Mr. Alexander Hay, Mr. John Falconer, and Mr. Adam Coult, advocates.

The Lords Commissioners of Justiciary having considered the libel at the instance of his majesties advocat for his highness interest, against the persons beforenamed and designed, pannels,* with the debate thereupon, they find the pannels, or any one of them, their officiating or exercising the office of a pastor in any episcopal congregation without producing their letters of orders from a Protestant bishop, to the justices of the peace at their quarter sessions, and recording them in manner lybelled, relevant to debarr and hender them or any of them from officiating and exercising the said office of a pastor, in any episcopal meeting house or congregation until their said orders be produced and recorded as is prescribed in the said act of parliament lybelled upon. And find the said pannells, or any one of them, their having on any of the dayes lybelled, within the space of two moneths preceding the citation on this lybel, neglected or omitted in express words to pray for his majestie king George, and the prince of Wales, during the exercising of their divine service in their respective congregation or assembly, relevant to infer the pain of 20l. sterling, against each of the said pannells neglecting as aforesaid, and repell the baill defences proponed for the pannells, and remit the pannells and lybel as found relevant to the knowledge of an assize.

Sic Subscribitur, JA. MACKENZIE, I. P. D.

The Lords continue the dyet and cause till to-morrow at ten a clock, and ordain all parties to attend.

June 19th, 1716.

Intran'

Mr. Daniel Taylor, &c.

Indicted and accused, *ut in die præcedenti*. The Interloquitor oppenly read.

ASSIZE.

Sir William Menzies, of Glaidstaines.

Thomas Fairholm, of Pelton.

Malcolm Whyt, merchant in Edinburgh.

William Elphingston, wright there.

Walter Murray, of Halmgre.

George Turnbull, merchant, in Edinburgh.

Robert Arnot, lorimer there.

George Ord, merchant in Edinburgh.

Archibald Ogilvie, brewer there.

Thomas Rutherford, merchant there.

Walter Davidson, saidler there.

Robert Still, merchant there.

Charles Hay, baxter there.

William Shaw, merchant there.

James Nimmo, taylor there.

The Assyse all lawfully sworn and no objection of the law in the contrair.

* In the Record the names of the pannells are here repeated.

The pursuer for probation adduces the judicial Declaration of the pannels, and witnesses after deponing, viz.

Wee ministers of the gospel pannels and hereunto subscribing, do from a principal of ingenuity, and that the honourable Court may not be detained in adducing of proofs by witnesses, hereby acknowledge, that we have exercised the office of pastors, within two months preceding the execution of the lybel against us, and that our letters of orders were not registrat in the justices of peace, at their books at their quarter sessions, and that we did not pray in the terms of the interloquitor of the lords of justiciary, and that for the reasons pled for us and contained in *Act* Information. In testimony whereof we have subscribed this presents at Edinburgh this 19th day of June 1716 years.—*Sic Subscribitur*, Will. Abercrombie, David Freebairn, Da. Ranken, A. Sutherland sen. Da. Lamy, R. Marshall, And. Lumsden, Robert Keith, Pa. Middleton, Ro. Coult, Ja. Hunter, Gasper Kellie, Pat. Home, Arth. Miller, Henry Walker, Tho. Rhind, G. Young, Ro. Cheyne, Wil. Miln, Mr. Grame, Ja. Walker.

JA. MACKENZIE, I. P. D.

Edinburgh, June 19th, 1716.

I, Mr. Robert Calder, minister of the gospel, do judicially in presence of the Lords Commissioners of Justiciary and Assyse, own and acknowledge, that I did occasionally preach in some or other of the meeting houses lybelled since December last, but not for two moneths preceding the 13th of May last, neither did I read prayers in any meeting house since the said moneth of December, and I do likewise acknowledge, I did not produce my letters of orders as the law directs.

Sic Subscribitur, RO. CALDER.

JA. MACKENZIE, I. P. D.

Edinburgh, June 19, 1716.

I, Mr. William Cockburn, minister of the gospel, own that within the time lybelled, I did exercise the function of a pastor, day and date foresaid; and I further own that during the time lybelled, did not pray in the terms lybelled.

Sic Subscribitur, WILL. COCKBURN.

JA. MACKENZIE, I. P. D.

I, Mr. Daniel Taylor, minister of the gospel, do acknowledge my having exercised the office of a pastor in an episcopal congregation lybelled since the 1st of December last, without recording my letters of orders, but have not officiated in any of the meeting houses lybelled within the two moneths preceding the 13th of May. In witness whereof, I have signed these presents at Edinburgh this 19th of June 1716 years.

Sic Subscribitur, D. TAYLOR.

JA. MACKENZIE, I. P. D.

William Cuming, merchant in Edinburgh, aged 33 years or thereby, married, solemnly

sworn, purged of partial council, examined and interrogat, depons, That some times between the 13th of March and the 13th of May last, upon the Lord's day, he heard Mr. George Johnston pannel, preach in the episcopal meeting house in Barringers-closs, and that the said Mr. Johnston before sermon, used a short introductory prayer, and after sermon used some few words, concluding with the Lord's Prayer. And being interrogate what he meant by expression (some words) depons he made use of the words "lett us pray," to which he immediately subjoined the Lord's Prayer. Depons when he heard Mr. Johnston preach and pray as abovesaid, the liturgy of the Church of England was read in that meeting house, but not by Mr. Johnston: depons, that he did not hear Mr. Johnston pray in express words for his majestie king George, *Causa scientia patet*, and this is truth as he shall answer to God. *Sic Subscribitur*, WILLIAM CUMING.

JA. MACKENZIE, I. P. D.

William Brown, writer and clerk to the hammermen of Edinburgh, aged 66 years or thereby, married, solemnly sworn, purged of partial council, examined and interrogate, depons, *conformis precedenti in omnibus*, *Causa scientia eadem*. And this is truth as he shall answer to God.

Sic Subscribitur, WILLIAM BROWN.

JA. MACKENZIE, I. P. D.

Mr. William Kerr, writer in Edinburgh, aged 40 years or thereby, married, solemnly sworn, purged of partial council, examined and interrogate, depones, That he has heard Mr. Thomas Moubray preach in the meeting house in the back of Bells-wynd, several times between the 13th of March and the 13th of May last, and that before his preaching he heard him make use of collect, and after sermon by way of prayer, but never heard the said Mr. Moubray pray in express words for his majesty king George, nor the prince of Wales; and depones, that the collects that Mr. Moubray made use of before and after sermon were in the service book. *Causa scientia patet*. And this is the truth as he shall answer to God. And further depones, that the king's name is not mentioned in any of the two collects, and this is also the truth as he shall answer to God.

Sic Subscribitur,

WM. KERR.

GILB. ELIOT.

William Brown, merchant in Edinburgh, aged 36 years or thereby, solemnly sworn *ut supra*, depons, That he has heard Mr. Thomas Moubray preach several times in his meeting house at the back of Bells-wynd, betwixt the 13th of March and the 13th of May last, and that he made use of a short prayer before sermon, but none after sermon to the best of his memory: depons, he never heard him pray for his majestie king George, nor the prince of Wales in express words; and depons, that the short prayer he made use of before sermon was the words of a collect in the ser-

vice book, and that king George's name is not mentioned therein. *Causa scientie patet*. And this is the truth as he shall answer to God. And further depones, that he had a short prayer after sermon before the blessing, which is likewise a collect, but that the king's name is not mentioned therein: and this is likewise the truth as he shall answer to God.

Sic Subscribitur,

WM. BROWN.

GILB. ELIOT.

George Main, jeweller in Edinburgh, aged 53 years or thereby, married, solemnly sworn, purged of partial council, examined and interrogat, depones, That he has heard Mr. Andrew Cant sometimes betwixt the 13th of March and the 13th of May last, preach in a meeting house in Skinners-closs, and that before sermon he used a select collect out of the liturgy of the Church of England, and that he used no prayer after sermon: depones, that he did not hear him pray for king George nor the prince of Wales in express terms, and that the collect he made use of does not contain the prayer for the king. *Causa scientie patet*, and this is the truth as he shall answer to God.

Sic Subscribitur,

GEORGE MAIN.

WM. CALDERWOOD.

Andrew Deuchar, writer in Edinburgh, aged 27 years or thereby, solutus, solemnly sworn, purged of partial council, examined and interrogat, depones *conformis precedenti in omnibus*, and this is truth, as he shall answer to God.

Sic Subscribitur,

AND. DEUCHAR.

WM. CALDERWOOD.

James Naughtley, merchant in Edinburgh, aged 53 years, married, solemnly sworn, purged of partial council, examined and interrogat, depones, That to the best of his memory, he has heard Mr. Wyllie, one of the pannels preach since the first of December last, but cannot be positive to have heard him since the 13th of March, and betwixt that time and the 13th of May last: depones, that when he heard him preach as above, it was in the meeting house in baillie Fife's-closs. *Causa scientie patet*, and this is truth as he shall answer to God.

Sic Subscribitur,

JAMES NAUGHTLEY.

DA. ERSKINE.

John Caird, cordiner in St. Nenians row, aged 66 years or thereby, married, solemnly sworn, purged of partial council, examined and interrogat, depones, That to the best of his memory has heard Mr. Wyllie, one of the pannels, preach in a meeting house in baillie Fife's-closs since the 1st of December and before the moneth of March last; as also to the best of his memory has heard the said Mr. William Wyllie preach in the said meeting house since the 13th of March, and before the 13th of May last, but as to this last time he cannot be positive, and that when he preached, he does not remember he heard him say prayers either before or after sermon. *Causa scientie patet*, and this is truth as he shall answer to God.

Sic Subscribitur,

JOHN CAIRD.

DA. ERSKINE.

Continued till to-morrow.

June 20, 1716.

Intra'

Mr. Daniel Taylor and the others as formerly.

Indicted and accused *ut in die precedenti*.

The said day, the persons who past upon the assize of the above pannels, returned their verdict in presence of the saids lords, whereof the tenor follows:

EDINBURGH, June 19, 1716.

The above Assize having inclosed, did choys sir William Menzies to be their chancellor, and Thomas Fairholm to be their clerk, and having considered the lybel at the instance of his majesties advocate against Mr. William Abercrombie, Mr. David Freebairn, Mr. David Rankine, Mr. Alexander Sutherland, senior, Mr. David Lammie, Mr. Robert Marishall, Mr. Andrew Lumsdain, Mr. Robert Keith, Mr. Patrick Middleton, Mr. Robert Coult, Mr. James Hunter, Mr. Jasper Kellie, Mr. Patrick Home, Mr. Arthur Miller, Mr. Henry Walker, Mr. Thomas Rhind, Mr. George Young, Mr. Robert Chein, Mr. William Milne, Mr. George Grahame, Mr. James Walker, pannels, and the lords commissioners of justiciary their interloquitur thereupon with the judicial confessions given by the above named pannels, all in one voice find the lybel proven as to them. And as to Mr. Robert Calder and Mr. Daniel Taylor, pannels, find the first of the lybel proven by their judicial acknowledgements, and the second part not proven. And as to Mr. William Cockburn, pannel, find the first part of the lybel not proven, but find the second part proven by his judicial acknowledgment. And as to Mr. George Johnstoun and Mr. Thomas Moubray, Mr. Andrew Cant, Mr. William Wyllie, pannels, find the first part of the lybel proven, but does not find the second part of the lybel proven. Their presents are subscribed by our said chancellor and clerk in our names day and place foresaid.

Sic Subscribitur, WM. MENZIES, Chan.

THO. FAIRHOLME, Clerk.

Continued till Monday next.

June 28, 1716.

The Lords Commissioners of Justiciary having considered the Verdict of Assize returned upon the twenty day of June instant, against Mr. Daniel Taylor, Mr. William Abercrombie, Mr. David Freebairn, Mr. George Johnstoun, Mr. George Grahame, Mr. Jasper Kellie, Mr. Henry Walker, Mr. Patrick Home, Mr. Robert Calder, Mr. William Milne, Mr. William Cockburn, Mr. Alexander Sutherland, senior, Mr. Robert Chein, Mr. Thomas Moubray, Mr. George Young, Mr. Andrew Cant, Mr. David Lambie, Mr. David Rankine, Mr. Patrick Middleton, Mr. Andrew Lumsdain, Mr. Robert Marishall, Mr. James Walker, Mr. William Wyllie, Mr. Robert Keith, Mr. Thomas

Rhind, Mr. Arthur Miller, Mr. Robert Coult, and Mr. James Hunter, pannels, they in respect thereof, by the mouth of Charles Kinross, macer of court, discharge and forbidd the bail forenamed persons (except Mr. William Cockburn) and each of them to officiat or exercise the office of a pastor in any episcopal meeting house or congregation, ay and while they produce their letters of orders from a Protestant bishop before the justices of peace at their quarter sessions, and record them in their books; and hereby require and command, all sheriffs of shires, magistrats of burghs, and other magistrats and officers of the law, to hinder and debarr all and every one of the saids persons (except Mr. Cockburne) from officiating and exercising the said office of a pastor, in any episcopal meeting house or congregation, within their respective bounds and jurisdictions, until the producing and registrating their letters of orders as aforesaid: and in re-

spect of the said verdict returned against Mr. William Abercrombie, Mr. David Freebairn, Mr. David Rankine, Mr. Alexander Sutherland, senior, Mr. David Lambie, Mr. Robert Marishall, Mr. Andrew Lumadain, Mr. Robert Keith, Mr. Patrick Middleton, Mr. Robert Coult, Mr. James Hunter, Mr. Jasper Kellie, Mr. Robert Home, Mr. Arthur Miller, Mr. Henry Walker, Mr. Thomas Rhind, Mr. George Young, Mr. Robert Chein, Mr. William Milne, Mr. George Grahame, and Mr. James Walker, against whom it is found proven that they did not pray for king George, &c. The said lords do fine and ammerciat each of the saids persons in the sum of twenty pounds sterling, to be applyed the one half to the informer, the other half to the poor of the paroch, conforme to the act lybelled upon, which is pronounced for doom.—*Sic Subscribitur,*

JA. MACKENZIE,
W. CALDERWOOD,

GILB. ELIOT.
D. BRAKINZ.

END OF VOL. XVIII.

of the same kind as the one which is now being
used in the United States. It is a very simple
and easy to use. It is a very good one.
It is a very good one.

It is a very good one.





THE NEW YORK PUBLIC LIBRARY
REFERENCE DEPARTMENT

This book is under no circumstances to be taken from the Building

[illegible]



